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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERMS, 1894, 1895, IN

159, 160, 161, 162 U. S.

BOOK 40,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS, LLD.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY,
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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. STEPHEN JOHNSON FIELD,
HON. JOHN MARSHALL HARLAN,
HON. HORACE GRAY,
HON. DAVID JOSIAH BREWER,
HON. HENRY BILLINGS BROWN,
HON. GEORGE SHIRAS, JR.,
HON. HOWELL EDMONDS JACKSON,[1]
HON. EDWARD DOUGLASS WHITE,
HON. RUFUS W. PECKHAM.[2]

ATTORNEY GENERAL,

HON. RICHARD N. OLNEY,
HON. JUDSON HARMON.[3]

SOLICITOR GENERAL,

HON. HOLMES CONRAD.

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER,

HON. J. C. BANCROFT DAVIS.

MARSHAL,

JAMES MONTGOMERY WRIGHT, ESQ.

---

[1] Mr. Justice JACKSON died August 8, 1895.
[2] Mr. Justice PECKHAM was appointed December 9, 1895, and qualified January 6, 1896.
[3] Mr. HARMON was appointed Attorney General June 8, 1895, to succeed Mr. Olney, resigned upon his appointment as Secretary of State.

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ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TIME OF THESE REPORTS, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

Allotments, April 2, 1894, see Appendix I. Book 38, and Feb. 3, 1896, see Appendix IV. herein.

Names of Justices, and whence appointed.	By whom Appointed.	Circuits, 1891–1896.	Commissioned.	Sworn in.
Associate Justice HORACE GRAY, Massachusetts.	President Arthur.	First. Me., N. H., Mass., Rhode Island.	1881. (Dec. 20.)	1882. (Jan. 9.)
Associate Justice HENRY B. BROWN,[1] Michigan.	President Harrison.	Second. Vermont, Conn., New York.	1890. (Dec. 29.)	1891. (Jan. 6.)
Associate Justice RUFUS W. PECKHAM,[2]	President Cleveland.	Second. Vermont, Conn., New York.	1895. (Dec. 9.)	1896. (Jan. 6.)
Associate Justice GEORGE SHIRAS, Jr., Pennsylvania.	President Harrison.	Third. New Jersey, Penn., Del.	1892. (July 26.)	1892. (Oct. 10.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C., W. Va., S. C.	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice EDWARD D. WHITE, Louisiana.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1894. (Feb. 19.)	1894. (Mar. 12.)
Associate Justice HOWELL E. JACKSON,[3] Tennessee.	President Harrison.	Sixth. Ky., Tenn., Ohio, Mich.	1893. (Feb. 18.)	1893. (Mar. 4.)
Associate Justice JOHN M. HARLAN,[4] Kentucky.	President Hayes.	Sixth. Ky., Tenn., Ohio, Mich.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice JOHN M. HARLAN,[5] Kentucky.	President Hayes.	Seventh. Ind., Ill., Wis.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice HENRY B. BROWN,[6] Michigan.	President Harrison.	Seventh. Ind., Ill., Wis.	1890. (Dec. 29.)	1891. (Jan. 6.)
Associate Justice DAVID J. BREWER, Kansas.	President Harrison.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Wyo.	1889. (Dec. 18.)	1890. (Jan. 6.)
Associate Justice STEPHEN J. FIELD, California.	President Lincoln.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho.	1863. (Mar. 10.)	1863. (Dec. 7.)

[1] Until February 3, 1896.
[2] After February 3, 1896.
[3] Until his death, August 8, 1895.
[4] After February 3, 1896.
[5] Until February 3, 1896.
[6] After February 3, 1896.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERMS, 1894, 1895.

Vol. 159.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1894.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

3] JOSEPH L. WHITE, *Plff. in Err.*,
v.
MARTHA ANN VAN HORN ET AL.

(See S. C. Reporter's ed. 3-20.)

Deed, when evidence—explanatory evidence—form of speech—requests to charge jury—interest, when recoverable—forgery.

1. Under the issue of forgery of a deed, another deed is admissible evidence to show the manner in which the grantor signed his name and the value he put on similar land.
2. Where testimony as to declarations of a person is admitted without objection, evidence to throw light upon and explain them is admissible.
3. That a witness prefixes his statement with the words "I should say" is no objection, when it is evident that they were not the expression of a conjecture, but simply a form of speech.
4. A request to charge was rightly refused, which requested the court to disregard the proofs and to instruct a verdict for defendant, upon a contested question of fact.
5. A request to charge was correctly refused, where the charge of the court, as actually given to the jury, furnished all that the party requesting was entitled to on the point.
6. A request to the court to charge the jury upon a purely hypothetical statement of facts, which was calculated to confuse and was fully covered by the charge already given, was correctly refused.
7. Under the Texas statute when the defendant in ejectment is liable for the use and occupation of the land from the day of his purchase, he is entitled as against his warrantors to interest on the price paid by him from that day.
8. Under the Texas statute, one falsely personating another and signing his own name, intending thereby to counterfeit the signature of the other, and by reason of the fact that the names are *idem sonans* to produce the impression that the name signed is that of the other, is guilty of forgery.

[No. 261.]

Submitted April 5, 1895. Decided June 3, 1895.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment in favor of the plaintiffs, Martha Ann Van Horn *et al.*, against Joseph L. White, defendant, in an action of ejectment for the recovery of a tract of land and for a certain sum as rent, and also in favor of the defendant for a certain sum as an allowance for improvements, and also against the warrantors of title to defendant, for a certain sum. *Affirmed except as to certain issues, and remanded for a new trial as to them.*

*Statement by *Mr. Justice* **White**: [4

On the 2d of October, 1889, widow Martha Ann Van Horn, Elizabeth Evans, and her husband, David B. Evans, all three citizens of the state of Missouri, and Mary Ann Boling, and her husband, W. W. Boling, citizens of the state of Kentucky, brought an action against Joseph L. White, a citizen of Hill county, state of Texas. The action was one of ejectment to recover a certain tract of land situated in Hill county. The plaintiffs claimed to be the owners of an undivided third each of the land for which they sued.

The defendant excepted to the petition upon the ground that it set out no cause of action, and then filed a general denial. He next pleaded limitations, under the law of Texas, of 1, 3, and 5 years; he averred his purchase and possession of the property in good faith, and alleged that he had put improvements thereon worth $1125, for the value of which improvements he prayed judgment in the event of his eviction. In addition, he averred that he and George G. White, on the 20th day of May, 1882, purchased the property in controversy under a warranty deed from W. R. Baker for $1280 cash, and their note, due on the first day of December, 1882, for $2460, bearing ten per cent interest from date until paid; that they paid this note before maturity, with interest amounting to the sum of $2570; that one half of the total sum of the purchase money, or $1900, was paid by him, and that Baker, as his warrantor, was liable, in the event of his eviction, to refund the same, with eight per cent interest from the date of the respective payments. He further alleged that

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on the 6th day of October, 1883, he bought from George G. White, for $3789, the undivided half which had been acquired by the latter as above stated, and that George G. White also warranted the title, and would therefore be obliged to repay him, if the plaintiffs recovered, the amount of the purchase price, with interest. The prayer was that Baker and White be called in warranty to defend the suit, and that if it was decided that the plaintiffs were the rightful owners of the property, there might be a judgment over against Baker for the amount of the price paid him, with interest at the rate of eight per cent from the dates of the payments, and a like judgment against White, with interest from the 6th of October, 1883.

5] *Baker, in response to the call in warranty, filed a plea to the jurisdiction of the court, on the ground that he was not, at the time of the service of the petition, an inhabitant of the northern district of Texas. Subsequently, the death of Baker being suggested, his executors were made parties defendant to the call in warranty, and the same judgment was prayed against them which had been asked against him. The executors reiterated the plea to the jurisdiction filed by Baker, and, in addition, demurred on the ground (1) of no cause of action; (2) because the defendant could not sue them on the warranty until actually evicted; and (3) because a call in warranty could not be engrafted on an action of ejectment, the sole purpose of which was the settlement of the controversy between the parties plaintiff and defendant, in regard to their title to the property. The executors also insisted that, even if they should be held liable, under the call in warranty, they owed no interest from the date of the sale, because White had been in the enjoyment of the property from the time of his purchase. George G. White submitted his rights to the court with consent that if the case should be decided in favor of the plaintiffs, judgment should be entered against him for such amount as the court might deem proper. On the 25th of April, 1890, the plaintiffs filed their replication to the defendant's plea of limitations, in which they set out that they, the plaintiffs, claimed the property in controversy as the heirs at law of J. H. Chism, and that at the time of the taking of possession of the land in controversy, by the defendant, and those under whom he claimed, two of the plaintiffs, Mrs. Boling and Mrs. Evans, were married women, and consequently the statute of limitations did not run against them. The replication contained the further averment: "Said plaintiffs further show that the defendants, on their claim of title to the land in controversy, deraign their title through a forged pretended deed of conveyance, to wit, a pretended deed which defendants claim is a transfer of the headright certificate, by virtue of which the land in controversy was patented by the state of Texas to J. H. Chism, and, therefore, in law said pleas of three and five years' limitations cannot prevail."

6] *The demurrer to the jurisdiction of the court to entertain the call in warranty was overruled, and the case was tried by a jury, resulting in a verdict for the plaintiffs for the whole amount of the land claimed and $350 rent. There was also a verdict in favor of the defendant for $750, as an allowance for improvements, and against the estate of Baker, under the calls in warranty, for $3690, with interest at eight per cent from October 2, 1887, and against George W. White for the sum of $3789, with interest from October 6, 1883, at eight per cent. After an ineffectual effort to obtain a new trial, the defendant, Joseph L. White, brought the case by error here, making as parties, defendants in error, the original plaintiffs, the executors of Baker, and George G. White.

The undisputed facts were as follows: The plaintiffs are the sole legal heirs of James Harvey Chism, who served in the army of Texas during her war with Mexico. In reward for his services there were two land certificates issued to him in the name of "J. H. Chism." The first, known as "a bounty certificate," numbered 4298, was certified on the 15th day of September, 1838, and covered 1280 acres of land. The other was "a headright certificate," issued by the Board of Land Commissioners of Harrisburg county, in the following form:

"The Republic of Texas, }
"County of Harrisburg. }

"No. 990. Class 2.

"This is to certify that J. H. Chism has appeared before us, the Board of Land Commissioners for the county aforesaid, and proved according to law that he arrived in this Republic subsequent to the declaration of independence and previous to August, 1836, and that he is a single man, and produced an honorable discharge, is entitled to one third of a league of land to be surveyed after the 1st day of August, 1838.

"Given under our hands, at Houston, this 1st day of November, 1838.

"J. G. Hutchinson, *President.*

"John Woodruff, *Associate Commissioner.*

"Attest: Thos. Wm. Ward, *Clerk.*"

*On the 31st day of October, 1838, J. H. [7 Chism, by a deed drawn in the county of Harrisburg, sold to R. B. Dobbins, for the sum of $500, the bounty certificate for 1280 acres of land first above mentioned. The clerk of the Board of Land Commissioners for Harrisburg county, in the performance of his duty under the Texas law, made a return of the issue of the headright certificate, describing it as "a second class certificate, No. 990, issued in November, 1838, to J. H. Chism for one third of a league of land." In 1840, Texas created a "Traveling Board," whose duty it was to inspect the records of all the Boards of Land Commissioners, "and ascertain by satisfactory testimony what certificates for lands had been issued by the respective boards to legal claimants, and report as soon thereafter as practicable to the Commissioner of the General Land Office such certificates as they find to be genuine, setting forth in their reports the number and date of the certificates, the quantity of the land, and the name of the person to whom it was issued." Sayles' Early Laws of Texas, vol. 1, p. 885. In June, 1841, this Board made its report to the General Land Office, and described the headright certificate here involved, as follows: "Second-class certifi-

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cate, No. 701, issued November 1, 1838, for one third of a league of land to J. H. Chisholm." On the 27th of October, 1852, the following document was recorded in Harris county, Texas—W. R. Baker being at that time the clerk of said county:

"Know all men by these presents, that I, J. H. Chisholm, for the sum of $150 to me paid by E. M. Robinson, do hereby sell, transfer, and convey to the said Robinson, his heirs and assigns forever, my headright for one third of a league of land, No. ——, dated November, 1838, issued by the Board of Land Commissioners for Harrisburg County, together with the land upon which the same may be located, to have and to hold the same to him, the said Robinson, his heirs and assigns forever, and I agree to warrant and defend the said claim against all claims whatsoever.

"Witness my hand and seal, at Houston, December 2, 1838.

"J. H. Chisholm.

"Witnesses. George W. Lively.
"J. H. Southmayd.

8] *"Republic of Texas, }
"County of Harrisburg, }

"Before me, Andrew Briscoe, Chief Justice of Harrisburg County, came J. H. Chisholm, the grantor above, and acknowledged to me that he signed and executed the foregoing deed for the uses and purposes therein contained; to certify which I have hereunto set my hand and seal of the county, at Houston, December 2, 1838."

On January 2, 1858, J. M. Steiner deposited in the General Land Office of Texas the certificate No. 990, for one third of a league of land, issued, as above stated, to J. H. Chism, and lands were taken up thereunder in Hill county, Texas, and patent was issued therefor. On the 25th of July, 1888, a copy of the paper which had been recorded in the county of Harrisburg was placed on record in Hill county.

The plaintiffs, as heirs of J. H. Chism, claimed the land covered by the patent issued under this headright certificate. Their case substantially depended upon testimony tending to show that after serving in the army of Texas, Chism returned to Kentucky, and stated that he was entitled to certain lands in Texas, and had with him papers so showing; that he subsequently went again to Texas for the purpose of looking after his land claims, and returned to Kentucky about November, 1838; that on his second return he also stated that he had land in Texas, and had sold some; and that he then had papers indicating his ownership of land in that state. The testimony of his sisters and others tended to identify one of the papers which he had with him on this last occasion with the land certificate No. 990. There was testimony to the effect that he was a good penman, that he signed his name J. H. or J. Harvey Chism, and his name appeared as such on the army rolls and other official documents of the Republic of Texas. He died in 1839. After his death, in 1850 or 1851, his father placed the papers relating to the claim of the son for Texas lands in the hands of Augustin Moreman, and gave him a power of attorney, in order that he might visit Texas and perfect the claim. Moreman, with the papers in his possession, *proceeded to Texas [9 for the purpose of executing his agency. On arriving there, he went to the land office and exhibited the papers. The officers of the land office pronounced the claim valid and in all respects regular, but declined to act upon it because there was a defect in the power of attorney, it having been acknowledged by a Kentucky official and not by a commissioner of the state of Texas. In consequence of this fact, Moreman was unable to obtain the patent for the land, and left the papers with a Mr. Ferguson, in Austin, Texas, and returned to Kentucky. Before a new power of attorney could be executed the father of Chism died, and Moreman's arrangements with him were thus terminated. Subsequently, on the request of the mother of Chism, Moreman wrote to Ferguson for the papers, and they were returned in an envelope. Moreman handed over this envelope as he received it at the postoffice, without examination, to Mrs. Chism. There was also testimony tending to show that after this date the heirs of Chism sent the papers thus received (which are not very accurately identified) to Texas for the purpose of obtaining the land, and that the papers thus sent, whatever they were, were burned by accident.

The deposition of Moreman was taken; annexed to it was a certified copy of the original certificate No. 990, issued to J. H. Chism. This was shown to him, and he was asked whether the original, of which it was a copy, was among the papers which were turned over to him in 1850 or 1851 by the father of J. H. Chism, and in connection with which his power of attorney was given. Mr. Moreman answered: "I have examined the above copy, and should say that the original of which it is a copy was among the papers turned over to me by the father of J. H. Chism. The language seems familiar, and I recognize some of the terms, as 'having an honorable discharge' and 'being a single man.' The original paper was folded twice, and the folds were somewhat frayed with handling, looking like an old paper; the writing was remarkably effeminate. I cannot say definitely whether the original paper was returned to the father or mother of J. H. Chism or not. The last time I ever saw them was in Austin, Texas, in 1850 *or [10 1851, in the month of May." The witness then proceeded to state the facts connected with his employment, his journey to Texas, his going to the land office, and his failure because of the defect in his power of attorney.

The defendant's case was supported by the testimony of Baker, who said that he bought the certificate as the agent of one Robinson, and that at the time the transfer was drawn the certificate was delivered to him by the seller. Describing the seller, he said: "He represented that he had been serving in the army, and I have an indistinct memory that I called his attention to a discrepancy or difference in the spelling of the name, and that the explanation was that some people spelled it as it was pronounced, according to the sound." He then testified that the original transfer was lost, and that the witnesses whose names purported to be affixed to it and the officer before whom it purported to have been acknowledged

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were dead; and that Robinson, the principal for whom he claimed to have acted in buying the certificate, lived in the state of New York, and was known to nobody in Texas, except himself and family. His testimony in regard to Robinson was indefinite. He said that the man was alive some few years before and was in New York, but gave no address by which he might be found. He further testified that he had sold this certificate, along with others, as the agent of Robinson to J. De Cordova, and that De Cordova had resold it to him. That, as the owner of this certificate, he had employed a man by the name of Steiner to apply for and enter land thereunder.

Messrs. **E. H. Graham** and *Tarlton & Morrow* for plaintiff in error.

Messrs. **Morgan H. Beach,** *T. W. Gregory,* and *McKinnon & Carlton* for defendants in error.

Mr. Justice **White** delivered the opinion of the court:

11] *The assignments of error are addressed, first, to the alleged illegal admission of evidence; secondly, to the refusal of the court to give certain charges; and, thirdly, to the charges actually given.

1st. The defendant objected to the introduction of the deed of sale made by J. H. Chism on October 31, 1838, of his bounty certificate, because it was *res inter alios* and irrelevant. The objection was untenable. The issue of forgery *vel non* of the deed from which the title in controversy was deraigned clearly made the proof relevant. The evidence tended to show the manner in which J. H. Chism signed his name at or about the time it was contended that the transfer signed by J. H. Chisholm had been executed. It was also admissible as tending to show how J. H. Chism then valued Texas land, and thus to disprove the claim that he had sold a certificate entitling him to 1400 acres at $150 at just about the same time he had obtained $500 for a certificate for a less quantity. Irrespective of this, testimony had been elicited without objection to the effect that J. H. Chism had declared, on his second return to Kentucky, that he had sold land in Texas, and this deed was competent to explain that statement. It is a matter of no moment whether testimony as to these declarations of J. H. Chism was admissible or not, since it was admitted without objection, and it was competent to offer evidence to throw light upon and explain them.

2d. The objection taken to the statement of the witness Moreman, that "he should say" that the original, of which the certificate produced was a copy, was among the papers turned over to him by the father of J. H. Chism, went, obviously, to the effect and not to the admissibility of that statement. Besides, the objection separates the words "I should say" from the whole context of the witness' testimony; whereas the context makes it clear that those words, instead of being the expression of a conjecture, were simply a form of speech, for, after using them, the witness proceeded to furnish the basis for his statement by describing the original document in such a way as to give emphasis to his identification of the copy.

*3d. The court refused to instruct the [12 jury, at defendant's request, as follows: "The uncontroverted evidence in this cause shows that the certificate by virtue of which the land in controversy was located came into the hands of W. R. Baker, as agent of E. M. Robinson, as a purchaser, in December, 1838, and that it was thereafter located on the land by Steiner as the agent of Baker, who had acquired the title of Robinson in the same, and if the person who sold the same to Robinson through Baker, under whatever name, was, at the time of the sale to Baker, the owner, of the certificate, you will find a verdict for defendant; and in this connection you are instructed that it is a presumption of fact that a person in possession of a certificate is the owner in the absence of evidence to the contrary, whether he have a written assignment or not, and it is shown by the evidence that the certificate in question was in possession of a person who sold it to him for Robinson recently after it was issued, it having been issued in November, 1838; if you should believe such person was not the same to whom it was issued, yet, unless the evidence shows that the person to whom it issued had not sold it, you would be authorized to find for the defendant."

This charge was rightly refused. It practically requested the court to disregard the proof, and amounted to a request to instruct a verdict for the defendant. The very issue in the case was whether the certificate did or did not come into the hands of Baker, as agent, in 1838. The reliance of the defendant was on the testimony of Baker, and the fact that the name J. H. Chisholm and the name J. H. Chism were *idem sonans.* But Baker's testimony was directly contradicted by that of Moreman, and it is impossible to reconcile the two. If the certificate was in Moreman's hands as testified to by him, it could not have been in the hands of Baker, in 1838, as sworn to by him. There were, besides Moreman's testimony, many circumstances tending to refute Baker's statements. These were the fact that the transfer from Robinson was not put on record until 1852, when Baker was clerk, and therefore himself made the record; the loss of the original; the fact that the transfer was made in the name of Robinson, *whose ex-[13 istence and whereabouts were so meagerly disclosed as to render it impossible from the testimony to discover him; that, although the first transfer in 1838 purported to have been made in the name of Baker as agent, there was a subsequent transfer by Baker to De Cordova, and yet, a third transfer from De Cordova back to Baker; that the patent for the land was not obtained until 1858, many years after Baker claimed that he was in possession of the certificate; and, finally, that the transfer itself, when examined by the light of surrounding facts, affords some ground for the claim that Baker could not have had the certificate in his possession in 1838, when the transfer was made.

The certificate contained six statements: First, its class; second, the quantity of the land for which it issued; third, its number; fourth, the date of its issue; fifth, the name of

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the person to whom it was issued; sixth, the county from which it was issued. The transfer, in describing the certificate, states it as having been issued to J. H. Chism; makes no mention of day or number. It says, "No. ——," and that the certificate was "dated November, 1838," giving no day of the month, and it is signed "J. H. Chisholm." The failure in the transfer to give either the number of the certificate or the day of the month on which it was issued, as also the mention of the name of J. H. Chism in its body, coupled with the signature "J. H. Chisholm," were in themselves claimed to be, as they undoubtedly were, circumstances tending to show that the party who wrote the transfer could not have been in possession of the certificate.

It was contended that this inference was further strengthened by the public records. Thus, the return to the General Land Office by the county clerk gave the number 990, corresponding with that of the certificate itself, and gave the month as November, 1838, without giving any day of the month. The report of the Traveling Board described the certificate by a wrong number, 701, instead of 990; it gave the date thereof as November 1, 1838, and the name of the grantee as J. H. Chisholm. The fact is that the transfer seemed to have been drawn with reference to these public records, 14] and, in order not *to conflict with either of them, it uses the name J. H. Chism in the body and the name J. H. Chisholm in the the signature, and it omits the number of the certificate altogether, and mentions no day of the month, the day being also omitted in one of the records. Under this condition of the proof, the court was obviously correct in not taking the question of fact from the consideration of the jury.

4th. The court refused to charge as follows at the request of the defendant:

"The certificate was issued to a person whose name was spelled therein Chism. The transfer in evidence shows that the person who transferred the same spelled his name Chisholm. Now, if the person who so transferred the certificate was the same to whom it issued, it is not material in what form he signed it, you will find for the defendant; and in determining whether he was the same person you may consider the fact, if a fact, that the person who sold to Baker was a soldier, the date of his certificate, the whereabouts of J. H. Chism about the time, and the evidence introduced by plaintiffs that J. H. Chism was in Texas about the time of the transfer."

This charge was also correctly refused. In some particulars it assumed the existence of facts not proved by asking the court to state to the jury that Chism was in Texas about the time of the transfer, December 2, 1838, whilst there was evidence that he returned to Kentucky in November, 1838. Besides, we think the charge of the court, as actually given to the jury, furnished all that the defendant was entitled to on this point. It was as follows:

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two thirds of the land sued for; and on this issue as to the person who made the transfer being the same person *to whom said certificate No. 990 [15 issued, the burden of proof is on the defendant; and if the proof does not so satisfy you, the plaintiffs are entitled to recover the whole land unless defeated by the defendant's plea of five years' limitation as to Mrs. Van Horn's one-third interest therein."

5th. The court refused to give, at defendant's request, the following charge:

"It is shown by the evidence that the certificate has been in the land office since 1857, and is now there, and if the certificate or paper about which plaintiffs testify was burned in Dallas or elsewhere, then the paper testified about by them is not this certificate."

This charge was also correctly refused. It asked the court to instruct upon a purely hypothetical statement of fact and was calculated to confuse, and was, moreover, fully covered by the charges actually given.

6th. The court refused to give the following requested charge:

"The transfer introduced by the defendant to the certificate is not a forgery in law, whether signed by the person who was the owner of said certificate acquired from the person to whom it issued or by the person to whom it issued, and you are instructed that if in this case you should find for the plaintiffs, in any event you will find for the defendant one third of the land as against M. S. Van Horn, and for the other plaintiffs only two thirds of the land."

This charge was correctly refused. There was no evidence tending to show that the transfer was made by any person claiming to have acquired the certificate from Chism; on the contrary, the testimony of Baker and all the testimony in the case on both sides presented the issue of whether Chism, the person to whom the certificate had been issued, signed the transfer. There was no proof in any way to indicate that Chism had transferred to some one else his certificate, and that this other person had signed J. H. Chisholm in the alleged transfer to Baker. That portion of the charge which asked that the jury be instructed that if the transfer was signed by Chism, to whom the certificate issued, it was not a forgery, was fully covered by the charge given.

*7th. The court gave the following [16 charge, and exception was taken thereto:

"If you believe from the evidence that W. R. Baker falsely made or caused or procured to be made falsely, or in any way aided, assisted, advised, or encouraged the false making of, the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the land certificate 990, issued to J. H. Chism, with intent to make valuable thing or money thereby, or with intent to set up a claim or title or to aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owner of the land, then the said transfer

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is a forgery, and you will find for plaintiffs for the land in controversy."

It is claimed that this charge was erroneous because it submitted issues not raised by the evidence, and was calculated to impress the jury with the belief that there was some proof of such action on the part of Baker, and thus prejudice the defendant's case. But this objection takes it for granted that there was nothing in the testimony indicating that Baker made the false indorsement, if one was made. We have already stated the tendency of the testimony on both sides, and that the very nature of the direct, as well as the circumstantial, evidence necessarily raised the question of forgery *vel non*, and of Baker's connection with the forgery, if there was any. Nor is this charge amenable to the criticism that it assumes the fact that the transfer was false. It is true that the court used the words "in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm." But it is manifest from the connection in which these words were used, and from the entire charge given, that the court left to the jury the question of whether the transfer was forged or not, without expressing any opinion thereon. Indeed, it was expressly charged that on the issue of the forgery the burden of proof was on the plaintiffs.

8th. The following charge was also objected to:

"If you believe from the evidence that a man of the name of J. H. Chisholm or of any [17] other name, who was not the *identical party to whom the certificate No. 990 issued to J. H. Chism, did falsely make and transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title, or aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owners of the land, or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy. If you believe from the evidence that J. H. Chisholm or any other person not being the identical person to whom certificate No. 990, in the name of J. H. Chism, issued, did falsely counterfeit the original grantee in making the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby, or with the intent to set up a claim or title, or aid or assist any one else in setting up a claim or title, to the land in controversy, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights of the true owner of the land, or with any fraudulent intent whatever, then you will find said instrument a forgery, and will find for plaintiffs for the land in controversy."

This charge, it is said, is erroneous (*a*) because it presents an issue not raised by the evidence; and (*b*) because it excludes the hypothesis that a person to whom J. H. Chism may have transferred the certificate by delivery was the person who signed the transfer "J. H. Chisholm;" and (*c*) because if such person signed his own name, "J. H. Chisholm," his signature was not a forgery under the law then existing in Texas.

There was, as we have already said, no evidence tending to show a transfer by J. H. Chism, the grantee, to another person, and an assignment by such person to Baker. The entire proof on both sides was addressed to the question of whether the certificate was in the possession of Chism at the time that Baker claimed that it was delivered to him, and so remained thereafter. The whole case turned upon this question, and the issue of whether the transfer was a forgery or not in a large *measure de- [18] pended on the conclusions formed by the jury as to this fact. But the claim that if the name of J. H. Chisholm was signed by one bearing that name, the writing of this signature could not under any circumstances constitute a forgery, is unsound. It is asserted by the plaintiff in error that the law of Texas as to forgery prior to 1876 was as follows:

"He is guilty of forgery who, without lawful authority, and with intent to injure and defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made would (if the same be true) have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever." Art. 2093, Paschal's Digest of Laws.

Clearly, if one whose name was J. H. Chisholm took a certificate issued to J. H. Chism, and, falsely personating J. H. Chism, signed his name as J. H. Chisholm, intending thereby to counterfeit the signature of J. H. Chism, and by reason of the fact that the names were *idem sonans*, to produce the impression that the name signed was that of J. H. Chism, this act would have been a forgery under this statute. The case of *Com.* v. *Baldwin*, 11 Gray, 197, 71 Am. Dec. 703, cited to the contrary, sustains this view.

9th. The ninth assignment is covered by what we have already said.

10th. The court gave the following charge, which was objected to:

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed 'J. H. Chisholm,' and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two thirds of the lands sued for; and on this issue, as to the person who made the said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendant; and if the proof does not so *sat- [19] isfy you, the plaintiffs are entitled to recover the whole land unless defeated by the defendant's plea of five years' statutes of limitation as to Mrs. Van Horn's one-third interest therein."

It is contended that the word "satisfy" exacted a greater degree of proof than the law required, and we are referred to cases in Texas which, it is claimed, hold that an instruction unless the party on whom the burden of proof

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rests establishes his case by "satisfactory evidence," the jury must find for the other side, exacts from the first party an undue degree of proof. Whatever, abstractly speaking, may be the merits of this objection, it is unavailable here. The charge objected to was only one of a number, and, we think, taking all the instructions together, they fairly stated to the jury that their conclusions were to depend on their belief as to the preponderance of proof.

11th. This assignment of error is addressed to the charge of the court in regard to the controversy between White and his warrantors. This charge is thus set out in the record:

"The court instructed the jury that if they found for the plaintiff for the whole of the land in controversy, they would find for the defendant White, against the executors of Baker, the sum of $3960, with 8 per cent interest from October 2, 1887 (it being in evidence that that was the amount of the purchase money paid by White to Baker, and this suit having been filed on the 2d day of October, 1889); and the court also instructed the jury to find for the defendant White the value of his improvements made in good faith, and that if the amount exceeded the value of use and occupation of the premises from the 2d day of October, 1887, they would find the value of the use and occupation from the time said White took possession, not to exceed the value of the improvements, and deduct it from the value of the improvements."

It is contended that to allow the defendant interest only from October 2, 1887, instead of from the date of the sale, in 1882, was erroneous. The Texas statute limits the right to recover, in an ejectment suit, for use and occupation, to a period of two years prior to the commencement of the suit. 2 Sayles' Tex. Civ. Stat. 4809.

20] *The court evidently had this statute in view, and considered that as the plaintiff's right to recover for use and occupation was restricted to two years, the defendant's claim against the warrantor for interest should be confined to the same period, upon the theory that as long as the possessor enjoyed the fruits he was not entitled to recover interest on the price. This view, however, overlooked another provision of law, which allows the plaintiff in ejectment to recover for use and occupation for a longer period than two years prior to the bringing of the action, where the defendant in ejectment sets up a claim for improvements. In such a case the law allows a claim for use and occupation beyond the period of two years, and to the extent necessary to offset the claim for improvement. 2 Sayles' Tex. Civ. Stat. 4810, 4815. Here the defendant made a claim for improvements, and the claim for use and occupation was allowed beyond two years, and to the extent necessary to offset the improvements. As the claim for use and occupation did not equal the claim for improvements, the former must necessarily have extended to the full period of defendant's occupancy. To limit the defendant's recovery of interest against the warrantor to the period of two years was, therefore, to deprive him of interest on the price from the day of the sale, although he was held accountable for use and occupation from that date. He ought, therefore, to have been allowed interest against the estate of Baker from the day of the sale.

Error in this regard, however, in no way concerns the controversies between the plaintiffs and the defendant. The judgment will therefore be affirmed except in regard to the issues between the defendant and the executors of Baker, defendants in the call in warranty; in this particular the case is remanded with directions to grant, on application of defendant, a new trial.

In all other respects the judgment is affirmed.

OZIAS TOWNSEND, *Appt.*, [21
v.
THE ST. LOUIS & SANDOVAL COAL & MINING COMPANY, The Sandoval Coal & Mining Company ET AL.

(See S. C. Reporter's ed. 21-35.)

Former suit, when a bar—stale claim.

1 The invalidity of a claim for services is substantially established by a decree that stock issued therefor was invalid because issued without anything having been paid for it.

2. A claim for personal services against a corporation asserted against purchasers at a judicial sale of the property of the corporation, over eight years after the claim accrued and more than seven years after such sale, and not asserted during a long litigation, if not barred by the statute of limitations, is too stale to receive favor from a court of equity.

[No. 308.]

Argued April 25, 1895. Decided June 3, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Illinois, dismissing a suit in equity brought by Ozias Townsend, plaintiff, against the St. Louis & Sandoval Coal & Mining Company *et al.*, defendants, to obtain a decree that defendants pay an alleged debt of plaintiff against the said company, and that the sale by the receiver was void, and that if the new company, the Sandoval Coal & Mining Company, refused to pay the same, its property be sold and the debt paid with the proceeds. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

Ozias Townsend, a citizen of the state of Missouri, brought his bill in equity in the circuit court of the United States for the southern District of Illinois on November 30, 1887, against the St. Louis & Sandoval Coal & Mining Company, and the Sandoval Coal & Mining Company, corporations created under the laws of the state of Illinois, and Isaac Main, Lambert Noland, Frank Seymour, Charles Reinhardt, Jacob Lichty, Margaret E. Edwards,

NOTE.—*As to laches, when a good defense*, see note to Felix v. Patrick, 36: 720.

As to length of time as bar to relief in cases of fraud; statute of limitations as a plea in equity; stale claims; cases of undiscovered fraud; when laches bars remedy, see note to Hammond v. Hopkins, 36: 135.

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executrix of Francis H. Edwards, deceased, and Lucinda N. Rockwell, executrix of C. N. Rockwell, deceased, all citizens of the state of Illinois. A demurrer to this bill having been sustained, the complainant brought an amended bill against the same defendants on August 14, 1888, which began with averments of the following facts:

On December 12, 1877, the St. Louis & Sandoval Coal & Mining Company was duly incorporated and organized under the laws of the state of Illinois. The purpose of its incorporation was the mining and selling of coal, and the term of its existence was to be ninety-nine years. Its principal office was at the town of Sandoval, Marion county, Illinois, and near that town it was to carry on its mining operations. The capital stock of the company was fixed at $50,000, divided into 500 shares of $100 each. The directors were five 22]*in number, namely: Isaac Main, John B. Mears, Henry Wellhoener, James Sheals, and Ozias Townsend, the complainant. Among others, the testators of the said defendants Margaret E. Edwards and Lucinda N. Rockwell, and the defendants Isaac Main, Lambert Noland, Charles Reinhardt, and Jacob Lichty, were subscribers to the stock. All the said directors were stockholders. The complainant's subscription to the stock was 391 shares, of which he was to hold 380 shares as trustee for the company, and to sell the same for its benefit. The complainant attended to the incorporation and organization of the company, secured to himself as its trustee 436 coal mining rights, and purchased with his own money four acres of land to be used for mining purposes, and through which, by means of a shaft and drifts, the coal underlying the lands in respect of which he had secured the mining rights could be reached and utilized. On January 9, 1878, he conveyed the said four acres of land to the company in fee simple. In the work thus done by him in the interests of the company he was continually engaged from July 1, 1877, to January 1, 1878, and besides paying $200 for the land, he expended in connection with the incorporation of the company and the securing of the mining rights the sum of $200. After the organization of the company a regular meeting of its board of directors was held on December 20, 1877, in the city of St. Louis, at which all the members were present, and at which meeting the salary of the complainant as president and *ex officio* superintendent of the company was fixed at $150 per month, to commence on January 1, 1878, and provision made that all his necessary expenses of travel in the interests of the company should be repaid to him. In such action of the directors the complainant did not participate. The complainant at once entered upon the duties of his said office, and continued faithfully to perform them until the dissolution of the company on January 25, 1886. In March, 1878, a duly called meeting of the directors was held in East St. Louis, Illinois, for the purpose, among others, of auditing an account which the complainant had against the company for securing for it the said mining rights, and for money expended by him as 23] *aforesaid. All the directors were present at this meeting except Isaac Main. James Sheals resigned as a director, and True N. Blackman was duly chosen a director to fill his place, and participated in the proceedings had. At this meeting the complainant presented to the board his account in the sum of $12,050 for compensation for his services and for money expended as before stated, and then retired from the board and took no part in its deliberations. Thereupon, Mr. Mears, one of the directors, offered a resolution, which stated in the preamble thereof that the complainant had devoted a large share of his time for the past year to the organization of the company, and had freely expended his money in promoting its interests, in securing for it large and very valuable mining privileges, and in travel, for all of which he had received no compensation; and provided as follows:

"*Be it resolved, 1st,* That in full satisfaction for such services and expenditures and for his attention to the business of this company up to and prior to the 1st day of January, 1878, the said Ozias Townsend is hereby allowed and this company binds itself to pay to him the sum of ten thousand dollars, the same to be receipted for by him as in full compensation for said services as aforesaid; and if he shall wish to be indorsed upon the stock held by him as a member of the association as so much paid on account of calls made and to be made on such of the stock as may be held or indicated by him, and such indorsement by the secretary and treasurer of this company shall be held and accounted for as a receipt in full from him for calls on said stocks to the amount of ten thousand dollars as aforesaid.

"*Be it resolved, 2d,* The secretary and treasurer is hereby authorized and directed to indorse upon the stock held by said Townsend, as he shall indicate, payments of calls on the same to the extent aforesaid, and, in the event of such indorsement failing, then he shall have a valid claim against this company to that extent for such services hereby acknowledged to be rendered, but not otherwise."

This resolution the members of the board who were present adopted unanimously. The complainant accepted this *settlement of [24 his claim, and the resolution was duly signed by each member of the board present, being a majority of all the directors.

After presenting the averments, of which the foregoing statement is the substance, and averring that the amount so allowed him was fair and reasonable compensation for the time and labor which he had devoted to the interests of the company, the complainant alleged that the defendant Main, with intent to defraud the complainant and to prevent his collecting the said amount allowed him by the board of directors, and the said salary and traveling expenses, combined and confederated with the other stockholders residing in Marion county, Illinois, to wreck the corporation by the process of the courts, and to buy in all its assets at a sum greatly below their real value, so that ostensibly the assets would all be gone when the complainant should take steps to collect the said debts; that with this end in view, on June 27, 1878, a bill in equity was filed in the circuit court of Marion county, Illinois, by Isaac Main, Frank Seymour, Francis H. Edwards, Lambert Noland, Charles Reinhart,

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Jacob Lichty, C. N. Rockwell, and Henry Wellhoener (the latter of whom, as the complainant averred, withdrew from the suit upon learning the animus thereof) against the said company, Ozias Townsend, of St. Louis, Missouri (the present complainant), and all the other subscribers to the capital stock who resided out of the state of Illinois.

The complainant showed that the said bill alleged, among other things, that on January 10, 1878, the company had entered into a contract with the said Frank Seymour (a defendant in the present suit) to sink a shaft on the said land down to the coal thereunder; that Seymour, in pursuance of that contract, had sunk a shaft to the depth of about 114 feet, when he stopped work for the reason that the company had failed to perform its part of the contract; that the corporation was indebted to Seymour on account of the said work in the sum of about $1700, and owed other persons about $1300 (not mentioning, however, the company's said alleged indebtedness to the complainant Townsend) that the whole 25] cost *of sinking the shaft down to the coal would be about $10,800; that on February 14, 1878, an assessment of 5 per cent on the capital stock had been made; that the said plaintiffs, Isaac Main, Lambert Noland, Jacob Lichty, C. N. Rockwell, Charles Reinhardt, Francis H. Edwards, and Henry Wellhoener, paid their assessments, but that all the other stockholders of the company failed to pay; that, by reason of such failure, the stock of all the other stockholders except three (who do not appear in the present suit) was, on April 29, 1878, forfeited, but that the holders thereof were still liable for their indebtedness to the company; that some time between March 8 and April 6 (the year not being given) the directors of the company, with the exception of Isaac Main, fraudulently and without consideration acknowledged, by resolution, an indebtedness of $10,000 to the said Ozias Townsend for services claimed to have been rendered and money expended for the company; that such services were never rendered, and that no money was expended by Townsend for which the company was liable; that, according to the provision of the said resolution, that if Townsend so desired the said $10,000 should be indorsed upon the stock held by him as a member of the company, he had issued, of paid up stock, to his wife $5000, to George W. Wharton $4000, and to True N. Blackman $1000, which stock those persons pretended to hold as paid-up stock, but for which they had paid nothing to the company; that the said mining rights were conveyed to Townsend in trust for the company, with a condition that a shaft should be sunk upon the land within two years from November 6, 1877; that those rights were valuable, provided the shaft should be sunk within the said time, but that in the then unfinished condition of the shaft the mining rights and the land were not worth enough to pay the company's debts, that such property and the buildings upon the land were all the effects the company owned; that nearly all the stockholders of the company were insolvent; and that in the then present condition of the company it would be useless to attempt to continue its business. The complainant showed that the prayers of that bill were that the affairs of the company might be wound up, *a receiver be appointed, the property of [26 the company be sold, the proceeds of the sale thereof be applied to the payment of the company's debts, and that if the same should be insufficient to pay the debts, then the stockholders might be assessed to pay the balance, and that the corporation might be dissolved.

The complainant averred that, as a defendant in the said bill so described by him, no summons was served upon him either in his individual capacity or as president of the company, and that neither he nor the company appeared, but that summons was served upon said Isaac Main as a director; that, at the August term, 1878, of the said circuit court of Marion county a decree *pro confesso* against the defendants in the aforesaid bill was entered, finding the facts alleged in that bill to be true, and granting the relief therein prayed for; that the court appointed a receiver of the company's property, and directed him to sell the same; that on September 28, 1878, the receiver sold at public sale all the property belonging to the company to the said Isaac Main, who was the only bidder, for the sum of $200, and executed and delivered to him a properly acknowledged deed for the same; that the sale was reported to the court, and that the court, on February 11, 1879, confirmed the same; that at that time the property thus sold was worth $20,000; that on March 24, 1881, an appeal was taken to the supreme court of the state, and was there reversed on the ground that the service upon Main as a director of the corporation when he was one the plaintiffs in the case was not legal service upon the corporation, and that the circuit court of Marion county had had no jurisdiction over it.

The complainant further averred that the cause having been remanded to the said court, he and the other defendants therein filed their answer to the bill, denying that the board of directors of the company wrongfully acknowledged an indebtedness to him; that the company in its answer to the said bill denied that it fraudulently acknowledged an indebtedness to him or issued paid-up stock to him or to any one else without consideration, and that such allegations were the only ones in the *said bill and answers in regard to the [27 company's indebtedness to him.

He showed that the case was heard in that court in July, 1883, upon bill, answers, and evidence, and that the court found that the company had, on March 10, 1878, ceased to prosecute the work for which it was organized, leaving debts unpaid to the said Frank Seymour and others (but making no finding with relation to the complainant's claim); that the business of the company had been mismanaged by its officers; that the company was insolvent and that it would be useless for it to resume business, and decreed that the corporation be dissolved and that the appointment of the receiver be confirmed, and ordered the receiver to make a further report.

It was further averred by the complainant that in pursuance of the fraudulent scheme to prevent the collection of his claim against the company, Isaac Main and some of the plain-

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tiffs in the above described suit organized a new corporation under the laws of the state of Illinois, having its principal office at Sandoval, called "the Sandoval Coal & Mining Company," for the purpose of having the property of the old company conveyed to it; that Main, in the year 1879, conveyed to the new company the said land and mining rights and all the assets of the company for the nominal sum of $200, but really upon the consideration that the new company should pay all the debts of the old company, except the said debts of Townsend, the present complainant; that the new company took the property with knowledge and notice of those debts, and also of such scheme to prevent their collection; that the property was charged with a trust in favor of the complainant as a creditor of the old company; that at the time the property was transferred by Main to the new company it was worth at least $20,000, and that that company was not a bona fide purchaser of the same.

The complainant showed that at the February term, 1885, of the said court, the plaintiffs in the aforesaid bill filed a supplemental bill in the cause, making the new company a party defendant, and that the new company filed an answer thereto, and at the same time filed its 28] crossbill, in which it alleged that *it had bought the said property from Main in good faith and had paid all the debts of the old company, amounting to $2465.30; that it had made valuable improvements under and upon the said land; that the plaintiffs in the said bill against the old company and others were the only legal stockholders in the old company; that the complainant Townsend and others, defendants in that bill, were not bona fide stockholders in the old company; and prayed that a conveyance might be made to it of the said property of the old company, and that the old company might be restrained from prosecuting an ejectment suit against the new company, and also from prosecuting an action of trespass against its officers. The complainant showed that an answer was filed by him to the said crossbill, and that the case was heard by the circuit court of Marion county, and a decree entered therein in August, 1885, granting the relief prayed for in the crossbill, and that thereupon he and the old company and other defendants in the said original, supplemental, and crossbills appealed to the supreme court of the state, where the decree was affirmed.

It was alleged by the complainant that since the original decree *pro confesso* had been held void by the supreme court for want of proper service on the old company, and since there was no new sale of the property under the decree entered after the remanding of the cause, it followed that the sale to Main under the former decree was also void. He further alleged that the question whether the old company, if it had not been dissolved, would have been liable to him for his said services, and for money expended by him for its benefit, was not in issue in either of the said cases and was not determined therein; and that, therefore, he was not estopped by the decrees entered in those cases from asserting in his present bill his rights as a creditor of the old company.

The complainant finally averred that the new company, pretending that in the suit to dissolve the old corporation his said debts due by it were considered, and that the decree entered therein was a final adjudication of his account, had never paid those debts or any part thereof, and refused to *do so. He [29 stated his willingness to contribute his proportionate part toward the payment of his debts if the court should be of opinion that he was a stockholder. He prayed that the defendants might answer his bill, but not under oath; that the court might require the individual defendant's holders of stock in the old company, to pay the balance which, as he alleged, was due thereon; and might decree that the sale by the receiver to Main was void; that the new company was a trustee of the property for the payment of the debts due to the complainant; and that if the new company should persist in its refusal to pay the same its property, or as much as might be necessary to pay the said debts, be sold and the debts be paid with the proceeds.

The Sandoval Coal & Mining Company filed its answer to the complainant's amended bill on August 28, 1888, in which it denied on information and belief that the complainant had performed the alleged services or expended money for the old company's benefit, or had purchased the said land with his own money, and averred the fact to be that the land was paid for by the new company; denied that the complainant obtained any valid title to the said mining rights, and averred that those rights were conveyed on condition that the old company would sink a shaft to a paying vein of coal, and work the same, within two years from the conveyance of such rights, and that the shaft not having been sunk to the coal within the time limited, the rights were forfeited; and denied on information and belief that the complainant had performed the duties of president of the company for the time stated in the bill, or for any time. The defendant alleged that anything which might have been done at the meeting described in the bill at which, as averred therein, the complainant's salary as president and superintendent of the company was fixed at $150 per month, was void for the reason that the meeting was not authorized nor its acts legally ratified; and that the aforesaid action of the board of directors at the meeting in East St. Louis, Illinois, when Main was not present, by which one fifth of the capital stock of the company was voted to the *complainant, was illegal and void, and [30 was one of the causes which led to the company's dissolution.

The defendant stated that the complainant had correctly presented the allegations of the bill filed for the purpose of dissolving the old company, and averred that, although no summons to that proceeding was served upon the complainant herein, yet he was served by publication, under the statute of Illinois. It was denied by the defendant that the said property was worth $20,000 at the time it was sold by the receiver to Main, and it was averred that the property was not worth more than Main paid for it.

The defendant showed that although, as was stated in the bill, the aforesaid decree dis-

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solving the old company was reversed by the supreme court of Illinois, it was reversed in part only, and that so much thereof as related to the appointment of the receiver was affirmed. It was therefore asserted by the defendant that the judgment of the said supreme court did not affect the decree entered in the circuit court of Marion county after the remanding of the cause, and that the reasons for the supreme court's partial reversal did not apply to the complainant herein, because he answered the said bill before the second hearing.

It was averred that by virtue of the decree entered upon the second hearing the master in chancery of the circuit court of Marion county executed and delivered to the defendant company a valid deed to the said property; and that under that deed it held the property by an absolute title, and not in trust for the complainant, as alleged in his bill. The defendant denied that it took the property from Main with knowledge of the complainant's debts against the old company; averred that, on the contrary, it knew nothing of such debts or claims, and insisted that so far as it and the complainant were concerned, all business matters between them were finally settled in the second decree of August, 1885. The defendant prayed that the complainant's amended bill might be dismissed.

The other defendants, on the same day, filed their joint and several answer to the complainant's amended bill, denying the same allegations of the bill that were denied in the 31] answer of *the defendant company, and averring, among other things, that the stock of the old company, taken by the complainant, was taken for himself and not in trust for the company. They showed that the said property was in the hands of the receiver from August, 1878, to some time in the year 1885, and averred that in all that time the complainant had not presented to the receiver his said claim or any claim. They stated that they relied upon the aforesaid decrees and orders of the circuit court of Marion county as a complete defense to the complainant's amended bill, and denied that any debt was due by them or by the old or new company to the complainant as alleged in the bill, or that the complainant was entitled to the relief which he prayed for, or to any relief. The dismissal of the amended bill was prayed for by them also.

Replication was duly made by the complainant, and a large amount of testimony taken, on which, and on the amended bill, the answers, and the record of the proceedings had in the state court, the cause was heard in the circuit court, and a decree entered therein on February 7, 1889, by which the amended bill was dismissed. From that decree the complainant appealed to this court.

Mr. **Upton M. Young** for appellant.
Mr. **Green B. Raum** for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

Our examination of this case has not been aided by any findings of fact or law by the court below. It has, hence, been necessary to make a very full statement of the facts as disclosed in the pleadings and evidence. That statement when made, however, does not disclose a case calling for extended treatment.

The present bill of complaint filed in the circuit court of the United States, as finally amended, was met by answers, in which, among other matters of defense, it was alleged that, in proceedings instituted in the circuit court of Marion *county, Illinois, on June [32 27, 1878, by Isaac Main and others against the St. Louis & Sandoval Coal & Mining Company, and against Ozias Townsend (the appellant in the present case), and which proceedings resulted in a final decree, on August 9, 1883, in favor of the complainants, which final decree was affirmed by the supreme court of Illinois on January 25, 1888, the same claims and matters of controversy set up in the present bill were litigated and adjudicated in favor of the appellees and against the appellant in the present case.

Of course, if this were so, such final judgment of the courts of Illinois would be a conclusive bar when pleaded to the present bill, and it is so conceded, as necessarily it must be, by the counsel of the appellant in his argument and brief in this case.

It is, however, contended that the issues involved in this suit were not the same with those involved and adjudicated in the state court. The first question, then, for our determination, is whether the matters tried and adjudged in the state courts were the same with those which the appellant sought to have considered in the circuit court in the present case.

This question is readily determined by an inspection of the records in the respective cases.

As above stated, the bill as originally filed in the circuit court of Marion county, Illinois, alleges the insolvency of the St. Louis & Sandoval Coal & Mining Company, and that Ozias Townsend's claim against that company was without consideration and fraudulent, and asked for the appointment of a receiver and for a sale of the company's property. Upon a decree *pro confesso*, a receiver was appointed and a sale ordered. This decree was on appeal reversed by the supreme court of Illinois for want of proper service of process, and the cause was remanded for further proceedings, the receiver being continued. In the court below, when the cause came back, a supplemental bill was filed making the Sandoval Coal & Mining Company a party defendant. The latter company then filed an answer admitting all the allegations in the original and supplemental bills filed by Main and others, *and [33 also filed a crossbill, in which were recited the facts of the organization and insolvency of the St. Louis & Sandoval Coal & Mining Company, and alleging that it had in good faith bought the coal property and fixtures of the old company from Isaac Main, who had purchased them under the original decree of sale; that Ozias Townsend and his assignees were not bona fide stockholders in the old company, and praying the court to so decree, and that the complainants in the original bill were the only valid and legal stockholders in said old company, and that the original complainant be ordered to convey, in the name of the St.

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Louis & Sandoval Coal & Mining Company by valid conveyance to the said Sandoval Coal & Mining Company, the tract of land on which the shaft was sunk and all mining rights held by said first-named company, and also praying that the St. Louis & Sandoval Coal & Mining Company should be restrained from prosecuting an ejectment suit and a trespass suit that had been brought against the Sandoval Coal & Mining Company. As already stated, this litigation terminated in a decree declaring that the material allegations in the crossbill were true; that Isaac Main and the other appellees in the present case were the only stockholders in the St. Louis & Sandoval Coal & Mining Company who had paid anything on their stock, and that they were the only parties or stockholders who had any interest in or right to determine how the assets of said company, which had been dissolved by the decree of the court, should be disposed of, to whom, and for what consideration. The decree further declared that Ozias Townsend and his assignees, defendants in the crossbill, never had paid anything for their supposed stock in said St. Louis & Sandoval Coal & Mining Company, and that if any such stock had been issued to them it was wrongfully and fraudulently done, and that neither of them had any interest in the assets of said company, nor any right to interfere with the disposition of such assets. The decree further adjudged that Isaac Main had bought the property of the St. Louis & Sandoval Coal & Mining Company, at the instance and request of all the valid stockholders therein, for the purpose of selling the same 34] for enough to pay *off the indebtedness of that company, which then amounted to over two thousand dollars, and that Main afterwards, at their instance and request, sold and conveyed all said property in consideration of the sum of $2465, paid by the complainants in the crossbill, which sum was all the property was worth; and it was further decreed that a deed of conveyance, in the name of the St. Louis & Sandoval Coal & Mining Company, should be made of said property.

As already stated, Ozias Townsend and others appealed from this decree to the supreme court of Illinois, where the same was affirmed.

To escape from the conclusive effect of this decree, the complainant in the present bill asserts that his claim for services and for money expended by him for the St. Louis & Sandoval Coal & Mining Company were not in issue in said cases, and that as a creditor he can now assert such claim against the assets of that company now in the possession of the new company.

It may not be said that, in no case or in no circumstances, can a creditor of a company dissolved by legal proceedings assert a claim against its assets in the hands of a new company organized on its ruins, but it is clear that this complainant is in no condition to maintain such a claim in the present instance. Not only did the original bill against Townsend and others allege that the stock held by him and by others to whom he had caused stock to be issued had been fraudulently issued, but the crossbill directly charged that the credit of ten thousand dollars, for which said stock had been issued on account of said Townsend, was fraudulently voted for pretended labor and money furnished and performed by him, when no such labor had ever been performed by him nor any money furnished or expended by him for such company. These allegations were traversed by answers, denying that the company "fraudulently acknowledged an indebtedness to the said Townsend or issued paid-up stock to him without a sufficient consideration, or anybody else."

In the present bill Townsend alleges that by his agreement with the St. Louis & Sandoval Coal & Mining Company*he was to have a[35 right to be credited on stock with ten thousand dollars for his services, and in his testimony he says that he gave of this paid-up stock $5000 worth to his wife, $4000 worth to George Wharton, and $1000 worth to True N. Blackman. This stock so issued by Townsend to his wife, Elizabeth Townsend, to Wharton, and Blackman, was part of the very stock declared by the circuit court of Marion county, in its decree sustaining the crossbill, to have been invalid as issued without consideration.

The manifest purpose and aim of the present bill are to go back of this decree, and to assert his original claim for services against the new company. We are of opinion that the invalidity of his claim for services was substantially established by the decree that the stock issued therefor was invalid, because issued without anything having been paid for it; and we are also of opinion that even if Townsend's original claim for services had not been merged in stock, but had remained as a valid and unsatisfied claim, no ground has been shown upon which the court below could have declared that such claim could be asserted at law or in equity against the Sandoval Coal & Mining Company or its stockholders. Even if the complainant's claim had been a conceded and bona fide claim against the St. Louis & Sandoval Coal & Mining Company, yet, as it had accrued to him, according to his own showing, on January 1, 1878, it could not be successfully asserted in a court of equity against purchasers at a judicial sale made in August, 1878, by a bill filed November 30, 1885. If, as he now is obliged to contend, Townsend did not assert his claim for personal services during the long litigation in the state courts, such claim, if not barred by the statute of limitations, was too stale to receive favor from a court of equity.

The decree of the court below is affirmed.

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36] JOHN H. WHITE ET AL., *Appts.*,
v.
BOYD EWING, Receiver, etc.

(See S. C. Reporter's ed. 36-40.)

Jurisdiction of circuit court.

Any suit by or against a receiver appointed in a general creditors' suit pending in the United States circuit court against a corporation, whether for the collection of its assets, or for the defense of its property rights, is ancillary to the main suit, and within the jurisdiction of such circuit court, regardless either of the citizenship of the parties or of the amount in controversy.

[No. 918.]

Submitted May 20, 1895. Decided June 3, 1895.

ON CERTIFICATE from the Circuit Court of Appeals for the Sixth Circuit certifying questions to this court for its decision as to the jurisdiction of the circuit court in an action brought by a receiver in a creditor's suit against a corporation, to recover debts due to it. *Question answered in the affirmative.*

Statement by *Mr. Justice* **Brown:**

This case arose upon a certificate of the court of appeals for the sixth circuit, based upon the following facts:

The Cardiff Coal & Iron Company, a corporation of Tennessee, becoming insolvent, a creditor's bill was filed in the circuit court for the eastern district of Tennessee by George F. Bosworth, a citizen of Massachusetts and a judgment creditor of the company, setting forth the insolvency of the company, the wasting of its assets, etc., and praying for a sale of the property, the collection of its choses in action, the appointment of a receiver, and for an injunction. In pursuance of the prayer of this bill the appellee, Ewing, was appointed receiver of the company, ordered to take possession of its assets, and to manage and protect the same for the benefit of the creditors under orders from the court. All creditors were ordered to file their claims.

Subsequently the receiver filed a petition stating that a large proportion of the company's assets consisted of promissory notes, amounting to about $225,000, given for land purchased from the company, upon which liens had been retained to secure their payment. These notes were executed by 130 different persons and were for various amounts, many of them for less than $2000. The receiver petitioned for authority from the court to institute suits for the collection of such notes, stating that, in order to save costs and 37] expense, he had *been advised that it was proper, if it might be done, to bring in all the debtors by bill or petition and join them as defendants in one suit; that he was requested by the creditors to proceed in this manner; and that to sue the debtors separately would require more than one hundred suits with the enormous expense incident thereto.

In compliance with this petition, the court made an order that the receiver be directed to institute suit by proper bill or petition in the pending case against all persons indebted to the defendant company (the Cardiff Coal & Iron Company) by note or account, as set forth in his petition.

In pursuance of this order, the receiver filed his bill in the circuit court against 130 persons, of whom thirty were alleged to be citizens of Tennessee, and the remainder citizens of other states, all of whom were joined as defendants, and the amounts alleged to be due from them, respectively, were in most cases less than $2000. It was also alleged that special liens were retained in each case in the deed to the purchaser, to secure the deferred payments of the purchase money, and the court was asked to enforce such liens by sale of the lands, for the satisfaction of the balance of the purchase money due separately from each and all said defendants, upon their respective notes.

The resident defendants were personally served with subpœna, and an order of publication made against the nonresident defendants. No exception was taken to the form of the bill by demurrer or otherwise; and the defendants nearly all answered, denying their liability. The case was referred to a master, and on his report decrees were entered against those found to be indebted; such decrees being in a majority of instances for sums less than $2000. The lots were ordered to be sold to pay the amounts so found due. Appeals from these decrees were duly taken to the circuit court of appeals, and perfected by the appellants in this case.

Upon this statement of facts, the circuit court of appeals certified the following question to this court for its determination:

"Had the circuit court of the United States in a general *creditor's suit properly pending [38 therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit, the receiver claimed the right to recover from any one debtor a sum not exceeding $2000."

Messrs. **Heber J. May, Tully R. Cornick,** *John F. McNutt,* and *John W. Yoe* for appellants.

Messrs. **Robert Pritchard, Foster V. Brown,** and *Frank Spurlock* for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

While the receiver prayed in his petition to bring in all the debtors by bill or petition in one suit, alleging that it was so requested by creditors, in order to avoid the expense of a separate suit against each; and the bill was brought in that form against 130 defendants, who were charged to be severally indebted upon notes given for lots of land purchased from the company. No exception was taken to the form of the bill by demurrer or otherwise,

NOTE.—*As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit,* see note to Roberts v. Lewis, 36: 579.

As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since 1875; amount in dispute, see note to Schunk v. Moline, M. & S. Co. 37: 256.

As to power and duties of receivers, see note to Davis v. Gray, 21: 447.

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but the defendants answered, denying their liability. The question certified does not, as we understand it, demand the opinion of this court as to whether a single bill against all these defendants would lie for the amounts severally due by them (upon which point we do not feel called upon to express an opinion); but whether, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2000, the court had jurisdiction to render a judgment against them.

This question must be answered in the affirmative. As was observed by this court in *Porter* v. *Sabin*, 149 U. S. 473, 479 [37: 815, 818]: "When a court exercising a jurisdiction in equity appoints a receiver to hold the property of a corporation, that court assumes the administration of the estate; the possession of 39]the *receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it."

The circuit court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditor's bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver; and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy. *Freeman* v. *Howe*, 65 U. S. 24 How. 450, 460 [16: 749, 752]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]; *Dewey* v. *West Fairmont Gas Coal Co.* 123 U. S. 329 [31: 179]; *Re Tyler*, 149 U. S. 164, 181 [37: 689, 694]; *Root* v. *Woolworth*, 150 U. S. 401, 413 [37: 1123, 1126]; *Rouse* v. *Letcher*, 156 U. S. 47, 49 [39:341, 342].

Indeed, it was conceded that, where an insolvent corporation is placed in the hands of a receiver of the circuit court, such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into that court in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate, and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed.

This position is entirely correct so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits. The receiver does not take his authority as an or- 40] dinary indorsee of the paper, and *subject to the disability to sue in the Federal court, which attaches to such indorsee, but he takes title by operation of law, and as an instrument of the court which appointed him. The cases upon which the appellant relies, of *New Orleans Pac. R. Co.* v. *Parker*, 143 U. S. 42 [36: 66], and *Walter* v. *Northeastern R. Co.* 147 U. S. 370 [37: 206], were both original bills, over which jurisdiction could only be acquired upon proper allegations of citizenship and amount. In this case, however, the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation over which it has by an original bill obtained jurisdiction. In this particular, the jurisdiction of the circuit court does not materially differ from that of the district court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted. There is just as much reason for questioning the jurisdiction of the court in this case upon the ground of the want of diverse citizenship, as upon the ground that the requisite amount is not involved.

Two cases decided by justices of this court are directly in point: *Price* v. *Abbott*, 17 Fed. Rep. 506; *Armstrong* v. *Trautman*, 36 Fed. Rep. 275.

The question certified will therefore be answered in the affirmative.

CHARLES W. HORNE, *Plff. in Errr.*, *v.* C. A. SMITH ET AL.

(See S. C. Reporter's ed. 40-46.)

Meander line—government survey.

1. Where the meander line of a government survey was really a mile or more from the main waters of a river, and the water line of a bayou opening into the river, was evidently intended as the real boundary, the patent, describing the land by the numbers of the sections and its quantity as 170 acres, will not convey a strip of unsurveyed land of a mile or more in width containing six hundred acres between the bayou and the river, although the official plat names the river as the boundary of the survey.
2. Although official surveys are not open to attack in an action at law, yet it may be shown that the meander line of land conveyed by a patent is the water line of a bayou, and not the water line of the main channel of a river into which the bayou empties, although the official plat showed the land as bordering on the river.

[No. 341.]

Submitted May 2, 1895. Decided June 3, 1895.

NOTE.—*As to errors in survey and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

As to right of the United States and the states to shore lands and accretions against piers, see note to Hallett v. Beebe, 14: 35.

As to what is seashore; how far lands bounded on, extend, see note to United States v. Pacheco, 17: 865.

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IN ERROR to the Circuit Court of the United States for the Northern District of Florida, to review a judgment in favor of defendants, C. A. Smith *et al.*, in an action brought by Charles W. Horne, plaintiff, to recover possession of land in the county of Brevard, Florida. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On September 27, 1890, plaintiff in error, as plaintiff, commenced an action to recover possession of lot 7, section 23 (except thirty acres on the north side), and lots 1 and 2, section 26, all in township 29 south, range 38 east, in the county of Brevard, state of Florida. The defendants answered, denying possession of the property described in the plaintiff's complaint. A trial was had, which resulted, on January 14, 1891, in a verdict for the defendants, upon which verdict, on June 30, 1891, judgment was entered. Thereupon plaintiff brought this writ of error.

Mr. **H. Bisbee** for plaintiff in error.

Mr. **Geo. M. Robbins** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

But a single question needs consideration. The title of the plaintiff to the property described in his complaint is not challenged, but the contention of the defendants is that the land which confessedly they occupy is not a part of the land so described. In other words, the only question involved is one of description and boundary.

Plaintiff's title rests on a patent from the United States, dated March 20, 1885, conveying "lot numbered seven of section twenty-three, and the lots numbered one and two of section twenty-six, in township twenty-nine south, of range thirty-eight east of Tallahassee meridian in Florida, containing one hundred and seventy acres and forty-two hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general." The official plat of township 29 was in evidence, which showed that sections 23 and 26 were fractional sections bordering on the Indian river. On this plat a meander line runs through the sections from north to south, the Indian river being on the west thereof. The east line of the sections is, so far as these lots are concerned, the ordinary straight line of government surveys. In the south half of the south-[42] east *quarter of section 23 is lot 7. The area of that lot is given as 73.06 acres. The northeast quarter of section 26 is divided into lots 1 and 2. The area of lot 1 is 54.90 acres, and of lot 2, 42.58 acres. The boundary lines of these three lots are all straight with the exception of the meander line on the west. The length of the section line between lot 7 and lot 1, extending from the east section line to the meander line on the west, is stated to be 30.55 chains. Along the course of this meander line, as shown on the plat, runs, according to the testimony, a bayou or savannah opening into Indian river, and west of this bayou, and between it and the main waters of the river, is a body of land extending in width a distance of a mile or a mile and a quarter, and amounting to some 600 acres. This is a body of low land, in some places, however, from four to six feet above the level of the river, and covered with a growth of live oak trees, many of them three and four feet in diameter. It was not land formed by accretion since the survey.

The contention of the plaintiff is that, inasmuch as this body of land is not shown upon the official plat, and although the boundaries and areas of the three lots are given, the latter aggregating only 170 acres, the patent for the lots conveys all the land to the main body of the river. In other words, a patent for 170 acres conveys over 700. The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land, not simply to the meander line, but to the water line, and hence, as claimed in this case, carries it to the water line of the main body of the river. The testimony is apparently not all in the record, nor are all the instructions, but this presents the ruling of the court: "It is the rule that the meander line is not the boundary line; they are run, not as boundaries of the tract, but for the purpose of finding the sinuosities of the bank of the stream. Fractional divisions made so by the water are designated and sold by the numbers attached to and reference is always had to the notes and maps of the survey. The water in the notes is the boundary, and when there exists a difference between the meander line as run and the actual margin of the stream or lake, the water is *the true boundary; but the [43 rule has its limitations, as, for instance, a case in Polk county, with which I am familiar, where there are fifteen miles intervening between the meander line and the margin of a lake. This breaks the rule, and I charge you that when, as in this case, there is from three fourths of a mile to a mile and a quarter between the meander line and the actual margin of the river, and when for half a mile in width this land has upon it oak trees, some of which are from three to four feet in diameter, especially where the waters of the river make up, forming a bayou which conforms substantially to the meander line of the government survey, this is not within the rule."

Whatever criticisms may be placed upon this instruction, we think that, as applied to the facts of this case, the ruling of the court was substantially correct. It is undoubtedly true that official surveys are not open to collateral attack in an action at law. *Stoneroad* v. *Stoneroad*, 158 U. S. 240 [39:966]; *Russell* v. *Maxwell Land Grant Co.* 158 U. S. 253 [39:971]. It is also true that the meander line is not a line of boundary, but one designed to point out the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272 [19: 74]; *Hardin* v. *Jordan*, 140 U. S. 371, 380 [35: 428]. It is also true that metes and bounds in the description of premises control distance and quantities when there is any inconsistency between them. *Morrow* v. *Whitney*, 95 U. S. 551, 555 [24: 456, 457].

But the question in this case is whether the

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boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned, but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river, is evident from these facts. In the first place, the area of the lots is given, and when that area is stated to be 170 acres, it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, 44] wholly within the east half *of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27.

These considerations are conclusive that the water line which was surveyed, and made the boundary of the lots, was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and between it and the main body of the Indian river. It is unnecessary to speculate why it was that it was not surveyed. It may have been a mere oversight, or it may have been because the surveyors thought that the action of the water would soon wash the low land away; but, whatever the reason, the fact is obvious that no survey was made of that body of land, and the boundary line fixed was the water line of the bayou.

The rule of public surveys, as prescribed by chap. 9, title 32, Rev. Stats. page 438, and following pages, requires that they be surveyed into townships of six miles square, with subsequent subdivisions into thirty-six sections of a mile square, except where the line of an Indian reservation or of tracts of land theretofore surveyed or patented, or the course of navigable rivers, renders this impracticable, with a proviso that "in that case this rule must be departed from no further than such particular circumstances require." Now, if this tract west of the bayou and between it and the Indian river was intended to be surveyed, obviously all the lines of sections 23 and 26 would have been run along straight lines, and so as to make complete sections and quarter sections. But such lines, at least those on the west side, were not run, and, whatever the reason, the survey stopped at the water line of the bayou, and left this body of land west thereof wholly unsurveyed.

45] *Although it was unsurveyed it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it. Cases of this nature are naturally few in number. *Lammers* v. *Nissen*, 4 Neb. 245, is somewhat in point. In that case it appeared that between the meander line as run and the Missouri river was a tract of several hundred acres, and the court held that as that body of land had not been surveyed it did not pass by a patent of a lot which on the government plat extended to the meander line. A similar ruling was made in *Glenn* v. *Jeffrey*, 75 Iowa, 20. *Whitney* v. *Detroit Lumber Co.* 78 Wis. 240, was a case in which the meander line shown in government surveys was a half mile or more from the real borders of a lake, and the court, in a very careful opinion, discusses the law of official surveys and holds that as the meander line was a mistake, the patent did not carry the land to the actual boundary of the lake, but only to the straight line which would have been the boundary of the quarter section if accurately surveyed. And the same doctrine is reaffirmed in *Lally* v. *Rossman*, 82 Wis. 147.

But it is said that because the water mentioned on the plat is called Indian river, the boundary must be taken as the water line of the river, and cannot be that of any intermediate bayou. *Bates* v. *Illinois Cent. R. Co.* 66 U. S. 1 Black, 204 [17:158], is instructive upon this. In that case a patent had been granted for 102.29 acres lying north of the Chicago river, bounded by it on the south and by lake Michigan on the east. The contention was that the main channel of the river entered the lake much below the line shown on the plat, and so the patent carried a larger tract than that described therein. It appeared that there were two channels of the river, and the court said in reference to this:

"The mouth of the river, being found, establishes the southeast corner of the tract. The plat of the survey, and a call *for the[46 mouth of the river in the field notes, show that the survey made in 1821 recognized the entrance of the river into the lake through the sand bar in an almost direct line easterly, disregarding the channel west of the sand bar, where the river most usually flowed before the piers were erected. It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of the water only temporary at particular times, and this flow produced to some extent by artificial means, by a cut through the bar, leaving the water to wash out an enlarged channel in seasons of freshets. The public had the option to declare the true mouth of the river, for the purposes of a survey and sale of the public land."

So, in the case before us, obviously the surveyors surveyed only to this bayou, and called that the river. The plaintiff has no right to challenge the correctness of their action, or claim that the bayou was not Indian river or a proper water line upon which to bound the lots.

We are of the opinion, therefore, that no substantial error was committed by the circuit court, and the judgment is affirmed.

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THE WISCONSIN CENTRAL RAILROAD COMPANY, *Plff. in Err.*, *v.* WILLIAM O. FORSYTHE.

(See S. C. Reporter's ed. 46-62.)

Act of Congress—lands withdrawn—enlargement of grant—construction of—decision of land department—estoppel.

1. Every Act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law.
2. The fact that lands are reserved from sale by the land department does not prevent a valid grant thereof from being expressly made by Act of Congress, although ordinary grants by Congress do not include such lands.
3. An enlargement of a grant of land made to the same grantee is not to be treated as an independent grant to a different party, but is *in pari materia* and is to be construed accordingly.
4. Where six sections per mile were granted in aid of a railroad, and the lands between the six and fifteen mile limits were withdrawn and reserved, and afterwards ten alternate sections were granted in aid of the same road, the later grant was merely an enlargement of the former one, and operated on the land reserved.
5. A construction of law by the land department is not conclusive upon the courts.
6. The delay of the plaintiff to commence an action of ejectment for two months and a half after a decision adverse to him and in favor of defendant by the land department, for lands for which plaintiff has been contesting for years, does not work an estoppel against him in favor of defendant who during such delay entered the land, built a residence thereon, and made improvements at a cost of $200, the land being worth $8000.

[No. 288.]

Argued March 28, 29, 1895. Decided June 3, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment in favor of defendant in an action of ejectment by the Wisconsin Central Railroad Company, plaintiff, against Wm. O. Forsythe, defendant, to recover possession of lands in the county of Ashland, Wisconsin. *Reversed, and a new trial ordered.*

Statement by *Mr. Justice* **Brewer:**

This was an action of ejectment, commenced on April 5, 1890, by the Wisconsin Central Railroad Company against William O. Forsythe in the circuit court of the United States for the western district of Wisconsin, to recover possession of the southwest quarter of section 11, township 47 north, of range 4 west, in the county of Ashland, Wisconsin. At the trial, on April 16, 1891, the court instructed the jury to render a verdict for the defendant. Judgment having been entered on such verdict, the railroad company brought the case here on this writ of error.

The title of the plaintiff rested on these facts: On June 8, 1856, the United States made a grant of land to the state of Wisconsin. The first and fourth sections of the Act making the grant are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the state of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage city to the St. Croix river or lake between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield, and also from Fond du Lac on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption *has attached to the same, [48 then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the state of Wisconsin for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads: *Provided further*, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further*, That any and all lands reserved to the United States by any Act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this Act, except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

"Sec. 4. *And be it further enacted*, That the lands hereby granted to said state shall be disposed of by said state only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and when the governor of said state shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold; and *so from time to time until said roads are [49 completed; and if said roads are not completed

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within ten years, no further sales shall be made, and the land unsold shall revert to the United States." 11 Stat. at L. 20.

We are concerned in this case with only the first of the two lines of road named, and shall therefore treat the Act as referring to it alone. On June 12, 1856, a withdrawal of the lands deemed necessary for the satisfaction of this grant was made by the land department. The grant was accepted by the state of Wisconsin on October 8, 1856 (Laws of Wis. 1856, chap. 118) and on October 11, 1856, the state conferred the benefit of it upon the La Crosse & Milwaukee Railroad Company. Laws of Wis. 1856, chap. 122. Under authority of an act of date March 5, 1857 (Laws of Wis. 1857, chap. 230), the La Crosse & Milwaukee Railroad Company conveyed to the St. Croix & Lake Superior Railroad Company so much of the grant as was north of the St. Croix river or lake, and was to aid in constructing the road from that point to the west end of Lake Superior and to Bayfield. On March 2, 1858, the St. Croix & Lake Superior Railroad Company filed in the Land Department at Washington its map of definite location of the road from the St. Croix river or lake to the west end of Lake Superior, and on July 17, 1858, a like map of definite location of the branch to Bayfield. On March 1, 1859, the Commissioner of the General Land Office forwarded to the local land officers a plat showing these locations, together with the six and fifteen mile limits thereof, and directed them to continue to reserve all vacant tracts outside of the six and within the fifteen mile limits from sale or location for any purpose whatever. In the letter conveying this direction it was stated that the agent of the state had selected all the vacant lands between the six and fifteen mile limits in lieu of the lands within the six mile limits already sold and pre-empted.

Nothing was done towards the construction of the road and branch from the St. Croix river or lake northward until after the passage [50] by Congress of the Act of May 5, 1864. *13 Stat. at L. 66. The first, third, fifth, and sixth sections of this Act are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose, by the Act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the Act granting lands to the state of Wisconsin, to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said *grant of June 3, 1856, but such [51] selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist."

"Sec. 3. *And be it further enacted*, That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said state may determine, in a northwestern direction, to Bayfield, and thence to Superior on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the Act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, that it shall be lawful for any agent or agents of said state, appointed by the governor thereof, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much public land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which the right of preemption or homestead has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state, or by the company to which she may transfer the same, for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than twenty miles from the line of said road."

"Sec. 5. *And be it further enacted*, That the time fixed and limited for the completion of

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52] said roads in the Act aforesaid of *June three, eighteen hundred and fifty-six, be, and the same is hereby, extended to a period of five years from and after the passage of this Act.

"Sec. 6. *And be it further enacted*, That any and all lands reserved to the United States by any Act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, and all mineral lands be, and the same are hereby, reserved and excluded from the operation of this Act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

On March 20, 1865, Wisconsin conferred upon the St. Croix & Lake Superior Railroad Company the full benefit of the grant made by the first section of this Act. Laws of Wisconsin, 1865, chap. 175. On April 22, 1865, the St. Croix & Lake Superior Railroad Company accepted this grant, and at the same time adopted the definite location theretofore made as shown by the maps on file in the Land Office at Washington. In 1869 the legislature of Wisconsin passed an act (Laws 1869, chap. 90) repealing said chapter 175 of the laws of 1865, and in 1874 (Laws of 1874, chap. 126) conferred the benefit of the grant on the North Wisconsin Railroad Company, which company afterwards by consolidation became merged in the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, hereafter called the Omaha company. This company constructed, and now owns and operates, the road from St. Croix river or lake to Superior, on Lake Superior, and also the branch to Bayfield.

The grant made by section three of the Act of Congress of 1864, was transferred by the state to the Portage, Winnebago & Lake Superior Railroad Company, whose name was afterwards changed to that of the Wisconsin Central Railroad Company, the plaintiff herein. Laws of Wis. 1866, chap. 314, 362; Laws 1869, chap. 257; Laws 1871, chap. 27. The map of definite location of the road thus aided was filed on November 10, 1869. Prior to December 31, 1876, the plaintiff had constructed, and now owns and operates, the road 53] as far north *as Ashland, on Lake Superior. The Bayfield branch of the Omaha road also touches Ashland, and the land in controversy is within ten miles of the plaintiff's road and between ten and fifteen miles of the Omaha road.

On February 12, 1884, the Omaha company and the plaintiff, in the consequence of the overlapping of their grants at and near the city of Ashland, entered into an agreement, which provided, among other things: "The Omaha company consents that the Central company [plaintiff] shall take patents for all lands in the overlap lying east of the easterly ten-mile limit of the Bayfield branch of the Omaha company, and north and east of the westerly ten-mile limit of the Central company, and agrees to assist the Central company to get such patents from the state of Wisconsin."

On February 25, 1884, the state of Wisconsin issued to the plaintiff a patent for a large quantity of land, including therein the tract in controversy, and on February 19, 1887, the Omaha company executed a further instrument of release to the plaintiff, by which it surrendered and waived all right of whatsoever nature to any lands east of a line therein described, which was so drawn as to include the lands in dispute. On July 2, 1887, the plaintiff filed in the Land Office at Washington lists of land, including the land in dispute, claiming them as part of its grant. The Commissioner of the General Land Office rejected these lists, holding that the plaintiff had no title to the lands, and, on appeal, the Secretary of the Interior, on January 24, 1890, affirmed this decision. After this the defendant took proceedings to enter the lands under the laws of the United States, went into possession, built a residence, and made certain improvements, at an expense of more than $200.

Messrs. **William F. Vilas, Louis D. Brandeis,** *Howard Morris*, and *William H. Dunbar* for plaintiff in error.

Messrs. **George G. Greene** and **A. B. Browne** for defendant in error.

Mr. Justice* **Brewer delivered the [54 opinion of the court:

The land in controversy is within the place limits of the plaintiff's road. Confessedly, therefore, the title passed to the plaintiff, providing the land was subject to the operation of the grant made by the third section of the Act of 1864. The contention is that it was not subject thereto by reason of the fact that it was withdrawn by the land department in 1856 and 1859 in order to satisfy the grant made by the Act of 1856. It was within the indemnity and not within the place limits of the grant in aid of the Bayfield road.

It is curious to note that in the communication made in 1859 by the land department to the local land officers it is stated that all the unsold lands within the indemnity limits along the line of that road had been selected by the agent of the state in lieu of the lands sold and pre empted within the place limits. If this selection was in fact made and was needed to satisfy the deficiency in the amount of lands within the place limits, and was approved by the land department, it would avoid the necessity for further inquiry; for whatever of right there was in the St. Croix & Lake Superior Railroad Company passed to the Omaha company, and was by it, under the agreements of February 12, 1884, and February 19, 1887, transferred to the plaintiff, and this was long anterior to any claim on the part of the defendant.

But assuming, in the absence of any direct evidence thereof, that no such selection was made, we pass to an inquiry as to the respective rights of the parties. The title of the plaintiff, as we have seen, can only be defeated by reason of the land not being within the scope of the grant made by the third section of the Act of 1864, and it is only excluded therefrom by the grant of 1856 and the reservation made in pursuance thereof. The reliance of defendant is on the long-established rule, often affirmed by this court and recognized in

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section six of the Act of 1864, to the effect that a grant by Congress does not operate upon lands theretofore reserved for any purpose whatsoever. There can be no doubt as 55] to this rule, or as to *the fact that lands withdrawn from sale by the land department are considered as reserved within its terms.

But it is a rule of equal, if not higher, significance that every Act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law.

"The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the Acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618, 625 [28: 1109, 1111]. See also *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491, 497 [24: 1095, 1097]; *United States* v. *Southern Pac. R. Co.* 146 U. S. 570, 597 [36: 1091, 1098]; *United States* v. *Denver & R. G. R. Co.* 150 U. S. 1 [37: 975].

In order to determine the intent of Congress we must look at the situation at the time the Act of 1864 was passed. The alternate sections within the six and fifteen mile limits of the Bayfield road were not granted by the Act of 1856. They were simply withdrawn from pre-emption and sale by the action of the land department in order that the beneficiary of the grant might, in case the full amount of lands granted was not found within the place limits, select therefrom enough to supply the deficiency. We do not mean that they were not reserved lands; on the contrary, as stated above, they were. Such is the uniform ruling of this court in interpreting like action on the part of the land department. Nevertheless, not being granted lands, they were still within the disposing power of Congress. There would be no question of the title of one to whom Congress had in terms granted them. "Until selection was made the title remained in the government, subject to its disposal at its pleasure." *Kansas Pac. R. Co.* v. *Atchison, T. & S. F. R. Co.* 112 U. S. 414, 421 [28: 794, 797]; *St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 56]112 U. S. 720, *732 [28: 872, 876]; *United States* v. *McLaughlin*, 127 U. S. 428, 450, 455 [32: 213, 221, 222]; *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 496, 511 [33: 687, 694]; *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 358, 374 [35: 766, 771].

The land was, therefore, subject to the full control of Congress at the time of the passage of the Act of 1864. What did Congress intend by that act? It had in 1856 granted to the state of Wisconsin six sections per mile to aid it in the construction of a road from Madison or Columbus, by way of Portage City, to the St. Croix river or lake, and thence to the west end of Lake Superior, and to Bayfield, with a proviso that if the road was not completed within ten years the unsold lands should revert to the United States. Wisconsin had accepted this grant, and thus impliedly undertaken to construct the road. It made the La Crosse & Milwaukee Railroad Company the beneficiary of this grant. Subsequently, with the assent of the state, that company had transferred to the St. Croix & Lake Superior Railroad Company so much of the grant as was designed to aid in the construction of that part of the road from the St. Croix river or lake northward to Lake Superior, with the branch to Bayfield. Eight years had passed, and only two years more remained until the expiration of the time fixed for the completion of the road. Only a short distance had in fact been built, to wit, 61 miles from Portage to Tomah, and that by the St. Croix & Milwaukee company in the spring of 1858. It was evident that the inducement of six sections per mile had not been sufficient to secure the construction of the road in the comparatively uninhabited portions in the northwestern part of the state, and so Congress determined to enlarge its grant in order to secure the accomplishment of the desired end. At the same time it perceived that the public interests required an additional road running through the central portion of the state northward to the two termini on Lake Superior, named for the road from St. Croix lake or river.

And so it passed the Act of 1864. This made a grant to the same grantee, to wit, the state of Wisconsin, but expressed the terms and purposes in three separate *sections. [57 Congress evidently knew that at the time two companies had been named by the state of Wisconsin as the parties to construct the road provided for by the Act of 1856. So, in the first section, it made a grant of ten sections per mile to aid in the construction of a road from St. Croix river or lake to the west end of Lake Superior, with a branch to Bayfield; in the second, a grant in substantially like terms for a road from Tomah to the St. Croix river or lake; and in the third, a grant also of ten sections per mile to aid in the construction of a road from Portage City, Berlin, Doty's Island, or Fond du Lac, as the state should determine, in a northwesterly direction to Bayfield, and then to Superior, on Lake Superior. In each of these three sections it named the state of Wisconsin as the grantee. Although it knew that the state had made two separate companies the beneficiaries of the Act of 1856, it made no grant to those companies. It dealt in all three sections with the state, relying upon the state as the party to see that the roads were completed, and to use its own judgment as to the manner of securing such construction. The Act of 1864 was therefore a mere enlargement of the Act of 1856, was made to the same grantee, was *in pari materia*, and is to be construed accordingly. It is not to be treated as an independent grant to a different party, and, therefore, liable to come in conflict with the rights of the first grantee.

For whose benefit was the withdrawal of the lands within the indemnity limits of the Bayfield road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: we do not know whether, along the line of road, when you finally locate it, there

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will be six alternate sections free from any pre-emption or other claim, and therefore so situated that you may take title thereto, and so we will hold from sale or disposal to any one else an additional territory of nine miles on either side that within those nine miles you may select whatever lands may be necessary to make the full quota of six sections per mile. When Congress, by a subsequent Act, makes a new and absolute grant to the same 58] *grantee of lands thus held by the government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands?

Kansas City, L. & S. R. R. Co. v. *Brewster*, 118 U. S. 682 [30:281], is in point. On July 26, 1866 (14 Stat. at L. 289), Congress passed an Act granting to the state of Kansas five alternate sections per mile to aid the Union Pacific Railroad Company, Southern Branch, in constructing a railroad from Fort Riley, upon the valley of the Neosho river, to the southern line of the state of Kansas. This corporation (its name having been changed to that of the Missouri, Kansas & Texas Railroad Company) constructed the road, and received patents for the land. The object of that suit was to vacate and declare void these patents, and the principal ground relied on for maintaining it was that, by an Act of March 3, 1863 (12 Stat. at L. 772) and a supplemental Act of July 1, 1864 (13 Stat. at L. 339), the lands had been appropriated to aid another company in building a road along the same line. The Act of 1866 had the ordinary reservation clause, similar to that found in section six of the Act of 1864 before us, and the contention was that the effect of this reserving clause was to except all the lands covered by the grants of 1863 and 1864 from the operation of the grant of 1866. It was conceded that if the intent of Congress was to aid in the construction of two separate lines of road the contention would have to be sustained, the court saying: "As the lands granted by the prior acts of 1863 and 1864 had, by the act of the legislature of Kansas, been granted to the Atchison, Topeka & Santa Fé Railroad Company, a then existing corporation of that state, for the purpose of building a road, with the same general description as to its course down the valley of the Neosho river, which might have run through these same lands if it had been built by the latter company, it is argued with great earnestness that these lands were necessarily reserved, under this clause of the Act of 1866, from the grant, as being reserved by the authority of Congress for the purpose of aiding in that object of internal improvement. If the A. T. & S. F. R. R. Co. had built a line of road along the same general course and through the same lands, twenty 59]miles in *width, that the M. K. & T. R. R. Co. has occupied with its road, and asserted a claim to these lands, or to any of them, the argument would be almost irresistible." But it was held, in view of certain arrangements made between the two companies (not then ratified by the state of Kansas, but expected to be, and, in fact, subsequently so ratified) that it was the intent of Congress simply to aid in the construction of one road, and that the Missouri, Kansas & Texas Railroad Company was entitled to the full benefit of the three acts. The court thus looked beyond the letter of the statutes to the intent of Congress, and upon that intent denied what would otherwise be a technical ground for relief.

But we need not go outside of this Act of 1864 for a clear disclosure of a like intent on the part of Congress. The Act of 1856 granted six sections per mile to aid in the construction of a road from St. Croix river or lake to Bayfield. The lands between the six and fifteen mile limits of the line of that road as located were withdrawn by the action of the land department. They were thus reserved lands. Now the first section of the Act of 1864 granted ten alternate sections to aid in the construction of a road along the same line. Can there be any doubt that this grant of four additional sections operated upon the land thus reserved between the six and fifteen mile limits? Yet if the Act of 1864 is to be taken as making a grant entirely independent from that of 1856, it could not be enforced as to land between the six and fifteen mile limits reserved under that prior grant. It will be noticed that the Act of 1864 makes no grant directly to the St. Croix & Lake Superior Railroad Company, but only to the state of Wisconsin, and the latter could, if it had seen fit, have made some other company the beneficiary; and yet can there be any doubt that Congress intended by this first section of the Act of 1864 merely an enlargement of the grant made by the Act of 1856 from six to ten sections, and also intended that as to the four extra sections the grant should operate upon lands reserved between the six and fifteen mile limits? If this be true as to one part of the grant of 1864, why is it not equally true as to another portion of the grant, all of it being to the same grantee?

*When Congress makes a grant of a spe- [60
cific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land, and when it prescribes that those lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that if possible the beneficiary shall receive those particular sections. So far as railroads are concerned, it is the thought, not merely that the general welfare will be subserved by the construction of the road along the lines indicated, but further that such grant shall not be attended with any pecuniary loss to the United States; for the universal rule is to double the price of even sections within the granted limits. The expectation is that the company receiving the odd sections will take pains to dispose of them to settlers, and thus by their settlement and improvement increase the value of the even sections adjoining and so justify the added price. To fully realize this expected benefit it is essential that the lands taken by the company shall be as near to the line of the road as possible; and so, while selection of remote lands is permitted, it is only when and because there is a necessity of such selection to make good the amount of the grant. Obviously, therefore, an act must be construed to realize, so far as is possible, this intent and to accomplish the desired result.

Still again, it must be noticed that the state

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of Wisconsin, the grantee named in both the Acts of 1856 and 1864, the plaintiff within whose place limits the land in controversy is situated, and the Omaha company, within whose indemnity limits it is, all three long since agreed that the land passed by this grant, and dealt with it as belonging to the plaintiff. Both roads have been constructed, and, undoubtedly largely through the instrumentality of their construction, population has poured into that part of the state, and the value of all real estate so increased that this particular tract is found by the jury to be worth $8000. After years have passed, and all the parties interested in the matter, other than the United States, have treated it as the property of the plaintiff, the defendant, relying upon a techni-
61] cal construction of the statutes, *seeks to enter the tract, and thus, for no more than the paltry sum of $400, two dollars and a half per acre being the double minimum price of land within the limits of railroad grants, to obtain title to property worth, as we have seen, at least $8000. The railroad company, under this construction, loses the land it supposed it was entitled to, which it has treated as its own, and has helped to make valuable; the government does not receive the $8000, nor indeed anything if the land be entered under the homestead laws, but a stranger comes in, who has done nothing to create that value, and appropriates it to his own benefit. The iniquity of such a result is at least suggestive.

But further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department. *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485]; *Shepley* v. *Cowan*, 91 U. S. 330 [23:424]; *Quinby* v. *Conlan*, 104 U. S. 420 [26:800]; *Doolan* v. *Carr*, 125 U. S. 618, 624 [31:844, 846]; *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U. S. 354 [39: 183].

Defendant also claims an estoppel by reason of these facts set up as a third defense in his answer, the truth of which was on the trial admitted by the plaintiff. The final decision of the Secretary adversely to the claim of the plaintiff was on or about the 10th day of January, 1890. The testimony in this case shows that it was made on January 24, 1890. Subsequent to that decision the defendant entered upon the premises, built a residence, and made other improvements, at a cost of more than $200. The plaintiff knew of his possession and of the making of such improvements, but took no action until the commencement of this suit, on April 9, 1890. It seems to us that the claim of an estoppel can hardly be seriously made. The plaintiff had been contesting for these lands in the land department for a series of years. Some time after the final decision therein the defendant enters upon the land and commences making improve-
62] ments, and in making such *improvements expends the paltry sum of $200, and the plaintiff fails to file a complaint in ejectment for two months and a half after the decision of the land department, and perhaps, nearly that time after the defendant had entered into possession. Surely the defendant had no reason to believe that the plaintiff had abandoned its claim to the land. Both the time of plaintiff's delay and the amount of his expenditures suggest the rule *de minimis non curat lex*. The title of $8,000 worth of land is not lost in such a way.

For these reasons we are of the opinion that the circuit court erred in its decision, and its judgment is therefore reversed and a new trial ordered.

The *Chief Justice* took no part in the consideration and decision of this case.

Mr. Justice **Harlan** dissented.

HENRY F. SPENCER, *Plff. in Err.*,
v.
ALEXANDER McDOUGAL.

(See S. C. Reporter's ed. 62-65.)

Public lands—withdrawal from sale.

An order of the land department withdrawing from sale all lands in a certain district in which lands have been granted for a railroad not yet located is sufficient to defeat a subsequent preemption of land thus withdrawn, although more land was withdrawn than was necessary.

[No. 245.]

Argued April 3, 1895. Decided June 3, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment for defendant in an action of ejectment. *Reversed and new trial ordered.*

The facts are stated in the opinion.

Messrs. **Louis D. Brandeis**, *Edward H. Abbot*, *Howard Morris*, and *William H. Dunbar* for plaintiff in error.

Messrs. **George G. Greene** and **A. B. Browne** for defendant in error.

Mr. Justice* **Brewer delivered the [**63** opinion of the court:

This was an action of ejectment brought by the plaintiff in error, plaintiff below, in the circuit court of the United States for the western district of Wisconsin, to recover possession of the east half of the southwest quarter and the east half of the northwest quarter of section number seven (7), in township number forty-seven (47) north, of range number four (4) west, in the county of Ashland and state of Wisconsin.

The land, found by the jury to be worth sixteen thousand dollars, is situated within the limits of the city of Ashland, more than six and less than ten miles from the Bayfield branch of the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, and also within ten miles of the Wisconsin Central Railroad Company. The title of the plaintiff rests upon an agreement between the two railroad companies settling all differences between them-

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsay, 5: 423.

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selves as to the lands within the place limits of each road, a patent from the state of Wisconsin to the Omaha company in pursuance of such agreement, and a deed from the latter to himself.

The same questions arise in this case as in that just decided, and it is unnecessary to enter into any detailed statement of the facts concerning the two land grants, or a discussion of the questions arising thereon. Obviously, as the land in controversy was within the place limits of each road, it either passed wholly to the Omaha company or in equal moieties to the two, and in the latter event the agreement referred to transferred all rights to the Omaha company.

As against this, the defendant offered evidence that on May 3, 1858, and June 16, 1858, respectively, two pre-emption declaratory statements were filed in the local land office, one in respect to one half of the tract and the other in respect to the remainder, and contends that up to those dates there had been no valid withdrawal of any lands by the land department, and, as a consequence, that these pre-emption claims attached to the land and excluded it from the operation of the grant. It may be remarked, in passing, that it does not appear that 64]*any attempt was ever made to prove up or acquire title under and in accordance with these declaratory statements. But the contention is that, by the simple filing of the statements, the land was excluded from the operation of the grant made by either act.

We are unable to assent to this contention. On May 29, 1856, the Commissioner of the General Land Office telegraphed to the local land officers of the district in which the land is situated to suspend from sale and location all lands in the district. This was prior to the passage of the act of 1856. On June 12, nine days after its passage, the Commissioner wrote to the same officers, referring to his telegraphic despatch, and saying that the object of the withdrawal thus ordered was to protect from sale the lands granted to the state by a bill which had passed both Houses of Congress, though not then approved by the President. But, it having been approved on June 3, he directs the continuance of the withdrawal. On October 26, 1856, he again wrote to the local land officers that upon the filing in their office of a duly certified map of the line of route as definitely fixed they "will, without waiting for further instructions from this office, cease to permit locations by entries or pre emption, or for any purpose whatever of the lands within fifteen miles of said route," and on March 1, 1859, which was after the filing of these declaratory statements, he sent a letter, inclosing a diagram of the lands in their district with the line of route as definitely selected designated thereon, and again notified them to withhold from sale all lands within the indemnity limits. The only objection which can be made to the order of June 12, 1856, which was after the passage of the act, is that the Commissioner withdrew too much land, to wit, all land in the district, but that was a matter for the determination of the land department, and cannot be revised or disregarded by the courts.

Wolcott v. *DesMoines Nav. & R. Co.* 72 U. S. 5 Wall. 681 [18: 689], is in point. In August, 1846, Congress granted to the territory of Iowa five alternate sections of the public lands, on each side of the Des Moines river, to aid in improving its navigation. It was a disputed question whether the grant terminated at the mouth *of the Raccoon Fork, or extended along [65 the whole length of the river to the northern boundary of the state. The land department ordered that lands the whole length of the river within the state should be withdrawn from sale. In the course of subsequent litigation it was decided by this court that the grant terminated at the mouth of the Raccoon river. But in the case cited it was held that the withdrawal by the land department of lands above the mouth of the Raccoon river was valid, and that a subsequent railroad grant, with the ordinary reservation clause in it, did not operate upon lands so withdrawn. If a withdrawal of land beyond the terminus of a grant can be sustained, as it was in that case, equally so should be one made in anticipation of the locations of two lines of road, which locations were as yet undetermined, and might be such as to bring almost any portion of the lands withdrawn within the idemnity limits of the grant.

The order of June 12, 1856, was never set aside. The letter of October 26, 1856, simply gave authority for a reduction in the area of the withdrawn territory upon the filing of a map of definite location, and that of March 1, 1859, forwarded a diagram showing the line of definite location of a part of one of the roads aided, and directed the continued withdrawal of land within the indemnity limits as disclosed thereby, but neither of them set aside the withdrawal of June 12, 1856, or in any other way affected it. These declaratory statements were of no validity; the land was then withdrawn from pre-emption or other sale, and withdrawn for the purpose of satisfying the grant to the state of Wisconsin.

The judgment of the circuit court will, therefore, be reversed and a new trial ordered.

The *Chief Justice* took no part in the consideration and decision of this case.

THE TEXAS & PACIFIC RAILWAY [66
COMPANY, *Plff. in Err.*,
v.
ROBERT N. SMITH ET AL.

(See S. C. Reporter's ed. 66-73.)

Title by prescription—notice of condition of land—receiver's receipt.

1. A receiver's receipt under a pre-emption entry constitutes a "just title" which is sufficient as the beginning of a right by prescription under the Louisiana Code, if possession under it is taken in good faith.

2. One who makes a pre-emption entry of public land, pays the government price, and receives a final receipt therefor, is not chargeable with notice of the fact that it was twenty years before swamp land granted to the state by Congress where it had not been selected or patented as such.

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

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8. Where a receiver's receipt is upon its face sufficient to transfer the full equitable title to a pre-emptor, and it does not disclose when his rights to the land were initiated, his vendees are not chargeable as matter of law with knowledge that the land was not subject to pre-emption or homestead because it was within an incorporated town at the date of the receipt.

[No. 133.]

Argued and Submitted December 19, 1894. Decided June 3, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Louisiana to review a judgment in favor of plaintiffs, Robert N. Smith *et al.*, against the Texas & Pacific Railway Company, for the possession of lands. *Reversed and a new trial ordered.*

Statement by *Mr. Justice* **Brewer**:

The facts in this case were as follows: On May 14, 1853, William W. Smith purchased from the state of Louisiana a tract known as Cross Lake, in section 25, township 18, range 14, containing twenty-one and eighteen one-hundredth acres. The title of the state rested on the claim that the land was swamp and overflowed, and passed to it under the acts of Congress granting such lands to the states. On December 3, 1857, the state filed a petition in the district court of the parish of Caddo to set aside such purchase and cancel the certificate of entry. While this action was pending, and before any trial, William W. Smith died, and the action was revived in the name of John W. Smith, administrator of his succession. Such administrator appeared and answered. The heirs of William W. Smith were not made parties, but upon the petition of the state and the answer of the administrator the action was tried before a jury, and a verdict returned in favor of the state, annulling the sale and canceling the certificate. A judgment was, on November 20, 1860, entered upon this verdict, from which the administrator took an appeal to the supreme court of the state, but such appeal was afterwards and on Aug. 11, 1869, dismissed by consent of counsel.

On February 24, 1872, at the local land office of the United States, W. D. Wylie entered 67] as a homestead the same tract *under the description of lot 15, in section 25, etc. On October 19 of that year he changed his homestead to a pre-emption entry, paid the government price for the land, and received a final receipt therefor. This receipt was recorded in the recorder's office of the parish of Caddo on November 20, 1872, and on the same day he conveyed a two-thirds interest in the land to Hotchkiss & Tomkies. On December 1, 1874, a United States patent was issued to Wylie for the land. Prior to his homestead entry, and on April 27, 1871, an act was passed by the state of Louisiana incorporating the city of Shreveport, and the tract in controversy was within the boundaries of that city as defined in the act of incorporation. In the spring of 1872 Wylie went into actual possession of the premises, and such possession has continued in him and his grantees up to the present time. By sundry mesne conveyances the title of Wylie passed to plaintiff in error.

This action was commenced in the circuit court on May 1, 1886, by the defendant in error, as heirs of William W. Smith to recover possession of the land. Among the defenses set up by the railway company was that of the statute of limitations, or prescription as it is called in the legislation of Louisiana. The case came on for trial on February 28, 1891, and resulted in a verdict and judgment for plaintiffs. Thereupon the defendant sued out this writ of error.

Messrs. **Wm. Wirt Howe, John F. Dillon,** and **Winslow S. Pierce** for plaintiff in error.

Messrs. **A. H. Leonard** and *Land & Land* for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

It is unnecessary to consider any questions other than those which arise upon the instructions of the court in respect to the matter of prescription. The possession of the defendant *and its grantors had continued from the [68 spring of 1872 until the commencement of this action,—about fourteen years,—four years longer than the time named in the statute. And the title under which this possession commenced was under instruments in legal form, executed by the proper officers of the United States, and apparently conveying full title. The receiver's receipt issued to Wylie was in these words:

"No. 17,830.

"Receiver's Office at Natchitoches, La., Oct. 19, 1872.

"Received from William D. Wylie, of Caddo Parish, Louisiana, the sum of forty-seven dollars and forty cents, being in full for the lot No. 15 south of the bayou, of section No. 25, in township No. eighteen (18) of range No. fourteen (14) west, containing eighteen acres and ninety-six hundredths, at $2.50 per acre.

"$47.40. J. Jules Bossier."

There is nothing on the face of this receipt or in the deed made on November 20 following by Wylie to Hotchkiss & Tomkies to indicate that the land was swamp or overflowed, or that it was within the corporate limits of the city of Shreveport, or tending to show when Wylie first entered upon it and initiated the right of homestead or pre-emption. And the same is true of the patent issued two years thereafter. Such a title is the "just title" which, within the terms of the Louisiana statutes, is the beginning of a right by prescription. And this is true whether we regard simply the receiver's receipt or the patent. Indeed, a patent from the United States is the highest evidence of title. As said by *Mr. Justice* Catron, in *Hooper* v. *Scheimer*, 64 U. S. 23 How. 235, 249 [16:452, 454]: "This court held, in the case of *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 450 [10:242], 'that Congress had the sole power to declare the dignity and effect of a patent issuing from the United States; that a patent carries the fee, and is the best title known to a court of law.' Such is the settled doctrine of this court."

There may be a question whether the patent in this case was not something more than the "just title" needed in prescription, *and [69 whether it was not conclusive as to the full title upon all the parties to this litigation. But that

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matter we shall not stop to consider, as it does not seem to have been discussed by counsel. It is enough for the purposes of this case if it be only a "just title." Articles 3481, 3482, and 3484 of the Louisiana Code are as follows:

"Article 3481. Good faith is always presumed in matters of prescription, and he who alleges bad faith in the possessor must prove it.

"Article 3482. It is sufficient if the possession has commenced in good faith; and if the possession should have afterwards been held in bad faith, that shall not prevent the prescription."

"Article 3484. By the term 'just title,' in cases of prescription, we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property."

This matter has been frequently considered by the supreme court of that state. See, among other, the following cases: *Carrel* v. *Cabaret*, 7 Mart. O. S. 375, 406; *Fort* v. *Metayer*, 10 Mart. O. S. 436, 439; *Dufour* v. *Camfranc*, 11 Mart. O. S. 675, 714, 13 Am. Dec. 360; *Frique* v. *Hopkins*, 4 Mart. N. S. 212, 225; *Eastman* v. *Beiller*, 3 Rob. (La.) 220, 223; *Hall* v. *Mooring*, 27 La. Ann. 596; *Giddens* v. *Mobley*, 37 La. Ann. 417, 419; *Barrow* v. *Wilson*, 38 La. Ann. 209, 213; *Pattison* v. *Maloney*, 38 La. Ann. 885, 888.

In the first of these cases the court said: "When the law says that a title defective in point of form shall not be the basis of prescription, what does it mean? A title, which, though apparently good, has some latent defect? Certainly not. A title, which, though apparently clothed with all the formalities required by law, may be proved defective by extensive evidence? No. It means a title on the face of which the defect is stamped. And 70]why? Because the holder of such a *title cannot pretend that he possesses in good faith; for he is supposed to know the defect of form which his title shows, and cannot plead ignorance of law. But admit latent nullities, unknown in point of fact to the possessor to prevent prescription, and what does good faith avail him? Or, rather, what becomes of the whole doctrine of prescription?" In the second: "He who alleges ill faith is bound to the strictest proof, for the presumption is against him." In the third case the title relied on was a sheriff's deed, and in respect to this the court observed: "The title presented here is perfect as it respects form; it pursues the very words of the statute; the defect is a want of authority in the sheriff to make such a conveyance, not a defect in the manner he made it. As nothing, therefore, appears on the face of the deed which is defective, the knowledge of want of right in the person who sold is not brought home to the vendee, and his error was one of fact, not of law. It is difficult to see where is the difference between this case and an ordinary one of sale, where the purchaser acquires, from a person who has no title, by a regularly executed act before a notary public. In such case the buyer acquires none, but he has that good faith which enables him to plead prescription." In *Eastman* v. *Beiller* we find this language: "A title defective in point of form cannot be a basis for prescription. By this the law means a title on the face of which some defect appears, and not one that may be proved defective by circumstances or evidence dehors the instrument." In *Hall* v. *Mooring* the title of the defendant was a patent from the United States and a deed from one apparently the agent of the heirs of the patentee. It was objected that the agent did not in fact have authority, but, nevertheless, the deed made by him was held sufficient for the purposes of prescription, the court saying: "The want of authority in Wright (the agent, to sell the lands is the only defect in defendant's title. If that defect did not exist, his title would be perfect without the help of prescription. The defendant's title is apparently perfect; so is the mandate of Wright. The defect complained of is dehors both acts, and was only made manifest on the *trial of this[71 case." In *Giddens* v. *Mobley*, a tax deed was shown, and it was held sufficient for the purpose of prescription, the court saying: "Where the deed is perfect in form, and the defense is want of right or authority in the officer to make it and not in the manner of making it, the knowledge that the officer had no right to make the sale is not brought home to the buyer." In *Barrow* v. *Wilson* the defendant claimed two tracts, and the title under which he claimed prescription was as to one, a patent from the state for land as swamp land, and the other, a tax deed, and the conclusions were as in the other cases, the court saying, in reference to the patent from the state: "Upon its face that muniment of title is transferable of the ownership of the property which it purports to convey."

These authorities sufficiently disclose the rule of law recognized in the state of Louisiana, and, of course, are controlling in the Federal courts. The learned circuit judge deemed that the principles sustained by these decisions were inapplicable on the ground that this land was swamp and overflowed land, and was also within the limits of an incorporated city, and that knowledge of these facts was chargeable to the parties in the chain of title. We quote from the bill of exceptions:

"As to Wylie, I charged that his title was a nullity, and, under the undisputed facts in relation to the land lying within the city limits, and as to its character being that of swamp and overflowed land in 1849 and continuously afterwards, and under the law forbidding public lands to be sold when lying within a city's limits, and the law of Congress of 1849 donating such swamp and overflowed lands to the state, Wylie is charged with knowledge of such facts and law, and the certificate given to him cannot be taken as a basis for the beginning or recurring in his favor of the prescription of ten years.

"I charged further in relation to testing the good faith of Wylie and vendees Hotchkiss & Tomkies, that they should be charged with such knowledge as is shown to have been in the common knowledge of the men and community of Shreveport, their place of residence,

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as to the land being swamp and overflowed land in 1849 and continuously thereafter, unless 72] *the jury from other evidence in the case should believe otherwise as to such knowledge in them; that they should be charged with knowledge of the fact that the land was in the city limits by the description of the land in the certificate under which Wylie sold, and which was recited in the act of sale to them, and they be charged with knowledge of the act limiting should the swamp and overflowed lands in 1849 to the state and of the law forbidding public lands of the United States lying within city limits to be sold to any one under the homestead or general land laws."

We think there was error in these instructions. Neither the fact that this was swamp and overflowed land, nor that it was within the limits of the city of Shreveport, appears upon the face of the receipt or patent. They are facts dehors those instruments. So far as respects the character of the land as swamp and overflowed land, it must be assumed from the statement made by the judge that the testimony showed that it was of such character in 1849 and continuously afterward. It must have been so in 1849 or no title passed to the state; but the fact that it was swamp and overflowed land in 1872 when Wiley entered it as a homestead does not prove that it was of similar character in 1849, nor that the title passed to the state under the Act of Congress. It is a well-known fact that land, by subsidence or elevation or through other causes, in a series of years may change its character, at one time being swamp and overflowed and at another dry upland. If it be conceded that Wylie was charged with knowledge of the fact that in 1872 it was swamp and overflowed, it does not follow that he is also chargeable with knowledge of the fact that twenty years before it was in like condition. No patent or conveyance had been made from the United States to the state. No selection or identification of the land as swamp land had ever been made by the land department of the government, and when Wylie's application to enter it as a homestead was recognized in that department he had a right to assume that it was land which did not pass by the Act of 1849 to the state. At least, he is not chargeable as a matter of law with knowledge of its condition in 1849, or 73] that by reason *of such condition it was among the lands granted by Act of Congress to the state.

With reference to its location within the limits of an incorporated town, even if it be true that Wylie, as the party entering, was charged with knowledge of the territorial limits of the town, and that this tract was within such limits at that time (a matter upon which we deem it unnecessary to express an opinion), it must be borne in mind that neither the receiver's receipt nor the patent disclosed when Wylie first entered upon the land for the purpose of making it his homestead, or when he first initiated his rights in respect thereto. The city was incorporated in 1871, the receiver's receipt was issued in October, 1872. Wylie might have been in occupation of the land years before the incorporation of the city, might have made application to enter it as a homestead before such incorporation, and a right thus initiated would not be defeated by the subsequent act of the state in incorporating the city. It follows, therefore, that as the receipt, which was upon its face sufficient to transfer the full equitable title to Wylie, did not disclose when his rights to the land were initiated, his vendees, Hotchkiss & Tomkies, were not chargeable as matter of law with knowledge of the fact that the land was, at that time, not subject to preemption or homestead. In other words, upon the face of the papers a good title was transferred to Wylie, and the matters upon which the learned judge relied were not such as of law the purchasers were charged with knowledge of. Other circumstances must appear to show knowledge and a want of good faith on their part, or else the title presented must be held a "just title" upon which to rest the claim of prescription.

For the error in these respects the judgment is reversed and a new trial ordered.

Mr. Justice **White** concurs in the judgment, but not in the reasons given therefor.

MASON P. GRAY, *Plff. in Err.*, *v.* STATE OF CONNECTICUT.

(See S. C. Reporter's ed. 74-77.)

License law.

The imposition of a fine upon a licensed pharmacist under a state law requiring him to procure a druggist's license before he can use spirituous liquors in the preparation of pharmacist's compounds does not violate his rights under the Constitution of the state or the 14th Amendment to the United States Constitution.

[No. 258.]

Submitted April 4, 1895. Decided June 3, 1895.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment of that court affirming the judgment of the Criminal Court of Common Pleas for New London County, in that State, adjudging Mason P. Gray, guilty of violating the statute of that state against the sale of intoxicating liquors without having a license therefor, and sentencing him to pay a fine. *Affirmed.*

Statement by *Mr. Justice* **Field:**

The plaintiff in error was charged before a justice of the peace for the county of New London, in the town of Groton, state of Connecticut, of keeping a place in that town, on the 1st day of January, 1890, and on divers days subsequently, previous to the time of making the complaint, where it was reputed that intoxicating and spirituous liquors were kept for sale; and also of selling on the 1st day of January, 1890, and at divers days between that date and the time of making the complaint, in that town and county, without having a license therefor, to persons to the prosecuting agent unknown, spirituous and

NOTE.—*As to constitutionality of laws regulating sale of liquors*, see note to Foster v. Kansas, 25: 666.

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intoxicating liquors, on the premises, in quantities less than one gallon to be delivered at one time; and also of keeping on the 1st day of January, 1890, and at divers days between that date and the time of making the complaint, at that town and county, without having a license therefor, spirituous and intoxicating liquors with intent to sell the same, all of which acts are alleged to have been done against the peace of the state, to be of evil example and contrary to the statute in such case made and provided.

The plaintiff in error, who was thus charged, 75] was arrested, *and on his plea of not guilty was tried and found guilty before the justice of the peace, and was ordered to pay a fine of eighty dollars and costs, and to stand committed until the judgment was paid.

The accused moved for an appeal from the judgment to the next session of the criminal court of common pleas for New London county, which was granted, to be held on the second Tuesday of September, 1890, at Norwich, the accused then and there to answer the complaint, at which time he appeared, and, a *nolle prosequi* being entered upon the first count, for his plea to the other counts he said "not guilty." After a full hearing of the cause on a new trial in the criminal court of common pleas the accused was found guilty and sentenced to pay a fine of fifty dollars and the costs of the prosecution, and to stand committed until the judgment was complied with.

Upon the trial in that court the counsel of the appellant contended that the court should charge the jury—

1st. That if they found "that the defendant did not sell nor keep with intent to sell, spirituous and intoxicating liquors as such, but kept such liquors to be used in compounding medicines and in dispensing the prescriptions of physicians, it was their duty to acquit him."

2d. "That the defendant as a licensed pharmacist had the right to use in the compounding of his medicines and tinctures all ingredients necessary to their proper preparation, whether such ingredients or any of them were spirituous or intoxicating or otherwise."

3d. "That the state having licensed the accused to pursue his business and occupation as a pharmacist, the board of commissioners for New London county could not by any action of theirs deprive him of the right to pursue his said business in all its branches."

4th. That section 3087 of the Revised Statutes of Connecticut, which declares "that any person who, without having a license therefor, shall sell or exchange, or shall offer or expose for sale or exchange, or shall own or keep with intent to sell or exchange, any spirituous and intoxicating liquors, shall be fined," and section 76] *3067 of such Revised Statutes, which provides "that a license to a druggist shall not be granted unless upon application made in the manner prescribed, and that the granting of such license shall be *discretionary with the county commissioners*,"—were contrary to the provisions of the 14th Amendment of the Constitution of the United States, because they abridged his privileges and immunities as a citizen of the United States, and deprived him of his property without due course of law.

But the court refused so to charge the jury, and on the judgment rendered upon the verdict, the case was taken to the supreme court of errors of Connecticut, in which court it was insisted that the court below had erred in instructing the jury that the only question for them to determine was whether the prisoner had complied with the regulations of the law, and in conducting his business had used liquors in compounding prescriptions without having a license therefor from the board of pharmacy and the county commissioners; and that the court had erred in directing the jury that if it was necessary that a man should use liquor in compounding medicines in the state and could not practice the business of druggist without it, then the law made it a prerequisite to obtain, not only a license from the board of pharmacy, but also from the county commissioners; and that the court had erred in not charging that sections 3087 and 3067 were contrary to the provisions of the Constitution of the state and the 14th Amendment of the Constitution of the United States. The court affirmed the judgment, from which the case was brought to this court on writ of error, the plaintiff in error assigning the same errors which were assigned in the supreme court of errors of Connecticut.

Messrs. **H. C. Robinson** and *S. H. Thresher* for plaintiff in error.

Mr. **Solomon Lucas** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

A license to pursue any business or occupation, from the governing authority of any municipality or state, can only be *invoked for [77 the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected by existing or new conditions. The degree of care and scrutiny which should attend the pursuit of the business or occupation practiced will necessarily depend upon the safety and freedom from injurious or dangerous conditions attending the prosecution of the same.

In the preparation of medicinal compounds, intoxicating liquors and even still more dangerous ingredients are often properly used; but the protecting care of the government, municipal or state, in their use, should never be relaxed beyond the bounds of absolute safety. The responsibility of the legal authority, municipal or state, cannot be stipulated or bartered away. Whatever provisions were prescribed by the law previous to 1890, in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful.

For reasons which were deemed sufficient after 1890 by the authorities of Connecticut, the use of spirituous liquors in the preparation of pharmacists' compounds required still further provisions than those previously existing, and it was provided that such liquors could

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not be subsequently used in their preparation without the pharmacist first procuring a druggist's license from the county commissioners.

The imposition by the court of a fine upon the accused for a disregard of this requirement trespassed in no way upon any of his rights under the Constitution of the state or the 14th Amendment of the Federal Constitution.

Judgment affirmed.

78] UNITED STATES, *Appt.*,
v.
JAMES M. BURR ET AL.

(See S. C. Reporter's ed. 78-87.)

Tariff law of 1894.

Imported merchandise entered for consumption, and delivered after August 1 and before August 28, 1894, is not subject to the rates of duty imposed by the Act of August 28, 1894.

[No. 1021.]

Submitted May 20, 1895. Decided June 3, 1895.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying certain questions to this court for decision as to the Tariff Act of 1894, on an appeal to that court from a judgment of the circuit court, deciding that certain imported merchandise was dutiable under the Tariff Act of August 28, 1894. *The first question answered in the affirmative, and the second in the negative.*

See same case below, 66 Fed. Rep. 742.

Statement by *Mr. Chief Justice* **Fuller:**

Burr & Hardwick, importers, made an importation of cotton laces, per The La Navarre, from Havre. The vessel arrived on August 7, 1894, and the goods were entered by them for consumption at the port of New York on August 8, 1894. Duty thereon was levied and assessed by the collector of customs at sixty per cent ad valorem under the provisions of schedule J, paragraph 373, of the Tariff Act of October 1, 1890, which was then in force. The duty was paid by the importers on August 8, and the goods were delivered to them on August 11, 1894. On August 28, 1894, the entry of the merchandise was liquidated at the customhouse as entered, that is to say, without any change of the duties from those assessed at the time of entry.

On that day the Tariff Act of that year became a law, and on September 7, 1894, the importers filed their protest, claiming that said cotton laces were dutiable at fifty per cent ad valorem under paragraph 276 of schehule J of the Act of August, 1894, and were not dutiable under the Act of October 1, 1890.

The board of general appraisers affirmed the decision of the collector, General Appraiser Somerville delivering the opinion. *The [79 importers appealed to the circuit court, and the return of the board was therein duly filed with the record and evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon. Evidence was taken in the circuit court before one of the general appraisers as an officer of the court, as to the legislative history of the Act of August 28, 1894, from which it appeared:

"(*a*) That the bill was introduced in the House of Representatives on December 19, 1893, House bill H. R. 4864.

"(*b*) That it passed the House of Representatives on February 1st, 1894.

"(*c*) That as it then passed the House of Representatives the date in sections 1 and 2 was as follows: 'On and after the first day of June, 1894, unless otherwise specially provided for in this Act,' etc.

"(*d*) That the bill was laid before the Senate February 2, 1894, and referred to the Finance Committee.

"(*e*) That the bill was reported by the Finance Committee on March 20, 1894.

"(*f*) That sections 1 and 2 of said bill, when so reported, contained the date of the 30th day of June, 1894, instead of the 1st day of June, 1894.

"(*g*) That said bill as amended by the Senate passed the Senate on July 3, 1894.

"(*h*) That when it passed the Senate the date contained in the first and second sections thereof was August 1, 1894, instead of the 30th day of June, 1894.

"(*i*) That the bill as amended in the Senate finally passed the House on August 13, 1894, without change, after a long discussion and deliberation by the committees of conference.

"(*j*) That on August 15, 1894, having received the signatures of the presiding officers of both Houses, the bill was sent to the President of the United States.

"(*k*) That on August 28, 1894, the bill was sent by the President to the Secretary of State, and the following indorsement was made thereon:

"'Note by the Department of State.—The foregoing Act, having been presented to the President of the United States *for his ap- [80 proval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.

"'H. R. No. 4864.—An Act to Reduce Taxation, to Provide Revenue for the Government, and for Other Purposes.

"'August 28, 1894.'"

It was stipulated in the circuit court that the persons composing the firm of Burr & Hardwick, the importers, were James M. Burr and Charles C. Hardwick; that the merchandise in controversy consisted of "cotton laces;" that the merchandise, if dutiable under the Act of October 1, 1890, was dutiable at sixty per cent ad valorem under the provision for cotton laces contained in paragraph 373 of schedule J of that Act; and that if the merchandise was dutiable under the Act of August 28, 1894, it was dutiable at fifty per cent ad valorem under the provision for cotton laces in paragraph 276 of

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

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schedule J of the latter Act. The cause thereafter came on to be tried in the circuit court, and the judge holding that court, after hearing the argument, gave an opinion January 15, 1895, 66 Fed. Rep. 742, reversed the decision of the board of general appraisers, and entered judgment January 16, 1895, holding that there was error in the decision of the board of general appraisers, and that the merchandise was properly dutiable as cotton laces at fifty per cent ad valorem under paragraph 276 of schedule J of the Act of August 28, 1894, and that the entry be reliquidated accordingly. From this judgment or decree an appeal was taken to the circuit court of appeals for the second circuit, and thereupon that court, desiring the instruction of this court, made its certificate, embodying the foregoing facts, and submitting the following questions:

"(1) Should the assessment for duty of the merchandise described in the foregoing statement of facts, under paragraph 373 of the Act of October 1st, 1890, be sustained, notwithstanding the provisions of the Tariff Act of August 28, 1894?

"(2) Should the said merchandise described in the foregoing statement of facts be assessed [81] for duty under paragraph *276, schedule J, of the Tariff Act of August 28, 1894?

"(3) Should the rates of duty prescribed by the first section of the Tariff Act of August, 1894 (unless otherwise specially provided for in said Act) be levied, collected, and paid upon all articles imported from foreign countries or withdrawn for consumption on and after Aug. 1, 1894, and prior to Aug. 28, 1894?"

Mr. **Wallace MacFarlane** for appellant.
Messrs. **Charles Curie, W. Wickham Smith,** and **David I. Mackie** for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Act of October 1, 1890 (26 Stat. at L. 567, chap. 1244), was in force until August 28, 1894, when it was repealed by section 72 of the latter Act (28 Stat. at L. 509, chap. 349), which reads as follows:

"All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this Act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. Any offenses committed and all penalties or forfeitures or liabilities incurred prior to the passage of this Act under any statute embraced in or changed, modified, or repealed by this Act may be prosecuted or punished in the same manner and with the same effect as if this Act had not been passed. All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures embraced in or modified, changed, or repealed by this Act, shall not be affected thereby; and all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the *passage of this [82] Act, may be commenced and prosecuted within the same time and with the same effect as if this Act had not been passed: *And provided further*, That nothing in this Act shall be construed to repeal the provisions of section three thousand and fifty eight of the Revised Statutes as amended by the Act approved February twenty-third, eighteen hundred and eighty-seven, in respect to the abandonment of merchandise to underwriters or the salvors of property, and the ascertainment of duties thereon."

By section 54 of the Act of October 1, 1890, it was provided: "That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

This merchandise was entered for consumption, and delivered after August 1 and before August 28, 1894, when the Act in question became a law. It was subject then to the rates of duty imposed by the law in force at that time, namely the Act of October 1, 1890, and the duties were properly assessed by the collector under that law, unless some provision to the contrary is to be found in the Act of August 28, 1894.

The first section of the Act of 1894 reads: "That on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this Act, there shall be levied, collected, and paid upon articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:"

The contention is that the language of that section being free from all obscurity and ambiguity, there is no room for construction, and that the court is imperatively required to conclude that it was the intention of Congress that the Act should have a retrospective operation as of August 1, 1894, although it did not become a law until after that date. It is conceded that the general rule is, as stated in *United States* v. *Heth*, 7 U. S. 3 Cranch, 398, 413 [2: 479, 483], that "words in a statute ought not to have a retrospective application, unless they are so clear, *strong, and impera- [83] tive that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;" and that the usual course in tariff legislation has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix a future date at which the statutes are to become operative. The question is not one of construction but of intention as to the operative effect of this Act in view of the existence of the particular date in section 1.

In view of the general rule and the admitted policy in respect of such laws, is there anything on the face of the Act which raises such a doubt in the matter as justifies the court in considering whether the language used in that particular section must be literally applied in the case before it?

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And upon the threshold we are met with the fact that the Act of October 1, 1890, was not repealed in terms until August 28, 1894; and that the repealing section of the latter act kept in force every right and liability of the government or of any person, which had been incurred or accrued prior to the passage thereof, and thereby every such right or liability was excepted out of the effect sought to be given to the first section.

The right of the government to duties under the tariff law which existed between August 1 and August 28 was a right accruing prior to the passage of the Act of 1894 (that is, the date when the bill became a law); and the obligation of the importers between August 1 and August 28 to pay the duties on their entries under the existing tariff law was a liability under that law arising prior to the passage of the Act of 1894; and if Congress intended that section 1 should relate back to August 1, still the intention is quite as apparent that the Act of October, 1890, should remain in full force and effect until the passage of the new Act on August 28, and that all acts done, rights accrued, and liabilities incurred under the earlier Act, prior to the repeal, should be saved from the effect thereof, as to all parties interested, the United States included.

The duties under consideration were paid August 8, and the merchandise delivered on [84] August 11, but it was not until *August 28 that the fact was stamped on the entry that the goods were liquidated as entered. There was no change in the classification, and no additional duty was demanded or collected, and the payment made at the time of entering the merchandise for consumption was the payment of duties. *Barney* v. *Rickard*, 157 U. S. 352 [39: 730]. The original assessment of duty was right, and the final liquidation was the same, and there was no specific provision in the Act of 1894 requiring a reliquidation at the rates under that Act. How, then, can it be held that the Act of October 1, 1890, was intended to be repealed by retroaction?

Moreover, in arriving at the true intention of Congress, we cannot treat section 1 as if it constituted the entire Act, but must deduce the intention from a view of the whole statute and from the material parts of it.

By section two it was provided that certain enumerated articles should be exempt from duty "on and after the first day of August, eighteen hundred and ninety-four, unless otherwise provided for in this Act," and as to those which were dutiable under the Act of October 1, 1890, the question arises whether Congress intended such duties should be collected, and refunded after the Act of August 28, 1894, went into effect?

By section 23 a license was provided for, and that "from and after the first day of August, eighteen hundred and ninety-four, no person shall transact business as a custom-house broker without a license granted in accordance with this provision." Since there was no law prior to this, which authorized the collector to require a license from a custom-house broker, it was manifestly anticipated, in using the words, the "first day of August," that the bill would become a law before that day.

By section 38 it was provided that on and after the first day of August, 1894, there "shall be levied, collected, and paid by adhesive stamps, a tax of two cents for and upon every pack of playing cards," and sections 43 and 45 impose a penalty of fifty dollars for every violation of the law incurred by making or selling such cards without affixing the stamps prescribed. Every dealer, if the Act were treated as operating *retrospectively, [85] would not only be liable for a tax of two cents a pack on every pack of playing cards manufactured or sold or removed from the place of manufacture, and upon every pack of playing cards in stock on and after August 1, but to an *ex post facto* penalty of fifty dollars for every pack of playing cards that he had sold or removed between August 1 and August 28. Of course these sections cannot be given a retroactive effect according to the terms employed. Again, a higher rate of duty was imposed on many articles by the Act of 1894 than under the prior Act, and a lower rate of duty on others, while some that were free were made dutiable, as for instance, the article of sugar. Must duties paid between August 1 and August 28 be refunded where the rate was lowered, and assessed where the rate was raised, or a duty imposed where none existed? Clearly not.

These considerations lead to the conclusion that the Act ought not to be construed to operate retrospectively contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary.

In these circumstances we are entitled to avail ourselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford. By section 895 of the Revised Statutes it is provided that "extracts from the journals of the Senate, or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court."

The certificate shows that the bill passed the House of Representatives February 1, 1894, and that its first section provided that the rates of duty prescribed should be levied "on and after the first day of June," while the second section provided that on and after that day certain articles named, when imported, should be exempt from duty.

*The bill was reported to the Senate by [86] the finance committee (to which it had been referred) on March 20, 1894, and "the thirtieth day of June" was substituted in sections one and two for the "first day of June." The bill, as amended in the Senate, passed that body July 3, 1894, and sections one and two were amended by substituting the first day of August for the thirtieth day of June. The conference committee of the House agreed to the bill as passed by the Senate without any further amendment, on August 13, and it was sent to the President on August 15. It thus

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appears that at every stage of its progress the intention of Congress was that the tariff provisions of the bill should operate prospectively, and that as by the concurrence of the House in the Senate amendments the bill did not go back to the Senate, "the first day of August" remained in the bill as originally fixed in the Senate July 3, 1894.

Both Houses intended that the duties imposed by section one, and the additions made to the free list in section two, should not take effect except at a point of time after the passage of the Act. And the Senate endeavored to effectuate that intention by its action on the third of July, but, because of the differences between the two bodies, the passage of the act was delayed, which delay was terminated by the House finally accepting the changes made by the Senate, so that no new date in the future was specifically assigned for section one to go into effect, although the intention that the act should not operate retrospectively was palpable throughout.

And as the Act of October 1, 1890, was not repealed by the Act of August, 1894, until the latter Act became a law, when inconsistent laws were declared thereby repealed, we think it cannot be doubted that Congress intended the rates of duty prescribed by the Act of 1894 to be levied on the first day of August, if the bill should then be a law, and if not, then as soon after that date as it should become a law. On the first day of August the duties prescribed by the first section of the Act of 1894 could not be lawfully levied, and, so far as the importations in this case are concerned and 87] others similarly situated, the law *required the exaction of the duties prescribed by the Act of 1890. As to such importations the first section of the Act of 1894 could not be literally carried out, unless by holding it to operate as a retroactive repeal, notwithstanding the saving clause, and this we consider altogether inadmissible. The language of section one was that on and after the first of August there *shall* be levied, and of the second section, that on and after the first day of August certain enumerated articles when imported *shall* be exempt from duty. In our judgment, the word "shall" spoke for the future, and was not intended to apply to transactions completed when the Act became a law.

We regard the third question as too general and unnecessary to be answered, but answer the first question in the affirmative, and the second in the negative, and it will be so certified.

GRAND RAPIDS & INDIANA RAILROAD COMPANY ET AL., *Plffs. in Err.*, v. JOHN M. BUTLER.

(See S. C. Reporter's ed. 87-95.)

Federal question—grants by the United States—land on a stream—island in Grand river.

1. The conclusion of the state court that the pleadings are sufficient to permit of the examination and determination of the point on which its decision turned involved no Federal question.
2. Grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies.
3. In Michigan a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof.
4. An island in Grand river which the government surveyor did not think of sufficient value to survey passes to one who receives the government's patent for the land on the bank of the river in which it lies.

[No. 198.]

Argued and Submitted January 29, 1895. Decided June 3, 1895.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment of that court affirming the decree of the Circuit Court of the County of Kent, in that state, in favor of the plaintiff, John Butler, against the Grand Rapids & Indiana Railroad Company *et al.*, defendants, in a suit to quiet title to certain land in that county. *Affirmed.*

See same case below, 85 Mich. 246.

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill filed by John Butler in the circuit court of the county of Kent, in the state of Michigan, against the Grand Rapids & Indiana Railroad Company and others, to quiet title to certain land in that county, resulting in a decree in complainant's favor, which was afterwards affirmed by the supreme court of the state, to review whose judgment this writ of error was sued out. The case is reported 85 Mich. 246.

Mr. **T. J. O'Brien** for plaintiffs in error.

Messrs. **Willard F. Keeney** and *Roger W. Butterfield* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The fractional north half of the southeast quarter of section 25, township 7 north, range 12 west, is located on the east bank of Grand river, and early in 1831 that part of the town lying east of the river was surveyed and subdivided, and the east bank of the river was meandered and surveyed. In 1837 the west bank of the river was meandered and surveyed, as were also four islands in the stream, designated as Islands Nos. 1, 2, 3, and 4; and that part of the town lying west of the river was surveyed and subdivided.

The north fractional half of the southeast quarter of section 25 was entered by Lyon and Hastings, September 25, 1832, and patent therefor issued to them November 5, 1833. Butler derived title under Lyon and Hastings, and claimed the land in dispute by virtue of riparian ownership, as taking, under the laws of

NOTE.—*As to jurisdiction of Federal over state courts: necessity of Federal question; what constitutes Federal question*, see note to Hamblin v. Western Land Co. 37: 267.

That patents to land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in survey and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

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Michigan, the bed of the stream to the thread thereof.

In 1855 a piece of ground in the river lying opposite land of which Butler's formed a part was surveyed and marked by the deputy surveyor Island No. 5 in Grand river. This sur- 89] vey *purported to be made in pursuance of instructions given May 24, 1854, by the surveyor general for Ohio, Indiana, and Michigan, whereby the deputy was authorized to survey the islands in certain lakes and in Grand river, Michigan, and was made in the third quarter of 1855. The verification by the deputy was in February, 1856, and by the chainman November 22, 1856.

In 1871 the Grand Rapids & Indiana Railroad Company procured from the General Land Office a patent, which, with many thousand acres of land, covered Island No. 5 in Grand river, containing 2.56 acres, but this patent was not recorded until August 9, 1887, and on September 9 following this bill was filed.

Complainant put himself upon these two propositions: "First. At the time of the survey and sale of the lands on the bank the spot in question was not an island in fact, and was not treated by the authorities as such. Second. Whatever its character, inasmuch as it was not meandered or set apart as an island, it passed to the riparian proprietor as appurtenant to the grant of the lands on the bank."

The supreme court of Michigan said: "A large mass of testimony was taken as to the character of this so-called island at the time of the original surveys and for some years subsequent, the complainant's testimony tending to show that it was at first a low sand bar covered a good part of the year with water, and the defendant's testimony tending to show that it was then a well-defined island. It is immaterial to determine what the facts are as to the condition of this land in those early days, for in our judgment it is of no consequence whether it was what might be termed 'an island' or a 'sand bar' or a 'piece of low wet ground.' The law is the same in either case."

The court called attention to the surveys of 1831 and 1837, in neither of which was any island meandered or surveyed on the site of Island No. 5, and to the fact that in the survey of 1837 the acreage of the four islands and of the mainland was given, and observed: "In surveying Island No. 3 the surveyor began at the lower end of the island. The eleventh 90] course *took him 'to maple on the head of island.' After taking his next course from the maple he made the following record: 'Channel between this and low willow isle 75 lks. wide and 3 ft. deep opposite ft. of willow isle on left, 250 of low wet ground on left to channel.' This 'low willow isle' is evidently what is now known as Island No. 5 as changed by the action of the water."

It was further stated: "The channel between the islands and the east bank was from seventy-five to one hundred feet wide. The channel between the islands and the west bank was several times wider. The depth of the water in each was about the same. The middle thread of the river was therefore west of the islands. About the year 1836 steamboats were placed on the river and docks were erected on the east bank nearly opposite Island No. 1. The principal business by boat was with the east side, where the city of Grand Rapids was situated. Steamboats also ran up the west channel to a steamboat warehouse on the west side of the river. About the year 1870 the east channel opposite Islands Nos. 1 and 2 was filled up, and the city constructed a sewer into and through that channel. The upper part of this channel was gradually filled, mainly by the owners of land upon the east bank. By these fillings this island has for some time been connected with and become a part of the mainland. The channel has been dredged out east of Island No. 3, and a steamboat slip and landing constructed, the upper end of which is a considerable distance below Island No. 5."

The court also found that Butler's possession of the premises was sufficient to maintain his suit, and some other matters were considered not necessary to be adverted to.

The court held that the well-recognized rule in Michigan was that a grantee of land bounded in the deed of conveyance by a stream takes title to the land under the water to the thread of the stream in the absence of an express reservation; that reservation cannot be implied; that when the government has surveyed its lands along the bank of a river and has sold and conveyed such lands by government subdivisions, its patent conveys the title to all islands lying between the meander *line [91 and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserves them when not surveyed; that the grant to Lyon and Hastings was made under the survey of 1831, by which, as the court found, "both banks of Grand river were meandered and by which the middle thread of the river was fixed west of this island;" and that the grant clearly vested in them title to the land in controversy, of which no subsequent survey by the government could deprive them; that there was no force in the objection that this was equivalent to a proceeding to cancel the patent since in this or any similar action, what was involved was the establishment of the fact that the title had passed by a former grant, and, therefore, that the government had no title to convey; in which cases courts protect purchasers from subsequent surveys.

The errors assigned are grouped by counsel, and stated thus: That the point that the land in question, even though an island, passed to Lyon and Hastings under their patent, if not reserved, was not properly before the court under the pleadings; that "the court erred in holding as matter of fact, on this record, that the island was not reserved in the Lyon and Hastings patent;" and that "the court erred in holding, upon this record, that Island 5 passed to Lyon and Hastings under the patent to them in 1833 of the north fraction of the southeast ¼ of section 25, township 7-12."

The state court held, however, the pleadings sufficient to permit of the examination and determination of the point on which its decision turned, and that conclusion involved no Federal question.

And as to the second proposition, it may be said that while the rule is that this court, upon

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a writ of error to the highest court of a state, in an action at law, cannot review its judgment upon a question of fact, (*Dower* v. *Richards*, 151 U. S. 658 [38: 305]), it is unnecessary to consider the extent of the power of this court, in that particular, in chancery cases, as we entirely concur in the result reached by the state court that there was no such reservation, and in its findings as follows: "In the present case there is no act on the part of the 92] government *showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey. It was not surveyed until about twenty-five years after the survey of 1831, and not till nearly twenty years after the survey of 1837, when the other islands and the lands upon the west bank were surveyed, thus completing the survey in that region."

The inquiry is reduced then to this, Did the court err in holding as matter of law, upon this record, that the grant vested in Lyon and Hastings the title to the particular land in controversy?

In *Hardin* v. *Jordan*, 140 U. S. 371 [35: 428], it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies, and the following from the opinion of Scates, *J.*, in *Middleton* v. *Pritchard*, 4 Ill. 510, 38 Am. Dec. 112, was quoted with approval: "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass, then, by a grant bounded by a stream of water? At common law, this depended upon the character of the stream or water If it were a navigable stream or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the center thread of the current. . . . At common law, only arms of the sea and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership of the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. And this latter, Chancellor Kent says, bears a perfect resemblance to public 93]highways. The consequence of *this doctrine is, that all grants bounded upon a river not navigable by common law, entitle the grantee to all islands lying between the main land and the center thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right. . . . The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant."

Hardin v. *Jordan*, *supra*, was a case from Illinois, and the question was as to the effect of the title granted by the United States along a small lake, in respect of the bed of the lake in front of the land actually described in the grant, and we said: "This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the state of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the state, extending either to the margin or center of the stream, according to the rules of that law. It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines." And see *Packer* v. *Bird*, 137 U. S. 661 [34: 819]; *St. Louis* v. *Rutz*, 138 U. S. 226 [34: 941]; *Shively* v. *Bowlby*, 152 U. S. 1 [38: 331].

In Michigan the common law prevails, and the rule is sustained by an unbroken line of authorities that a grant of land *bounded by [94 a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof. *Norris* v. *Hill*, 1 Mich. 202; *Lorman* v. *Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Rice* v. *Ruddiman*, 10 Mich. 125; *Ryan* v. *Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Watson* v. *Peters*, 26 Mich. 508; *Pere Marquette Boom Co.* v. *Adams*, 44 Mich. 403; *Fletcher* v. *Thunder Bay River Boom Co.* 51 Mich. 277; *Turner* v. *Holland*, 65 Mich. 453; *Grand Rapids* v. *Powers*, 89 Mich. 94, 14 L. R. 498, and many other cases.

In *Mitchell* v. *Smale*, 140 U. S. 406, 412, 413 [35: 442, 444, 445], a similar question to that disposed of in *Hardin* v. *Jordan*, 140 U. S. 371 [35: 428], arose, and *Mr. Justice* Bradley, speaking for the court, said: "We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary

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proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned. . . . We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other par-95]ties. *But since the grant to the respective states of all swamp and overflowed lands therein, this cannot be done. In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey of 1834-'35."

We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory; and did not survey the so-called Island No. 5 until twenty-five years after the survey of 1831, and nearly twenty years after that of 1837.

Although the facts were wholly different in *Horne* v. *Smith*, *ante*, 68, that case will be found instructive in connection with the questions arising here.

The supreme court of Michigan was right in holding that whatever there was of this conformation passed under the grant to Lyon and Hastings.

Judgment affirmed.

Ex parte WILLIAM BELT, *alias* WILLIAM JONES, Petitioner.

(See S. C. Reporter's ed. 95-100.)

Habeas corpus, when denied.

1. Where the court below had jurisdiction to determine the validity of an act which authorized the waiver of a jury, and to decide whether the record of a conviction before a judge without a jury where the prisoner waived trial by jury according to statute was legitimate proof of a first offense, this court cannot review the action of that court in this particular on habeas corpus.
2. The general rule is that the writ of habeas corpus will not issue unless the court under whose warrant the petitioner is held is without jurisdiction, and that it cannot be used to correct errors.
3. Ordinarily the writ of habeas corpus will not be issued when there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued although such remedy exists.

[Original.]

Submitted April 29, 1895. Decided June 3, 1895.

APPLICATION for leave to file a petition for the writ of habeas corpus, directed to the Superintendent of the Albany County Penitentiary in the state of New York for the discharge of the petitioner, Wm. Belt, *alias* Wm. Jones, held in custody of said superintendent under sentence of the Supreme Court for the District of Columbia. *Denied.*

See same case below, 22 Wash. L. Rep. 447.

The facts are stated in the opinion.

Messrs. **Geo. Kearney** and *Perry Allen* for petitioner.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an application for leave to file a petition for the writ of habeas corpus directed to the superintendent of the Albany county penitentiary, in the state of New York, for the discharge of petitioner now held in the custody of said superintendent under sentence of the supreme court of the District of Columbia. The case is thus stated by the court of appeals for the District of Columbia on affirming the judgment below: "The appellant, William Belt, *alias* William Jones, was indicted in the supreme court of the District of Columbia, holding a criminal court, and convicted on the twentieth day of February, A. D. 1894, of a second offense of larceny, and sentenced to three years' imprisonment in the penitentiary. The conviction was under section 1158 of the Revised Statutes of the United States for the District of Columbia, which provides that 'every person convicted of feloniously stealing, taking and carrying away any goods or chattels, or other personal property, of the value of thirty-five dollars or upward, . . . shall be sentenced to suffer imprisonment and labor, for the first offense for a period not less than one nor more than three years, and for the second offense for a period not less than three nor more than ten years.' At the trial of the case, after proof of the special offense charged against the defendant, the prosecution proceeded to prove that it was the defendant's second offense of the kind by offering in evidence the record of his previous conviction of the crime of larceny in the police court of the District of Columbia on April 8, 1893. To the admission of this record in evidence objection was made on the ground that it showed on its face a waiver of the right of trial by jury on the part of the prisoner and a trial and conviction by the court alone *without a jury, [97 a method of procedure claimed to be in violation of the Constitution of the United States, and therefore null and void. The objection was overruled, and exception taken; and upon that exception the case has been brought by appeal to this court."

NOTE.—*As to when habeas corpus may issue and when not; and from what courts and by what judges; what may be inquired into by writ of*, see note to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus, see note to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

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The opinion of the court of appeals will be found reported in 22 Wash. L. Rep. 447. The court held that the Act of Congress of July 28, 1892 (27 Stat. at L. 261), providing that in prosecutions in the police court of the district, in which, according to the Constitution, the accused would be entitled to a jury trial, the accused might in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial should be by the judge, and the judgment and sentence should have the same force and effect as if entered and pronounced upon the verdict of a jury, was constitutional and valid; and that the record of a trial, conviction, and sentence by a judge under such a waiver was competent evidence on an indictment for a similar offense to prove that it was the defendant's second offense of the same kind.

It is contended that the sentence as for a second offense under which petitioner is held is void because the first conviction of petitioner was void and of no effect in law, inasmuch as the constitutional requirement of trial by jury in criminal cases could not be waived by the accused person though in pursuance of a statute that authorized such waiver.

Does the ground of this application go to the jurisdiction or authority of the supreme court of the district, or, rather, is it not an allegation of mere error? If the latter, it cannot be reviewed in this proceeding. *Re Schneider*, 148 U. S. 162 [37: 406], and cases cited.

In *Ex parte Bigelow*, 113 U. S. 328 [28: 1005], which was a motion for leave to file a petition for habeas corpus, the petitioner had been convicted and sentenced in the supreme court of the District to imprisonment for five years under an indictment for embezzlement. It appeared that there were pending before that court fourteen indictments against the petitioner for embezzlement, and an order of the court had directed that they be consolidated under the statute and tried together. A 98] *jury was impaneled and sworn, and the district attorney had made his opening statement to the jury, when the court took a recess, and, upon reconvening a short time afterwards, the court decided that the indictments could not be well tried together, and directed the jury to be discharged from the further consideration of them, and rescinded the order of consolidation. The prisoner was thereupon tried before the same jury on one of the indictments and found guilty. All of this was against his protest and without his consent. The judgment on the verdict was taken by appeal to the supreme court of the district in general term, where it was affirmed. It was argued here, as it was in the court in general term, that the impaneling and swearing of the jury and the statement of his case by the district attorney put the prisoner in jeopardy in respect of all the offenses charged in the consolidated indictment, within the meaning of the 5th Amendment, so that he could not be again tried for any of these offenses, and *Mr. Justice* Miller, delivering the opinion of the court, after remarking that if the court of the district was without authority in the matter, this court would have power to discharge the prisoner from confinement, said: "But that court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury under the instruction of the court must pass if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal—a much stronger case than this—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by *the plea. The [99 same principle would apply to a plea of a former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea both as matter of law and of fact cannot be doubted. . . . It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action, when erroneous, a nullity. But the general rule is that when the court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities." And the application was denied.

In *Hallinger* v. *Davis*, 146 U. S. 314, 318 [36: 986, 989], it was said by this court: "Upon the question of the right of one charged with crime to waive a trial by jury, and elect to be tried by the court, when there is a positive legislative enactment, giving the right so to do, and conferring power on the court to try the accused in such a case, there are numerous decisions by state courts, upholding the validity of such proceeding. *Dailey* v. *State*, 4 Ohio St. 57; *Dillingham* v. *State*, 5 Ohio St. 280; *People* v. *Noll*, 20 Cal. 164; *State* v. *Worden*, 46 Conn. 349, 33 Am. Rep. 27; *State* v. *Albee*, 61 N. H. 423, 428, 60 Am. Rep. 325." And see *Edwards* v. *State*, 45 N. J. L. 419, 423; *Ward* v. *People*, 30 Mich. 116; *Connelly* v. *State*, 60 Ala. 89, 31 Am. Rep. 34; *Murphy* v. *State*, 97 Ind. 579; *State* v. *Sackett* 39 Minn. 69; *Lavery* v. *State*, 101 Pa. 560; *League* v. *State*, 36 Md. 257, cited by the court of appeals.

Without in the least suggesting a doubt as to the efficacy, value and importance of the system of trial by jury in criminal as well as in civil actions, we are clearly of opinion that the supreme court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof

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100] of a first offense, and this being so, *we cannot review the action of that court and the court of appeals in this particular on habeas corpus.

The general rule is that the writ of habeas corpus will not issue unless the court under whose warrant the petitioner is held is without jurisdiction, and that it cannot be used to correct errors. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued although such remedy exists. We have heretofore decided that this court has no appellate jurisdiction over the judgments of the supreme court of the District of Columbia in criminal cases or on habeas corpus; but whether or not the judgments of the supreme court of the district, reviewable in the court of appeals, may be reviewed ultimately in this court in such cases, when the validity of a statute of, or an authority exercised under, the United States is drawn in question, we have as yet not been obliged to determine. *Re Chapman*, 156 U. S. 211 [39: 401]. And that inquiry is immaterial here, as we have no doubt that the courts below had jurisdiction.

Leave denied.

JOHN BROWN, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 100-103.)

Erroneous instruction in a murder case.

An instruction to the jury, on a trial for murder, that if the person killed, a private individual, undertook, without any warrant, to arrest the defendant, believing him to be somebody else, and defendant in resisting the arrest killed the deceased, such killing would not be murder, but would be manslaughter, unless such killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose,—is erroneous, as the jury might have inferred from it that they could return a verdict of murder because alone of the way or mode in which the killing was done, even if the facts otherwise made a case of manslaughter only.

[No. 863.]

Submitted March 5, 1895. Decided June 3, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of conviction and sentence of John Brown for murder. *Reversed.*

The facts are stated in the opinion.

Mr. **Wm. M. Cravens** for plaintiff in error.

Messrs. **Edward B. Whitney**, Assistant Attorney General, and **Wm. H. Pope**, for defendant in error.

101] **Mr. Justice* **Harlan** delivered the opinion of the court:

This was an indictment, in which the defendant, a white man and not an Indian, was charged in one count with the crime of having killed and murdered, on the 8th day of December, 1891, at the Cherokee Nation, in the Indian country, and within the western district of Arkansas, one Josiah Poorboy; in another count, with having killed and murdered on the same day and in the same nation, county, and district, one Thomas Whitehead.

The accused was convicted of the crimes charged, and sentenced to be hanged. Upon writ of error to this court the judgment was reversed and the cause was remanded, with directions to grant a new trial. The grounds of that reversal are set forth in the opinion of *Mr. Justice* Jackson in *Brown* v. *United States*, 150 U. S. 98 [37: 1010].

At a second trial, Brown was again found guilty on each count. A motion for a new trial having been made and overruled, the accused was sentenced, on the second count, to suffer the punishment of death by hanging, but the sentence on the first count was postponed "to await the result of the judgment against him for killing Whitehead."

This writ of error brings up for review the judgment last rendered.

It appeared in evidence on the last trial, as on the first one, that Poorboy and Whitehead were in search of James Craig and Waco Hampton for the purpose of arresting them. Previous to that time, Craig had been arrested by a deputy marshal, Charles Lamb, upon a charge of adultery, and had escaped from the custody of that officer. Lamb testified that he had verbally authorized Poorboy to arrest Craig. It seems, also, that Hampton was under indictment, and there was a warrant for his arrest in the hands of deputy marshal Bonner.

The shooting occurred in a public road, along which Hampton, Roach, and Brown were riding (the latter riding behind Roach, on the same horse), about nine or ten o'clock at night, when an effort was made by Poorboy and Whitehead to arrest Hampton and Brown. There was evidence tending to show *that[102 Brown (who at the time of the killing was nineteen years of age) was supposed by Poorboy and Whitehead, in the darkness of the evening, to be Craig. There is considerable conflict in the evidence as to what occurred at the time the shooting took place, but it is reasonably certain that Brown shot and killed either Whitehead or Poorboy, after he and Roach were compelled to dismount from their horse.

After the court had completed its charge to the jury, the accused made two requests for instructions, which were given with certain modifications, but the giving of them was accompanied with the admonition that the principles of law then announced were to be taken in connection with what had been previously said by the court.

The first of the instructions asked by the accused was as follows: "The evidence in this case shows that the deceased, Poorboy and Whitehead, were not officers, but were acting as private citizens, private individuals, without any warrant for Brown, and having no charge against Brown. Therefore, if unintentionally or by mistake, believing him to be be somebody else, they undertook to arrest the defendant, and the defendant resisted such arrest, and in such resistance killed the deceased, or killed the parties attempting such arrest,

NOTE.—*As to homicide by officers in making an arrest; when justifiable*, see note to Tennessee v. Davis, 25: 648.

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such killing would not be murder, but would be manslaughter." The court gave this instruction with this modification: "Unless such killing was done *in such a way* as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder."

There was some evidence before the jury which, if credited, would have justified a verdict against the defendant for manslaughter only. Upon that evidence, doubtless, was based the above instruction asked by the defendant. If, in resisting arrest, he showed such brutality and barbarity as indicated, in connection with other circumstances, that he did not shoot simply to avoid being wrongfully arrested, but in execution of a wicked or malignant purpose to take life unnecessarily, or pursuant to some previous understanding with Hampton that he would assist in the killing of Whitehead and Poorboy, or either of them, the court should have so modified the defend-
103] ant's *instruction as to express that idea. But the jury might well have inferred, from the instruction, as modified, that they were at liberty to return a verdict of murder because alone of the *way* or *mode* in which the killing was done, even if they believed that, apart from the way in which the life of the deceased was taken, the facts made a case of manslaughter, not of murder. We do not think that a verdict of guilty of manslaughter or murder should have turned alone upon an inquiry as to the way in which the killing was done. The inquiry rather should have been whether at the moment the defendant shot there was present such circumstancs, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder.

Because of the error above indicated, and without considering other questions presented by the assignments of error, the judgment is reversed and the cause remanded, with directions to set aside the judgment as well as the verdict upon each count of the indictment, and grant a new trial. *Reversed.*

Mr. Justice **Brewer** and *Mr. Justice* **Brown** dissented.

CENTRAL LAND COMPANY of West Virginia, *Plff. in Err.*, *v.* JOHN B. LAIDLEY.

(See S. C. Reporter's ed. 103-112.)

Impairing obligation of contract—jurisdiction over state judgment—due process of law.

1. In order to come within the provision of the United States Constitution which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only.

2. The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the United States Constitution has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court.

3. When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the United States Constitution.

[No. 289.]

Argued March 29 and April 1, 1895. Decided June 3, 1895.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a judgment of that court reversing the judgment of the Circuit Court of Cabell County, West Virginia, in favor of the defendant, in an action of ejectment brought by John B. Laidley, plaintiff, against the Central Land Company of West Virginia to recover a tract of land in that state. A motion to dismiss was argued with the merits of the case. *Dismissed for want of jurisdiction.*

See same case below, 30 W. Va. 505.

*Statement by *Mr. Justice* **Gray:** [**104**

This was an action of ejectment, brought in April, 1882, in the circuit court of Cabell county, in the state of West Virginia, by John B. Laidley against the Central Land Company of West Virginia, to recover a tract of land in that state. The material facts were as follows:

Both parties claimed title under Sarah H. G. Pennybacker. On Febuary 25, 1870, she, being the owner of the tract, and the wife of John M. Pennybacker, executed, with her husband, a deed purporting to convey the land to C. P. Huntington. That deed was duly recorded, together with certificates of the recorder that, on the same day, the husband came before him and acknowleged it to be his voluntary act and deed for the uses and purposes therein mentioned; and that the wife came before him, "and being examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Sarah H. G. Pennybacker, acknowledged that she had willingly signed, sealed and delivered the same, and wished not to retract it." On October 16, 1871, Huntington conveyed his title to the Central Land Company. On January 26, 1882, Mrs. Pennybacker, having become a widow, executed and acknowledged, in due form of law, a deed of the same land to Laidley. These deeds were duly recorded.

At the first trial of this action, in December, 1884, Laidley requested the court to instruct the jury that the deed of Mr. and Mrs. Pennybacker conveyed his interest in the land; but that, if she was his wife at the time of

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws, see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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its execution and acknowledgment, it was not valid, so far as it purported to be her deed, and did not convey any interest she might have in the land, and could not operate by way of estoppel against her or her grantees. The court declined to give this instruction; and a verdict was returned for the Central Land Company, and judgment rendered thereon. Laidley took the case by writ of error to the supreme court of appeals of West Virginia, which in November, 1887, held that the instruction requested by Laidley should have been given: and that the wife's acknowledgment was defective, because it did not show that she had met all the **105**] requirements of the Code of West *Virginia of 1868, chap. 73, § 4 (copied in the margin*), which the court held to be that she should acknowledge the deed to be her act, should declare that she had willingly executed it, and should declare that she did not wish to retract it. The court accordingly reversed the judgment, and ordered the verdict to be set aside, and a new trial had in the circuit court of Cabell county. 30 W. Va. 505.

In March, 1888, the Central Land Company filed in the county court a bill in equity against Laidley, alleging that Huntington, through his agent, Laidley's father, purchased from Mr. and Mrs. Pennybacker the whole title in the land, and paid the price of $11,000, which was then its full value, and took possession of it under the deed of February 25, 1870, and held it until his conveyance to the Central Land Company, which had since been in possession thereof; that Laidley procured the deed of January 26, 1882, from Mrs. Pennybacker fraudulently, and with notice of all these facts, and for the price of only $500, although the land had greatly increased in value; that the supreme court of appeals, in the action of ejectment, had decided that the certificate of acknowledgment was defective in law, and consequently the deed did not convey her title to Huntington, and therefore reversed the judgment of the court below, and remanded the case for a new trial. The bill charged that, under and by virtue of that decision of the supreme court of appeals, the legal title was in Laidley, but that he held it in trust for the Central Land Company, and prayed for a declaration and execution of the trust, and for an injunction against the action at law, and for further relief. That bill was dismissed upon a hearing, and the decree of dismissal was, on appeal, affirmed by the supreme court of appeals in February, 1889. 32 W. Va. 134.

106] *In September, 1890, this action of ejectment was tried again in the circuit court of Cabell county. The Central Land Company requested the court to instruct the jury that, if they found from the evidence that Huntington purchased, paid for and took possession of the land, and afterwards, and before this action was brought, conveyed it to the Central Land Company, which took and since held possession thereof, then by section 8 of article 11 of the Constitution of the state of West Virginia, adopted by the people thereof in 1868; and by section 4 of chapter 73 of the Code of West Virginia of 1868, which section 4 was taken from the Code of Virginia of 1860, and was in force in the territory included in the state of West Virginia at the time of the adoption of its Constitution; and by the settled construction and interpretation which, before the formation of the state of West Virginia, had been given to this section by the supreme court of appeals of Virginia in the cases of *Hairston* v. *Randolphs*, 12 Leigh, 445; *Siter* v. *McClanachan*, 2 Gratt. 280, and *Grove* v. *Zumbro*, 14 Gratt. 501, the deed of February 25, 1870, from Mr. and Mrs. Pennybacker to Huntington, acknowledged as aforesaid, was sufficient to pass to him all the right, title, and interest of both the husband and the wife in the land, and the jury should find a verdict for the defendant. The court declined so to instruct the jury; and, at Laidley's request, instructed them that if, at the time of the execution of the deed of February 25, 1870, Mrs. Pennybacker was a married woman, that deed was absolutely void as to her, and passed no title of hers, legal or equitable, to Huntington; and by her deed of January 26, 1882, Laidley became vested with all her title and interest in the land.

The Central Land Company excepted to the refusal to instruct, and to the instruction given; and, after verdict and judgment for Laidley, presented to the supreme court of appeals a petition for a writ of error, which was refused "because the court is of opinion that the judgment complained of is plainly right; and the petitioner desiring to present to the Supreme Court of the United States a petition for a writ of error from this judgment, leave is hereby given to the petitioner to withdraw the petition and transcript of record aforesaid for that purpose."

*The Central Land Company thereup- [**107** on sued out this writ of error, and assigned the following errors:

"1st. That the purchase of the said land of the said Pennybackers, and the said deed conveying the same, became an executed contract, which no action of the judiciary of the state of West Virginia had any right, authority, or power to impair or invalidate by changing the settled construction of said section 4 of chapter 73 of the Code of West Virginia of 1868."

"2d. That under and by virtue of section 10, article 1, of the Constitution of the United States, no state is permitted to pass any law impairing the obligation of contracts; that the statutory construction of the laws of West Virginia, as it existed when the contract was made, governed the rights of parties, and rights vested under such existing constructions of the then laws cannot be devested, under said clause of the Constitution of the United States, by a subsequent decision of the state courts holding contracts invalid that were valid when made; such decisions of the state courts are contrary to the Constitution of the United States."

*When a husband and his wife have signed a writing purporting to convey real estate, she may appear before a recorder authorized to admit such writing to record in his office, and if, on being examined privily and apart from her husband by such recorder, and having such writing fully explained to her, she acknowledge the same to be her act, and declare that she had willingly executed the same, and does not wish to retract it, such privy examination, acknowledgment, and declaration shall then be recorded by such recorder in his office.

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"3d. Because there appears on the record of said cause a Federal question in this; that the courts of West Virginia, in construing the said statute relating to deeds and acknowledgments thereof so as to invalidate the said deed to C. P. Huntington, under which your petitioner claims, changed, without legislative action, the settled and established construction which existed at the time of the execution and delivery of said deed, which is contrary to the Constitution of the United States; and that there is a Federal question raised by said record in this; that the said decision of the circuit court of Cabell county, which undertakes to deprive your petitioner of his property, is without due process of law, retroactive in its effect, and unconstitutional."

Laidley moved to dismiss the writ of error, for want of jurisdiction; and the motion to dismiss was argued with the merits of the case.

Messrs. **F. B. Enslow, James H. Ferguson,** and *H. C. Simms* for plaintiff in error:

There is a Federal question involved in this case.

Gelpcke v. *Dubuque*, 68 U. S. 1 Wall. 175, 205, 206 (17: 520, 525); *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50, 55, 56, (19: 594, 597); *Olcott* v. *Fond du Lac County Suprs.* 83 U. S. 16 Wall. 678, 690, 691 (21: 382, 386, 387); *Douglass* v. *Pike County*, 101 U. S. 677, 686, 687 (25: 968, 971); *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294, 295 (26: 1090, 1095, 1096); *Anderson* v. *Santa Anna Twp.* 116 U. S. 356, 361, 362 (29: 633-635).

Messrs. **W. E. Chilton, James F. Brown,** *John B. Kenna,* and *John B. Laidley* for defendant in error:

When the judgment of a state court can be sustained on two distinct grounds, one of which involves a Federal question and one does not, the Supreme Court of the United States has no jurisdiction to review the judgment.

Blount v. *Walker*, 134 U. S. 607 (33: 1036); *Beatty* v. *Benton*, 135 U. S. 244 (34: 124); *San Francisco* v. *Itsell*, 133 U. S. 65 (33: 570); *Hopkins* v. *McLure*, 133 U. S. 380 (33: 660); *Hale* v. *Akers*, 132 U. S. 554 (33: 442); *Marrow* v. *Brinkley*, 129 U. S. 178 (32: 654); *De Saussure* v. *Gaillard*, 127 U. S. 216 (32: 125); *Adams County* v. *Burlington & M. R. R. Co.* 112 U. S. 123 (28: 678); *Crossley* v. *New Orleans*, 108 U. S. 105 (27: 667); *Santa Cruz County Suprs.* v. *Santa Cruz R. Co.* 111 U. S. 361 (28: 456); *McManus* v. *O'Sullivan*, 91 U. S. 578 (23: 390); *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 81 U. S. 23 (20: 850); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22: 429); *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 (31: 607).

If the judgment could have been based on the agreement of September 5, 1888, no jurisdiction could be taken by this court upon the ground of a supposed Federal question.

The meaning and intent of the state statute, and not its validity or constitutionality, is the sole question involved in plaintiff's instruction number five (5). If it appears that the decision of the state court turned upon the construction, and not the validity of the state statute, this court has no jurisdiction.

Commercial Bank of Cincinnati v. *Buckingham*, 46 U. S. 5 How. 317 (12: 169); *Grand Gulf R. & Bkg. Co.* v. *Marshall*, 53 U. S. 16 How. 165 (13: 938); *Green* v. *Neal*, 31 U. S. 2 Pet. 291 (8: 402); *McBride* v. *Hoey*, 36 U. S. 11 Pet. 167 (9: 673); *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152 (6: 289); *Knox* v. *Exchange Bank of Virginia*, 79 U. S. 12 Wall. 379 (20: 414); *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 (19: 370); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 181 (18: 382); *Mississippi & M. R. Co.* v. *McClure*, 77 U. S. 10 Wall. 511 (19: 997); *Burgess* v. *Seligman*, 107 U. S. 33 (27: 365); *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368 (9: 458).

It must affirmatively appear from the record, not only that the right under the Constitution was specially set up or claimed, but also that it was acted upon by the state court and decided adversely to the claimant, or the jurisdiction does not exist.

It cannot be said that by giving instruction number five for Lindley, the court acted on a right specially set up or claimed by the plaintiff in error, under the Constitution of the United States.

Cook County v. *Calumet & C. Canal & D. Co.* 138 U. S. 635 (34: 1110); *Texas & P. R. Co.* v. *Southern Pac. Co.* 137 U. S. 48 (34: 614); *Chappell* v. *Bradshaw*, 128 U. S. 132 (32: 369); *DeSaussure* v. *Gaillard*, 127 U. S. 216 (32: 125); *Brooks* v. *Missouri*, 124 U. S. 394 (31: 454); *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 (29: 118); *Susquehanna Boom Co.* v. *West Branch Boom Co.* 110 U. S. 57 (28: 69); *Simmerman* v. *Nebraska*, 116 U. S. 54 (29: 535); *Chouteau* v. *Gibson*, 111 U. S. 200 (28: 400); *Brown* v. *Colorado*, 106 U. S. 97 (27: 133); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18: 381); *Millingar* v. *Hartupee*, 73 U. S. 6 Wall. 258 (18: 829).

A right under the Constitution of the United States was not specially set up or claimed in defendant's instruction number one (1); and if so it does not affirmatively appear from the record that the court acted on that question and decided the same against the plaintiff in error; but the court, for aught that appears, refused the instruction on entirely different and distinct grounds, which have been already pointed out.

The mere fact that the state court held the deed to be void, when this court, if the case had been before it, might have held the same deed good, presents no Federal question.

Knox v. *Exchange Bank of Virginia*, 79 U. S. 12 Wall. 379 (20: 414); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18: 381).

Mr. Justice **Gray** delivered the opinion of the court:

The questions upon the merits of this case, discussed at length by counsel, were whether the supreme court of appeals of West Virginia rightly construed the provision of the Code of that state of 1868, which was, and was admitted to be, in all material respects, a re enactment of the corresponding provision of the Code of Virginia of 1860, prescribing the form of acknowledgment by a married woman of a deed of real estate; and whether the court below gave a construction of that provision less favorable to the validity of such a deed, than had been given to it by its own earlier decisions, and by the highest court of Virginia before the

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creation of the state of West Virginia. Those questions are not free from difficulty; and this court, before undertaking to pass upon them, must be satisfied that it has jurisdiction to do so.

The grounds relied on for invoking the appellate jurisdiction of this court are, in substance, that, by the decision of the supreme court of appeals of West Virginia, without any legislative action, the obligation of the contract contained in the deed from Mr. and Mrs. Pennybacker to Huntington, the grantor of the plaintiff in error, has been impaired, and the plaintiff in error has been deprived of its property without due process of law.

Assuming, without deciding, that these grounds were sufficiently and seasonably taken in the courts of West Virginia, we are of opinion that they present no Federal question.

In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only.

The appellate jurisdiction of this court, upon **110]** writ of error *to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this court, speaking by *Mr. Justice* Grier in such a case, as long ago as 1847, "It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary." *Commercial Bank of Cincinnati* v. *Buckingham*, 46 U. S. 5 How. 317, 343 [12: 169, 181]; *Lawler* v. *Walker*, 55 U. S. 14 How. 149, 154 [14: 364, 366].

It was said by *Mr. Justice* Miller, in delivering a later judgment of this court: "We are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox* v. *Exchange Bank*, 79 U. S. 12 Wall. 379, 383 [20: 414, 415].

The same doctrine was stated by *Mr. Justice* Harlan, speaking for this court, as follows: "The state court may erroneously determine questions arising under a contract which constitutes *the basis of the suit before it; it **[111** may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state Constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392 [30: 1059, 1060].

Many other decisions of this court to the same effect are cited in that case. See also *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 30 [31: 607, 612]; *St. Paul M. & M. R. Co.* v. *Todd County*, 142 U. S. 282 [35: 1014]; *Brown* v. *Smart*, 145 U. S. 454 [36: 773]; *Wood* v. *Brady*, 150 U. S. 18 [37: 981].

The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at the bar were either cases in which the writ of error was upon a judgment of a state court, which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana* v. *Pilsbury*, 105 U. S. 278 [26:1090], in *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 [28: 1084], and in *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486 [38: 793], or else the writ of error was to a circuit court of the United States, bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the state, as in *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175, 205 [17: 520, 525]; *Olcott* v. *Fond du Lac County Supvrs.* 83 U.S. 16 Wall. 678, 690 [21: 382, 386]; *Douglas* v. *Pike County*, 101 U. S. 677, 686 [25: 968, 971]; *Anderson* v. *Santa Anna Twp.* 116 U.S. 356, 361 [29: 633, 634], and other cases cited in *Louisiana* v. *Pilsbury*, 105 U. S. 278, 295 [26: 1090, 1096].

The distinction as to the authority of this court between writs of error to a court of the United States and writs of error to the highest court of a state, is well illustrated by two *of the earliest cases relating to munici- **[112** pal bonds, in both of which the opinion was delivered by *Mr. Justice* Swayne, and in each of which the question presented was whether the Constitution of the state of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The supreme court of the state, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the district

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court of the United States for the district of Iowa, following the later decisions of the state court, was reviewed on the merits, and reversed by this court, for misconstruction of the Constitution of Iowa. *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175, 206 [17: 520, 525]. But a writ of error to review one of those decisions of the supreme court of Iowa was dismissed for want of jurisdiction, because admitting the Constitution of the state to be a law of the state, within the meaning of the provision of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. *Mississippi & M. R. Co.* v. *McClure*, 77 U. S. 10 Wall. 511, 515 [19: 997, 998].

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States. *Walker* v. *Sauvinet*, 92 U. S. 90 [23: 678]; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 26 [28: 889, 895]; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 171 [36: 925, 930]; *Bergemann* v. *Backer*, 157 U. S. 655 [39: 845].

This court, therefore, has no authority to decide the main questions, argued at the bar, whether the decision of the supreme court of appeals of West Virginia, in effect, and erroneously, overruled the prior decisions of that court, and of the supreme court of appeals of Virginia before West Virginia became a separate state; and the writ of error must be dismissed for want of jurisdiction.

Mr. Justice **Field** dissented.

113] HENRY HILTON ET AL., *Plffs. in Err.*,

v.

GUSTAVE BERTIN GUYOT as Official Liquidator of the Late Firm of Charles Fortin & Co. ET AL.

Same

v.

Same.

(See S. C. Reporter's ed. 113-235.)

International law—how determined—comity of nations—action on foreign judgment—appearance—foreign practice—judgment, when prima facie evidence—foreign law—reciprocity—evidence.

1. International law, including questions concerning the rights of persons within the dominion of one nation by reason of acts done within the dominion of another, is part of our law, and should be ascertained and administered by the courts as often as such questions are duly submitted to their determination.
2. Where there is no written law upon the subject, such as treaty or statute, questions of international law must be determined by judicial decisions, the works of jurists, and the acts and usages of civilized nations.
3. Comity of nations is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or others who are under the protection of its laws.
4. Appearance by a citizen of New York having his principal place of business in the city of New York and a storehouse and agent in Paris, where he purchased but did not sell goods, in a suit in a French court, and carrying it on to prevent his property in Paris not in the custody of the court from being taken on judgment, give that court jurisdiction of his person.
5. Allowing plaintiff to testify without oath or cross-examination, or admitting papers in evidence, in France, according to the laws and practice of that country, is not sufficient ground for impeaching the foreign judgment in this country.
6. A foreign judgment for money in favor of a citizen of the foreign country against a citizen of this country, rendered by a competent court having jurisdiction of the cause and of the parties, upon due allegations and proofs and opportunity to defend according to the course of a civilized jurisprudence, whose record is clear and formal, is prima facie evidence, at least, in a suit upon it in this country, and is conclusive on the merits, unless impeached on special ground, or shown by international law or the comity of this country not entitled to full faith and credit.
7. Judgments rendered in a foreign country, by the laws of which our judgments are reviewable on the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are only prima facie evidence of the justice of the plaintiff's claim.
8. In the absence of statute or treaty, the comity of this country does not require that judgments of a foreign country be recognized as conclusive in this country, where such foreign country does not give like effect to our own judgments.
9. In an action on a French judgment, evidence by defendant that the French courts give no force and effect to the judgments of this country against French citizens, and that they are there re-examined on the merits, although rendered after proper personal service of process made in this country, is admissible.

[Nos. 130, 34.]

Argued January 19, 22, 23, 1894. Ordered for reargument before the full bench February 5, 1894. Reargued April 10, 1894. Decided June 3, 1895.

THE first of the above cases, No. 130, is in error to the Circuit Court of the United States for the Southern District of New York to review a judgment of that court in favor of the plaintiffs, Gustave Bertin Guyot as official liquidator of the late firm of Charles Fortin & Co. *et al.*, against Henry Hilton *et al.*, defendants, for the amount of a French judgment recovered by the firm of Charles Fortin & Co. against said defendants.

The second of the above cases, No. 34, is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a suit in equity brought by said defendants against the plaintiff for an injunction against the prosecution of the first action, etc.

The two cases were argued together in this court. *In the first cause, being the action at law, the judgment is reversed and cause remanded with directions for a new trial. In the second action, being the suit in equity, the*

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decree dismissing the suit is reversed and cause remanded for further proceedings.

See the same case (No. 34) below, 42 Fed. Rep. 249.

Statement by *Mr. Justice* **Gray:**

The first of these two cases was an action at law brought December 18, 1885, in the circuit court of the United States for the southern district of New York, by Gustave Bertin Guyot, as official liquidator of the firm of Charles Fortin & Co., and by the surviving members of that firm, all aliens and citizens of the Republic of France, against Henry Hilton and William Libbey, citizens of the United States and of the state of New York, and trading as copartners in the cities of New York and Paris and elsewhere, under the firm name of A. T. Stewart & Co. The action was upon a judgment recovered in a French court at Paris in the Republic of France by the firm of Charles Fortin & Co. all whose members were French citizens, against Hilton and Libbey, trading as copartners as aforesaid, and citizens of the United States and of the state of New York.

The complaint alleged that in 1886 and since, during the time of all the transactions included in the judgment sued on, Hilton and Libbey, as successors to Alexander T. Stewart and Libbey, under the firm of A. T. Stewart & Co., carried on a general business as merchants in the cities of New York and Paris and elsewhere, and maintained a regular store and place of business at Paris; that during the same time Charles Fortin & Co. carried on the manufacture and sale of gloves at Paris, and the two firms had there large dealings in that business, and controversies arose in the adjustment of accounts between them.

The complaint further alleged that between March 1, 1879, and December 1, 1882, five suits were brought by Fortin & Co. against Stewart & Co. for sums alleged to be due, and three suits by Stewart & Co. against Fortin & Co. in the tribunal of commerce of the department of the Seine, a judicial tribunal or court organized and existing under the laws of France, sitting at Paris, and having jurisdiction of suits and controversies between mer- [115] chants or traders growing *out of commercial dealings between them; that Stewart & Co. appeared by their authorized attorneys in all those suits; and that, after full hearing before an arbitrator appointed by that court and before the court itself, and after all the suits had been consolidated by the court, final judgment was rendered on January 20, 1883, that Fortin & Co. recover of Stewart & Co. various sums arising out of the dealings between them, and amounting to 660,847 francs, with interest, and dismissed part of Fortin & Co.'s claim.

The complaint further alleged that appeals were taken by both parties from that judgment to the court of appeals of Paris, third section, an appellate court of record, organized and existing under the laws of the Republic of France, and having jurisdiction of appeals from the final judgments of the tribunal of commerce of the department of the Seine, where the amount in dispute exceeded the sum of 1,500 francs; and that the said court of appeals by a final judgment rendered March 19, 1884, and remaining of record in the office of its clerk at Paris, after hearing the several parties by their counsel, and upon full consideration of the merits, dismissed the appeal of the defendants, confirmed the judgment of the lower court in favor of the plaintiffs, and ordered upon the plaintiffs' appeal, that they recover the additional sum of 152,528 francs, with 182,849 francs for interest on all the claims allowed, and 12,559 francs for costs and expenses.

The complaint further alleged that Guyot had been duly appointed by the tribunal of commerce of the department of the Seine, official liquidator of the firm of Fortin & Co., with full powers according to law and commercial usage for the verification and realization of its property, both real and personal, and to collect and cause to be executed the judgments aforesaid.

The complaint further alleged that the judgment of the court of appeals of Paris and the judgment of the tribunal of commerce, as modified by the judgment of the appellate court, still remain in full force and effect; "that the said courts respectively had jurisdiction of the subject-matter of the controversies so submitted to them and of the parties, the *said defendants having intervened by [116 their attorneys and counsel and applied for affirmative relief in both courts: that the plaintiffs have hitherto been unable to collect the said judgments or any part thereof, by reason of the absence of the said defendants, they having given up their business in Paris prior to the recovery of the said judgment on appeal, and having left no property within the jurisdiction of the Republic of France, out of which the said judgments might be made;" and that there are still justly due and owing from the defendants to the plaintiffs upon those said judgments certain sums, specified in the complaint, and amounting in all to 1,008,783 francs in the currency of the Republic of France, equivalent to $195,122.47.

The defendants in their answer set forth in detail the original contracts and transactions in France between the parties, and the subsequent dealings between them, modifying those contracts; and alleged that the plaintiffs had no just claim against the defendants, but that on the contrary the defendants, upon a just settlement of the accounts, were entitled to recover large sums from the plaintiffs.

The answer admitted the proceedings and judgments in the French courts; and that the defendants gave up their business in France before the judgment on appeal, and had no property within the jurisdiction of France, out of which that judgment could be collected.

The answer further alleged that the tribunal of commerce of the department of the Seine was a tribunal whose judges were merchants, ship captains, stockbrokers, and persons engaged in commercial pursuits, and of which Charles Fortin had been a member until shortly before the commencement of the litigation.

The answer further alleged that in the original suits brought against the defendants by Fortin & Co. the citations were left at their store house in Paris; that they were then residents and citizens of the state of New York, and neither of them at that time or within four years before had been within, or resident or

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domiciled within, the jurisdiction of that tribunal, or owed any allegiance to France; but 117] that *they were the owners of property situated in that country, which would by the law of France have been liable to seizure if they did not appear in that tribunal; and that they unwillingly, and solely for the purpose of protecting that property, authorized and caused an agent to appear for them in those proceedings: and that the suits brought by them against Fortin & Co. were brought for the same purpose, and in order to make a proper defense and to establish counterclaims arising out of the transaction between the parties, and to compel the production and inspection of Fortin & Co.'s books; and that they sought no other affirmative relief in that tribunal.

The answer further alleged that pending that litigation the defendants discovered gross frauds in the accounts of Fortin & Co.: that the arbitrator and the tribunal declined to compel Fortin & Co. to produce their books and papers for inspection; and that, if they had been produced, the judgment would not have been obtained against the defendants.

The answer further alleged that, without any fault or negligence on the part of the defendants, there was not a full and fair trial of the controversies before the arbitrator, in that no witness was sworn or affirmed; in that Charles Fortin was permitted to make, and did make, statements not under oath, containing many falsehoods; in that the privilege of cross-examination of Fortin and other persons who made statements before the arbitrator was denied to the defendants; and in that extracts from printed newspapers, the knowledge of which was not brought home to the defendants, and letters and other communications in writing between Fortin & Co. and third persons, to which the defendants were neither privy nor party, were received by the arbitrator; that without such improper evidence the judgment would not have been obtained; and that the arbitrator was deceived and misled by the false and fraudulent accounts introduced by Fortin & Co. and by the hearsay testimony given without the solemnity of an oath and without cross-examination, and by the fraudulent suppression of the books and papers.

The answer further alleged that Fortin & Co. made up their statements and accounts false- 118] ly and fraudulently, and with *intent to deceive the defendants and the arbitrator and the said courts of France, and those courts were deceived and misled thereby; that, owing to the fraudulent suppression of the books and papers of Fortin & Co., upon the trial, and the false statements of Fortin regarding matters involved in the controversy, the arbitrator and the courts of France "were deceived and misled in regard to the merits of the controversies pending before them and wrongfully decided against said Stewart & Co. as hereinbefore stated; that said judgment hereinbefore mentioned is fraudulent, and based upon false and fraudulent accounts and statements, and is erroneous in fact and in law, and is void; that the trial hereinbefore mentioned was not conducted according to the usages and practice of the common law, and the allegations and proofs given by said Fortin & Co. upon which said judgment is founded would not be competent or admissible in any court or tribunal of the United States in any suit between the same parties involving the same subject-matter; and it is contrary to natural justice and public policy that the said judgment should be enforced against a citizen of the United States, and that, if there had been a full and fair trial upon the merits of the controversies so pending before said tribunals, no judgment would have been obtained against said Stewart & Co.

"Defendants further answering allege that it is contrary to natural justice that the judgment hereinbefore mentioned should be enforced without an examination of the merits thereof; that by the laws of the Republic of France, to wit, article 181 [121] of the Royal Ordinance of June 15, 1629, it is provided, namely: 'Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall give rise to no lien or execution in our kingdom. Thus the contracts shall stand for simple promises, and notwithstanding such judgments our subjects against whom they have been rendered may contest their rights anew before our own judges.'

"And it is further provided by the laws of France, by article 546 of the Code de Procedure Civile, as follows: 'Judgments rendered by foreign tribunals shall be capable of execution *in France, only in the manner and in [119 the cases set forth by articles 2123 and 2128 of the Civil Code.'

"And it is further provided by the laws of France, by article 2128 [2123] of the Code de Procedure Civile [Civil Code]: 'A lien cannot, in like manner, arise from judgments rendered in any foreign country, save only as they have been declared in force by a French tribunal, without prejudice, however, to provisions to the contrary, contained in public laws and treaties' [and by article 2128 of that Code: 'Contracts entered into in a foreign country cannot give a lien upon property in France, if there are no provisions contrary to this principle in public laws or in treaties'].

"That the construction given to said statutes by the judicial tribunals of France is such that no comity is displayed toward the judgments of tribunals of foreign countries against the citizens of France, when sued upon in said courts of France, and the merits of the controversies upon which the said judgments are based are examined anew, unless a treaty to the contrary effect exists between the said Republic of France and the country in which such judgment is obtained; that no treaty exists between the said Republic of France and the United States, by the terms or effect of which the judgments of either country are prevented from being examined anew upon the merits, when sued upon in the courts of the country other than that in which it is obtained; that the tribunals of the Republic of France give no force and effect, within the jurisdiction of the said country, to the duly rendered judgments of courts of competent jurisdiction of the United States against citizens of France after proper personal service of the process of said courts is made thereon in this country."

The answer further set up, by way of counterclaim and in detail, various matters arising

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out of the dealings between the parties; and alleged that none of the plaintiffs had since 1881 been residents of the state of New York, or within the jurisdiction of that state, but the defendants were and always had been residents of that state.

The answer concluded by demanding that 120]the plaintiffs' *complaint be dismissed, and that the defendants have judgment against them upon the counterclaims amounting to $102,942.91.

The plaintiffs filed a replication to so much of the answer as made counterclaims, denying its allegations, and setting up in bar thereof the judgment sued on.

The defendants, on June 22, 1888, filed a bill in equity against the plaintiffs, setting forth the same matters as in their answer to the action at law, and praying for a discovery, and for an injunction against the prosecution of the action. To that bill a plea was filed, setting up the French judgments; and upon a hearing the bill was dismissed. 42 Fed. Rep. 249. From the decree dismissing the bill an appeal was taken, which was the second case now before this court.

The action at law afterwards came on for trial by a jury; and the plaintiffs put in the records of the proceedings and judgments in the French courts; and evidence that the jurisdiction of those courts was as alleged in the complaint and that the practice followed and the method of examining the witnesses were according to the French law; and also proved the title of Guyot as liquidator.

It was admitted by both parties that, for several years prior to 1876, the firm of Alexander T. Stewart & Co. composed of Stewart and Libbey, conducted their business as merchants in the city of New York, with branches in other cities of America and Europe; that both parties were citizens and residents of the city and state of New York during the entire period mentioned in the complaint; and that in April, 1876, Stewart died, and Hilton and Libbey formed a partnership to continue the business under the same firm name, and became the owners of all the property and rights of the old firm.

The defendants made numerous offers of evidence in support of all the specific allegations of fact in their answer, including the allegations as to the law and comity of France. The plaintiffs, in their brief filed in this court, admitted that most of these offers "were offers to prove matters in support of the defenses, and counterclaims set up by the defendants in the cases tried before the French courts, and which 121] or most *of which would have been relevant and competent if the plaintiffs in error are not concluded by the result of those litigations, and have now the right to try those issues, either on the ground that the French judgments are only prima facie evidence of the correctness of those judgments, or on the ground that the case is within the exception of a judgment obtained by fraud."

The defendants, in order to show that they should not be concluded by having appeared and litigated in the suits brought against them by the plaintiff in the French courts, offered to prove that they were residents and citizens of the state of New York, and neither of them had been, within four years prior to the commencement of those suits, domiciled or resident within the jurisdiction of those courts; that they had a purchasing agent and a storehouse in Paris, but only as a means or facility to aid in the transaction of their principal business, which was in New York, and they were never otherwise engaged in business in France; that neither of them owed allegiance to France, but they were the owners of property there, which would, according to the laws of France, have been liable to seizure if they had not appeared to answer in those suits; that they unwillingly, and solely for the purpose of protecting their property within the jurisdiction of the French tribunal, authorized an agent to appear, and he did appear in the proceedings before it; and that their motion to compel an inspection of the plaintiff's books, as well as the suits brought by the defendants in France, was necessary by way of defense or counterclaim to the suits there brought by the plaintiffs against them.

Among the matters which the defendants alleged and offered to prove in order to show that the French judgments were procured by fraud were that Fortin & Co., with intent to deceive and defraud the defendants and the arbitrator, and the courts of France, entered in their books, and presented to the defendants, and to the French courts, accounts, bearing upon the transactions in controversy, which were false and fraudulent, and contained excessive and fraudulent charges against the defendants, in various particulars specified; that the defendants *made due application to the tri-[122 bunal of commerce to compel Fortin & Co. to allow their account books and letter books to be inspected by the defendants, and the application was opposed by Fortin & Co., and denied by the tribunal; that the discovery and inspection of those books were necessary to determine the truth of the controversies between the parties; that, before the tribunal of commerce, Charles Fortin was permitted to and did give in evidence statements not under oath, relating to the merits of the controversies there pending; and falsely represented that a certain written contract, made in 1873, between Stewart & Co. and Fortin & Co. concerning their dealings, was not intended by the parties to be operative according to its terms; and, in support of that false representation, made statements as to admissions by Stewart in a private conversation with him; and that the defendants could not deny those statements, because Stewart was dead, and they were not protected from the effect of Fortin's statements by the privilege of cross-examining him under oath; and that the French judgments were based upon false and fraudulent accounts presented and statements made by Fortin & Co. before the tribunal of commerce during the trial before it.

The records of the judgments of the French courts, put in evidence by the plaintiffs, showed that all the matters now relied on to show fraud were contested in and considered by those courts.

The plaintiffs objected to all the evidence offered by the defendants, on the grounds that the matters offered to be proved were irrelevant, immaterial, and incompetent; that, in re-

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spect to them, the defendants were concluded by the judgment sued on and given in evidence; and that none of those matters, if proved, would be a defense to this action upon that judgment.

The court declined to admit any of the evidence so offered by the defendants, and directed a verdict for the plaintiffs in the sum of $377,775.44, being the amount of the French judgment and interest. The defendants, having duly excepted to the rulings and direction of the court, sued out a writ of error.

123] *The writ of error in the action at law and the appeal in the suit in equity were argued together in this court in January, 1894, and, by direction of the court, were reargued in April, 1894.

Messrs. **James C. Carter** and **Elihu Root** for plaintiffs in error and appellants:

There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation.

In the learned notes to the *Duchess of Kingston's Case*, in 2 Smith, Lead. Cas. 424, a very minute reference is made to the various decisions in England and in this country, and some attempt made to group and classify them, but the reader will scarcely gain any assistance from them, and will, after perusal, feel certain of one thing only, *viz.*, that the subject is involved in great confusion.

The natural and obvious method of doing justice between two contending parties is to examine their allegations, to ascertain the facts respecting the matter in dispute, and to declare the law arising upon these facts. But it would be an intolerable burden and expense, both to the public and to the parties, if the courts of the same country could be continually vexed with trials of the same controversy. *Interest reipublicæ ut sit finis litium.*

It is necessary that some limitation should be imposed; and the conclusion of state policy in this country and in England has been that the parties should be allowed one full and fair opportunity to try their grievances, and one alone. But justice, nevertheless, is, as it always must be, the overruling consideration; and the doctrine would never have been adopted unless the conclusion had been thought to be a safe one, that the judgment in the first and only trial allowed would be, in the vast majority of cases, a sound and righteous one.

The court must be clothed with complete jurisdiction over the subject-matter. It must also be clothed with complete jurisdiction over the parties.

Very numerous rules have been framed for the purpose of securing a righteous judgment after the court has acquired jurisdiction; such as that evidence must be on oath, witnesses subjected to cross-examination, hearsay excluded, irrelevant matters excluded, and appeals and reviews allowed for the purpose of correcting possible error.

The plaintiff is also required to state precisely what his demands are, and the defendant must make his answer to them. In this way exact issues are raised and it is those, and those only, which are decided by the judgment.

There are other rules framed to prevent the use of any judgment for the purpose of precluding future inquiry, except to the extent of the precise scope and effect of the judgment. Under these rules a judgment can never be employed as an estoppel beyond what has been directly decided by it.

The object of every judicial inquiry is to ascertain, declare, and enforce justice between the parties.

Whenever any former judgment cannot be with certainty assumed to have really done justice between the parties, the reason for allowing it to be an estoppel fails, and the use of it as such should therefore not be permitted.

What is actually administered among men is that approach to absolute justice which imperfect natures can understand and which can be made practicable in the actual business of life.

Whenever a court in the United States refuses to adjudicate upon the rights growing out of an original transaction on the ground that some other tribunal has previously adjudicated upon them, or accepts as the basis of its own adjudication the results which have been reached by another tribunal, it does it upon the ground that the judgment of the other tribunal is, in effect, in accordance with justice, according to our conceptions of justice.

The doctrine of the conclusiveness of domestic judgments rests upon two principal considerations: First. That there is a reasonably safe assurance that the the former judgment, reached only after the employment of precautions carefully devised for the elimination of error, is just and right; Second. The prime importance of the maxim, *interest reipublicæ ut sit finis litium*, which deems it a satisfaction of the duty of government to furnish remedial justice, if one fair opportunity has been given.

Both of these considerations are wanting in the case of foreign judgments. Except in the case of England and some of her colonies where the national standards of justice and also the methods of procedure very much resemble our own, we can have no full assurance that a just conclusion has been reached.

Jury trials, exclusion of improper evidence, cross-examination of witnesses, etc., are matters to which comparatively little attention is given.

The maxim, *interest reipublicæ ut sit finis litium*, applies to our own nation only. It is no part of our policy to restrict litigation in the world generally. In the case where a foreign judgment is set up as conclusive, we have not as yet afforded the one fair opportunity to litigate the question upon its original merits, which it is the obligation of government to furnish.

The suggestion that the comity of nations requires conclusive force to be given to foreign judgments, inasmuch as otherwise they will not give like force to our judgments, is wholly insufficient. This comity does, indeed, have a place in this branch of the law, but by no means the force thus suggested. We can never allow the assumption that Morocco or Turkey or Russia or even Germany, Italy, or

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France, have methods of judicial administration equal to our own, so as to justify ourselves in making a tacit agreement that we will enforce their judgments, if they will ours.

Our courts cannot show a comity toward England which they would deny to Russia. If a reciprocity in the treatment of judicial proceedings should be thought desirable, it can be safely brought about by treaty alone, where it may be yielded or withheld at pleasure.

If, therefore, foreign judgments are in any case to be held conclusive with us, it must be for other reasons than those upon which we hold domestic judgments conclusive. It cannot be said that foreign judgments are ever so conclusive that no inquiry into them can be allowed; but there are many cases in which they may be justly held substantially conclusive. The common characteristic of all of them is that the obligation of the state to ascertain, declare, and enforce justice according to its own conceptions of justice, does not in such cases exist, or is greatly diminished in force; and that it is wiser, safer, and better to adopt and enforce the judgment of the foreign state.

It is obviously necessary that all acts of the power of one nation over property within its jurisdiction should be respected in every other nation. If one nation undertakes to give title to property within its jurisdiction and another should declare the title void and take the property away from the holder, it would be a just cause of war. The judgments, therefore, of prize courts and courts of admiralty, and indeed all judgments *in rem*, must everywhere be held valid and conclusive in respect to all acts done under them. In such cases the judgment, where one is rendered, may be conclusive everywhere; but it is solely for the reason that the possession of the property affected by it and the right to make a judicial disposition of it draws along with it the right and the duty to make an adjudication.

There are other cases which fall under the same doctrine, such as judgments determining the status of individuals, as being married or single, etc., and judgments in proceedings to administer the property of intestates. There are other cases in which there is no obligation on our own part to do justice between parties who have had a litigation in another nation, resulting in a judgment, because we cannot do justice, or could perform the office so imperfectly that it is far wiser and better to suffer the foreign tribunals to have their way. In these cases again, any inquiry into the justice or injustice of the foreign judgment is unprofitable. It is much more likely to be right than any we could render. Cases affecting or relating to real property in the foreign state are of this character.

There is another class of cases in which we may and do hold a foreign judgment conclusive, because the parties to the controversy have no fair right to invoke the judgment of our courts upon its original merits. In such cases our society is instituted primarily for the purpose of protecting our own citizens in their rights, or sojourners among us in their rights growing out of transactions here, and not of reviewing the merits of foreign adjudications between their own citizens. The obligation to do justice by a trial on the original merit does not exist in this class of cases.

Gardner v. *Thomas*, 14 Johns. 134, 7 Am. Dec. 445.

Another class of cases may be found where a party who had voluntarily promoted a suit in a foreign tribunal and was there defeated, afterwards brings a new action in our courts upon the original cause, and thus seeks to renew the same controversy, and his adversary sets up in defense the foreign judgment. It cannot be unjust to him to bind him to the judgment of that jurisdiction which he has deliberately sought.

We now feel warranted in affirming the proposition that the question whether a foreign judgment is conclusive, so as to preclude inquiry into the original merits of the controversy, depends upon the circumstances under which it was rendered; and that it is not thus conclusive where the state is under its ordinary obligation to the party demanding such inquiry to give him at least one full and fair opportunity of having his cause adjudicated upon its original merits.

The general doctrine, as stated in most of the cases in the courts of the United States, declares that foreign judgments are prima facie evidence only. This, if taken literally, would make foreign judgments impeachable in all cases upon their merits.

The alleged exception principally relied upon was the case of *Lazier* v. *Westcott*, 26 N. Y. 146, 82 Am. Dec. 404. In this the action was to enforce a Canadian judgment. On the trial the record of the judgment was offered in evidence. The only question before the appellate court was whether the record was receivable in evidence, notwithstanding the technical objections. The court held it was; but the learned judge (Davies) who gave the opinion then proceeded to argue a question not raised, namely, whether foreign judgments were conclusive, and held that they were. This opinion is unimportant.

New York, L. E. & W. R. Co. v. *McHenry*, 21 Blatchf. 400, was a case of precisely the same character. The judgment was in no respect impeached.

A review of the English cases will show that the question whether a foreign judgment should be held conclusive depends upon the circumstances under which it was rendered. Many of the English cases arose upon Scotch, Irish, or colonial judgments, all of which are in English law called foreign. There seems no good reason why these should not be placed upon the same footing as domestic judgments.

Henderson v. *Henderson*, 3 Hare, 100, was a case where the question arose in respect to a Newfoundland judgment.

In *Godard* v. *Gray*, L. R. 6 Q. B. 139, the question was in relation to a French judgment.

Schibsby v. *Westenholz*, L. R. 6 Q. B. 155, was decided together with *Godard* v. *Gray*. The foreign judgment was sued on by the party recovering it. He was a Dane, resident in France, and the contract sued on was one the final performance of which was to be in France. The summons by which the action was begun was served on the Procureur Imperial, in the absence from France of the defendant, and the French consulate in London

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caused a copy to be served on him in London. This was in accordance with French law. The defendant did not appear in the action and had no property in France. It was admitted that the judgment was regular according to French law. The action was held not maintainable because the defendant was not a person so situated that he was bound to submit himself to the French courts. The court referred to the case of *General Steam Nav. Co.* v. *Guillon*, 11 Mees. & W. 877, where it was held that even voluntary appearance in a foreign tribunal by a person not a citizen of the country or bound to obey its laws would not bind him to the judgment rendered.

In *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 351, the action was to enforce a foreign French judgment awarding the plaintiff damages for breach of a covenant not to engage in trade and to restrain him from further breaches. The defense was that the agreement was void, and that the foreign judgment was erroneous and the defendant not bound by it. The agreement was held to be void and the further question was considered whether the foreign judgment was conclusive. The learned judge (Fry) accepted the doctrine that foreign judgments were conclusive, but with the qualification (entirely sound) which made that statement somewhat meaningless, when the circumstances were such as imposed upon the defendant the duty of obeying the foreign decision.

Nouvion v. *Freeman*, L. R. 37 Ch. Div. 244, decides that the foreign judgment set up in that case was not such a judgment as could be enforced in England.

Trafford v. *Blanc*, L. R. 36 Ch. Div. 600, was a case where it was sought to enforce the judgment of a tribunal in Zurich.

Voinet v. *Barrett*, 55 L. J. Q. B. 39, was a case where British citizens having extensive transactions in France were sued in a French court. So far as appears from the report above referred to, or from that of the case in the court below, reported in 54 L. J. Q. B. 521, no attempt was made to impeach the judgment for error, and the only objection made was that it was not binding upon the defendants because they did not voluntarily appear.

Bank of Australasia v. *Nias*, 16 Q. B. 717, was on a colonial judgment of New South Wales. It was held conclusive; but upon the ground that an appeal lay from it to the privy council.

In *Martin* v. *Nicolls*, 3 Sim. 458, the effort was to impeach the judgment of an English colonial court, that of Antigua. The precise grounds upon which the impeachment was attempted do not appear. The court held it not impeachable.

In the case of *Scott* v. *Pilkington*, 2 Best & S. 10, an action had been brought in New York by citizens of New York against citizens of Great Britain, and a judgment recovered, from which an appeal had been taken. The court expressly left the question whether, if it had appeared that the judgment of the New York court was erroneous, that would have been a defense.

In the case of *General Steam Nav. Co.* v. *Guillon*, 11 Mees. & W. 877, a collision had taken place on the high seas between an English and a French vessel. The owners of the French vessel sued the owners of the English vessel in the tribunal of commerce at Havre for damages, charging the fault on the English vessel. The defendants appeared in the suit and contested it, but the judgment went against them. They afterwards sued the owners of the French vessel in England for damages on account of the same collison, charging the fault on them. The defendant pleaded the Havre judgment, but the court, although it was of opinion that the plea was bad in form, intimated a clear opinion that it was bad in substance.

The only case which our own research has been able to discover, which appears to fully sustain the doctrine of the conclusiveness of foreign judgments, is that of *De Cosse Brissac* v. *Rathbone*, 6 Hurlst. & N. 301. The action was on a French judgment and the question arose whether it could be impeached for error. The defendants had appeared in the suit in which the judgment was recovered, but for the purpose of saving property which they had in France. The court decided in favor of the judgment, simply saying that the question had been settled by the authorities. The only authorities cited by counsel upon the argument in support of the alleged conclusiveness of the foreign judgment was the case of *Bank of Australasia* v. *Nias*, 16 Q. B. 717, which decided no such thing.

In *Russell* v. *Smyth*, 9 Mees. & W. 810, it was held that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given which the courts in that country are bound to enforce.

The other ground in the English cases is rather one of policy, namely, that the courts of that country should not engage in the work of retrying cases which have once been tried in a foreign country, for the reason that their judgments would not probably be any more agreeable to right and justice than the foreign judgment.

But an excellent opportunity was recently (in 1882) afforded to some English judges to test the soundness of these principles, and the court of king's bench immediately and utterly broke away from them.

In *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. Div. 295, Chief Justice Coleridge said: "I do not think it necessary to inquire for the present purposes what is the strictly accurate mode of stating the principle on which the courts of this country enforce the obligation created by foreign judgments. It has been stated by Parke, B., in *Williams* v. *Jones*, 13 Mees. & W. 628, 633, with the assent of Lord Blackburn in *Godard* v. *Gray*, L. R. 6 Q. B. 139, 148, and in *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155, 159, in one way, and it has been stated by Lord Brougham, in *Houlditch* v. *Donegall*, 2 Clark & F. 477, in another."

The falsity of the notion that the general doctrine that fraud vitiates everything which it taints will suffice to impeach a domestic judgment, where the fraud alleged was or might have been exposed at the trial is manifest. It has been clearly pointed out both in England and by this court.

Flower v. *Lloyd*, L. R. 10 Ch. 327; *United*

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States v. *Throckmorton*, 98 U. S. 61 (25: 96).

This at least is certain, that in the light of the above decision no one can say that the present doctrine of the English courts is that a foreign judgment is necessarily conclusive, even where there was full jurisdiction and a full opportunity for trial of the very point upon which the judgment is assailed.

When, however, a question arose in relation to the judgments of strictly foreign countries, the general course of English decisions has been to look into the circumstances under which the judgments were rendered, and if they were of such a character and rendered under such circumstances as to make it expedient, upon well-recognized legal principles, to treat them as conclusive adjudications, to accord to them that character, and otherwise to treat them as prima facie evidence only and not precluding an inquiry into the merits of the original controversy.

Foreign judgments are, in general, prima facie evidence only and do not constitute a bar to an examination of the original merits, but in certain cases they may justly be held to be conclusive.

Judgments *in rem* or those which, in the course of the exercise of a rightful jurisdiction, dispose of property by sale or otherwise, should be held to be unimpeachable in the courts of all countries, so far at least as the title to the property disposed of is concerned. Similar considerations apply to the case of foreign judgments determining the status, and rights growing out of the status, of individuals within their jurisdiction. But this must be subject to an exception when the foreign judgment is based upon laws or policies repugnant to those of the forum in which it is set up. And when the judgment has been rendered between foreigners in the states of which they were citizens, and while they were residents of that state, neither of the parties has any fair right to call upon the tribunals of another country to retry the merits of a controversy once determined by those tribunals to which its determination properly belonged.

Gardner v. *Thomas*, 14 Johns. 134, 7 Am. Dec. 445.

And where a party has promoted a suit in a foreign tribunal he should not, ordinarily at least, if ever, be permitted to impeach the judgment rendered in it.

The ground upon which the last conclusion rests is that where a party has chosen a foreign tribunal he should rest content with the results of his choice. This doctrine may apply to a defendant as well as to a plaintiff, and, therefore, if a defendant chooses, when under no restraint, and when he might, without peril to himself or his interests, refrain to submit his case to a foreign tribunal, the same reason exists for leaving him where the foreign judgment leaves him.

And in those cases where a citizen of our country takes up his residence in another, and is there sued, and appears, it may well be held that the judgment should be deemed conclusive against him in his own country, even when he still retains his nominal and technical citizenship therein.

It does not, however, follow that a foreign judgment should be enforced by us in every case where the public duty referred to does not exist.

We should not, in any case, enforce a judgment based upon a mere local law of a foreign state. We would not entertain an action based directly upon such law, and surely this difficulty could not be surmounted by first procuring the demand to be put into a judgment of the foreign state. Still less should we enforce any judgment based upon a liability repugnant to our local law, or to our established notions of justice and right.

De Brimont v. *Penniman*, 10 Blatchf. 436.

The judgment against A. T. Stewart & Co. cannot be treated as conclusive or as furnishing any bar to an original investigation into the merits of the controversy, for the plain reason that the state of New York and the United States do owe to the complainants the duty of affording to them one full and fair opportunity of having an adjudication by their own courts upon the original merits of the controversy. The plaintiffs in error are and always have been citizens and residents of the United States and of the state of New York, and are entitled to every privilege belonging to such citizens and residents. They did not voluntarily seek the jurisdiction of the French courts or voluntarily submit themselves to that jurisdiction, when called into it by others. They were neither residents of nor commorant in France. They happened to have personal property there, subject to seizure upon judicial process, and were obliged either to appear and litigate in the French tribunals or forfeit their property, or speedily remove it beyond the boundaries of France. They adopted the (supposed) less burdensome alternative. It was, in every substantial sense, a compulsory, and not a voluntary appearance. Judgment by default would have been rendered against them had they failed to appear, and they had property then within the jurisdiction which could have been reached by process in execution of the judgment. The appearance of Stewart & Co. was therefore not voluntary, but compelled.

An appearance by defendants in an action where property has actually been attached is compulsory, and not voluntary.

General Steam Nav. Co. v. *Guillon*, 11 Mees. & W. 887; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155.

In *Voinet* v. *Barrett*, 55 L. J. Q. B. 39, a case of a French judgment, the defendant appeared in the action. They had no property in France, but had extensive transactions there, and were likely at some time to have, and their appearance was from apprehension in regard to such property. The court held that the appearance was not compelled.

Stewart & Co. did indeed have a storehouse and agent in Paris. It was merely subsidiary to their main business in New York. Their real business had its head, home, and principal scope in New York. Their business was not in any sense removed from New York.

Nor is the circumstance that one of the contracts which created the relations of the parties was made in Paris, and in large part to be performed there, and perhaps to be interpreted according to the law of France, any ground for denying to the plaintiffs their right to a trial

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on the original merits in the courts of their own country. The courts of America are perfectly competent to ascertain and apply foreign law, and do it every day.

Little attention need be paid to the suggestion that most of the evidence bearing upon the controversy was in France. The evidence, wherever it was, was under the control of the parties, and could easily be produced in the tribunals of either country.

That the French judgment in the present case is conclusive cannot be maintained on the ground that Stewart & Co. have not the same rights as other citizens of the United States to at least one adjudication of their case upon its original merits.

Foreign judgments of the character to which the one in question belongs do not preclude an investigation of the controversy upon its original merits. They may, in some instances, have some effect and operation short of this.

This judgment was overwhelmingly impeached. Both the bill in equity and the matters offered to be proved most clearly showed it to be wholly erroneous, both in fact and in law. And the injustice inflicted by it, if enforced, would be enormous. This of itself is abundantly sufficient.

Stewart & Co. made every effort to get before the French tribunals every fact which bore upon the merits of the case, and that court would not lend its aid to these efforts and give them the facilities which it had in its power and which were absolutely necessary in order to enable them to bring out the facts; and even upon the limited and partial knowledge of the facts upon which the court acted, its judgment was grossly erroneous.

The case made against the judgment shows that a large part of the claims of Fortin & Co. were originally false, and known to be false, and were consequently fraudulent, and were supported by falsehood at the trial; and the case is therefore clearly within the doctrine laid down in the recent English case of *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. Div. 295, and the judgment consequently impeachable even upon the view of those tribunals which most strongly assert the conclusiveness of foreign judgments. But the judgment stands impeached upon another ground which deserves special attention. The offer was made to show that it was based upon an alleged agreement between Fortin & Co. and Stewart & Co., designed to secure invoice valuations at rates lower than the market price, which was in direct violation of the laws of the United States, and the offer was rejected.

The absolute denial by the French law to judgments of the courts of other nations of anything in the nature of conclusiveness extends to all cases whatsoever as against French citizens.

This is not the case where our courts are called upon to enforce a statute as in *National Steam Nav. Co.* v. *Dyer* ("*The Scotland*") 105 U. S. 33 (26: 1004), but where they are to declare what the law of comity is and requires.

Our courts would not undertake to undo what had been done under a foreign decree; but this is a very different thing from enforcing a purely executory foreign judgment. Payments compelled under a garnishee process fall under the same rule.

Barber v. *Lamb*, 8 C. B. N. S. 95.

There may also be cases where, from a variety of circumstances, it may be very reasonable to suppose that the judgment of the foreign court would more nearly accord with justice than any which could be reached by our own tribunals. In such cases our courts might fairly say that it would be wise for them to accept the foreign judgment as the ground of decision, not because it was conclusive, so as to preclude original inquiry, but because, after such inquiry, it seemed probable that it was the nearest practicable approach to justice.

When, after an opportunity had been given to the aggrieved party to maintain his claims, it appeared that the task could not be accomplished with any assurance of a result so just as would be effected by adopting the foreign judgment, that judgment might be adopted as the best compliance possible under the circumstances with the supreme obligation to do justice.

Two recent text writers, Pigott (Introduction and first chapter of Foreign Judgments) and Bigelow (Estoppel, 256–266), have thought that the best way to clear up what they regard as the confusion on this subject, would be to treat foreign judgments as conclusive. It can hardly be said that the efforts of these learned authors have been attended with much success.

A very able judge, Baron Parke, has the credit of establishing what some have supposed to be a solid foundation for the general conclusiveness of foreign judgments. He says: "Where a competent court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum and an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts may be supported and enforced." *Williams* v. *Jones*, 13 Mees. & W. 628. But it is not certain that he was the discoverer of this principle, inasmuch as it had been before stated by Lord Abinger, as well as by himself, in *Russell* v. *Smyth*, 9 Mees. & W. 810. This principle has, moreover, been quoted with approval by another very able judge, *Mr. Justice* Blackburn (*Godard* v. *Gray*, L. R. 6 Q. B. 139).

The only other ground upon which the conclusiveness of foreign judgments has been sought to be supported by the *dicta* of learned judges is what is called comity. When the courts of a nation exercise power over property, real or personal, which is within their grasp, whether such power is judicial or executive, the courts of another country cannot sit in judgment upon it. Such action involves the great issues of peace or war, and the treatment of it must be left to the supreme executive power alone. Whatever one nation thinks it fit to do in relation to persons or property fully and rightfully within its exclusive jurisdiction must be recognized everywhere. Nearly everything which is correctly disposed of under what is called the rule of comity proper falls within this field of the law. It scarcely need be said, therefore, that what is properly called comity can never subsist be-

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tween nations unless it is reciprocally acknowledged.

An array of the authorities will support the positions taken in this brief. Those will be classified as supporting our argument which appear on the facts, or are made by the opinions, to turn to a greater or less degree upon a favorable view of the considerations, or some of them, upon which the argument is based. Those only will be taken as opposed to it which appear upon the facts, or are made by the opinions, to turn upon considerations which are inconsistent with them, and in which the judgment would presumably have been different, had the views herein maintained been accepted. Those will be classified as consistent, in which the foreign judgment was allowed to have weight either because, upon the views above laid down, it ought to have been held conclusive, or because the grounds as expressed in the opinions were not hostile to such views.

Supporting:

Buttrick v. *Allen*, 8 Mass. 273, 5 Am. Dec. 105; 1 Ferguson, International Law, 380; *Simpson* v. *Fogo*, 1 Johns. & H. 18; *De Brimont* v. *Penniman*, 10 Blatchf. 436; *Burnham* v. *Webster*, 1 Woodb. & M. 172; *McEwan* v. *Zimmer*, 38 Mich. 765, 31 Am. Rep. 332 (Mr. Justice Cooley); *Holmes* v. *Remsen*, 20 Johns. 261, 11 Am. Dec. 269 (Platt, J.); *Sinclair* v. *Fraser*, 7 Morison, Dict. Dec. 4542, 1 Dougl. 5, *note* (House of Lords); *Herbert* v. *Cook*, Willes, 37, *note*; *Lang* v. *Holbrook*, Crabbe, 179; *McElmoyle* v. *Cohen*, 38 U. S. 13 Pet. 324 (10: 183); *Hanley* v. *Donohue*, 116 U. S. 4 (29: 536) (*Dicta* of Mr. Justice Gray); *Wiggins Ferry Co.* v. *Chicago & A. R. Co.* 11 Fed. Rep. 383 (*Dicta* of McCrary, J.); *Anderson* v. *Haddon*, 33 Hun, 440 (*Dicta* of Brady, J.); *Houldsitch* v. *Donegal*, 8 Bligh, N. S. 342; *Barney* v. *Patterson*, 6 Harr. & J. 202; *McKim* v. *Odom*, 12 Me. 94; *Williams* v. *Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 176; *Robinson* v. *Prescott*, 4 N. H. 451; *Warren* v. *Flagg*, 2 Pick. 448; *Gage* v. *Bulkeley*, 3 Atk. 214; *Hitchcock* v. *Aicken*, 1 Cai. 460 (This case not now the law so far as respects judgment of sister state); *Andrews* v. *Montgomery*, 19 Johns. 162, 10 Am. Dec. 213; *Jackson* v. *Jackson*, 1 Johns. 432; *Taylor* v. *Bryden*, 8 Johns. 172; *Pawling* v. *Willson*, 13 Johns. 205; *Pease* v. *Howard*, 14 Johns. 479; *Novelli* v. *Rossi*, 2 Barn. & Ad. 757; *Bowles* v. *Orr*, 1 Younge & C. 464; *Southgate* v. *Montgomeris*, 1 Sim. & Stu. 507, 12 Fac. Dec. 473; *Taylor* v. *Barron*, 30 N. H. 95, 64 Am. Dec. 281; *Aldrich* v. *Kenney*, 4 Conn. 382, 10 Am. Dec. 151; *Olden* v. *Hallet*, 5 N. J. L. 468; *Graham* v. *Gregg*, 3 Harr. (Del.) 408.

Consistent:

New York, L. E. & W. R. Co. v. *McHenry*, 17 Fed. Rep. 414 (Coxe, J.): an English judgment held conclusive in American courts; but (a) it was against a British subject and (b) was not impeached by pleading or proof.

Russell v. *Smyth*, 9 Mees. & W. 810: action in England on a Scotch judgment.

Williams v. *Jones*, 13 Mees. & W. 628: action in England on a judgment of an inferior English court.

Walker v. *Witter*, 1 Dougl. 1: action in England on a colonial judgment. Judgment not impeached. Action sustained, but *dicta* that such judgments were examinable.

Galbraith v. *Neville*, 1 Dougl. 6, *note*: precisely similar to that above.

Messin v. *Massareene*, 4 T. R. 493; *Crouden* v. *Leonard*, 8 U. S. 4 Cranch, 434 (2: 670); *Lazier* v. *Westcott*, 26 N. Y. 146, 82 Am. Dec. 404. (This case must be classified as consistent, although the argument of the opinion goes the length of asserting that foreign judgments are conclusive. But this question was not before the court). No impeachment of the judgment was attempted either by pleading or proof. The only question actually before the court was whether the judgment was receivable in evidence. Upon this point there could be no question. The view herein maintained fully admits this. And we also admit and assert that a foreign judgment is, in several instances, not only evidence, but conclusive and unimpeachable.

Martin v. *Nicolls*, 3 Sim. 460: judgment of colonial court.

Bank of Australasia v. *Nias*, 16 Q. B. 717, and *Henderson* v. *Henderson*, 3 Hare, 100, 6 Q. B. 289: judgments of colonial court.

Castrique v. *Imrie*, 8 C. B. N. S. 404, was a case of judgment *in rem*.

Godard v. *Gray*, L. R. 6 Q. B. 139. Defendant failed to bring to the notice of the French court the true construction of the English law, and could not, therefore, impeach the French judgment because it had mistaken the law of England.

Schibsby v. *Westenholz*, L. R. 6 Q. B. 165. The judgment of the French court was not sustained, no jurisdiction of the defendant's person having been obtained.

Copin v. *Adamson*, 45 L. J. Exch. 15. Defendant was a shareholder in a French company and elected a domicil in France, where process could be served on him in his absence, pursuant to French law. He could not attack the judgment successfully on the sole ground that he was not personally served He elected to be bound by the mode of service prescribed by French law.

Vallee v. *Dumerque*, 4 Exch. 290, and *Bank of Australasia* v. *Harding*, 19 L. J. C. P. N. S. 345: same principle as *Copin* v *Adamson*, 45 L. J. Exch. 15.

Rousillon v. *Rousillon*, L. R. 14 Ch. Div. 351. The French judgment was not sustained, there being no jurisdiction of defendant's person.

Voinet v. *Barrett*, 1 Cab. & El. 554, on appeal, 34 Week. Rep. 162. The French judgment was attacked only on the ground that defendant was not a resident or subject of France, and his appearance there was solely to protect his property. The French judgment was not impeached as having been unjustly or unduly obtained.

Buchanan v. *Rucker*, 9 East, 191, and *Tarleton* v. *Tarleton*, 4 Maule & S. 20, were both colonial judgments.

Monroe v. *Douglas*, 4 Sandf. Ch. 126: judgment *in rem*.

Shepard v. *Wright*, 59 How. Pr. 512. There was no jurisdiction of defendant's person.

Konitzky v. *Meyer*, 49 N. Y. 572, was the case of a foreign judgment against a surety

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which was paid. Under the contract of indemnity the foreign judgment was simply held competent evidence.

Opposing:

De Cosse Brissac v. *Rathbone*, 6 Hurlst. & N. 891, was a formal decision only, apparently for purposes of appeal.

The case of judgments of sister states has no relevancy to the question herein discussed. The Constitution of the United States requires full faith and credit to be given to the judicial proceedings of the several states. This is universally acknowledged to make them equivalent in point of conclusiveness to domestic judgments.

Mills v. *Duryee*, 11 U. S. 7 Cranch, 481, (3: 411); *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290 (18: 475).

Messrs. **William G. Choate** and *William D. Shipman* for appellees and defendants in error:

The French courts having jurisdiction of the subject-matter and of the parties, their judgments are conclusive to the same extent as domestic judgments, unless impeached for want of jurisdiction or for fraud in procuring the same.

The modern rule both in England and this country, overruling the earlier decisions which made a foreign judgment prima facie evidence only of a debt, is that a foreign judgment *in personam* is conclusive as to the existence of the debt established thereby, provided the court had jurisdiction of the subject matter and the parties, and such judgment can be impeached only for fraud.

2 Kent, Com. (13th ed.) 119 *et seq;* 1 Rolle, Abr. 530, fol. 12.

After that, the English courts limited the effect of foreign judgments, holding that no execution could issue on them, and that where a suit is brought to enforce such a judgment the record of the latter is only prima facie evidence of the debt, and the defendant may, if he can, defeat it by showing its injustice, or that it was irregularly or unduly obtained.

Sinclair v. *Fraser*, cited in *Dutchess of Kingston's Case*, 11 Harg. St. Tr. 222, in *Walker* v. *Witter*, 1 Dougl. 1, and in *Galbraith* v. *Neville*, 1 Dougl. 5, *note*.

But a distinction was made between the effect of a foreign judgment when suit is brought on it to enforce it, and when such judgment is pleaded in bar of a new suit on the original cause of action by the losing party. In the latter case, the foreign judgment was held conclusive, and therefore a bar of the new suit.

Phillips v. *Hunter*, 2 H. Bl. 410.

In the early cases in this country, where the doctrine of *Phillips* v. *Hunter*, that in a suit to enforce a foreign judgment, the judgment is only prima facie evidence of the debt, has been followed, the facts as well as the law embraced in foreign judgments have been held to be open to contestation.

Buttrick v. *Allen*, 8 Mass. 273, 5 Am. Dec. 105; *Wood* v. *Gamble*, 11 Cush. 8, 59 Am. Dec. 135.

And this, the general rule in England and in this country in the earlier decisions, has been adhered to in several of the states.

Lord Kames, in his work on Equity (2d ed. 1767), states the rule to be that the judgment of a foreign court dismissing a claim might be properly held to be conclusive, while one sustaining such a claim would be examinable on its merits.

Another ground for this distinction very plainly exists in the fact that if a party voluntarily invokes the aid of a foreign court to enforce his claim against his alleged debtor he is to be deemed to have elected that tribunal as a suitable and proper one for the purpose.

Schibsby v. *Westenholz*, L. R. 6 Q. B. 159.

The English courts, in modern times, have discarded the distinction made in *Phillips* v. *Hunter*, 2 H. Bl. 410, and now hold that a foreign judgment *in personam* rendered by a competent court of a civilized country, where a suit is brought on it to enforce it in the English courts, is as conclusive as when it is pleaded in bar of a new suit by the parties defeated abroad on the original cause of action, if the foreign court had jurisdiction of the parties, and the judgment is free from the taint of fraud in procuring it.

At first there seemed to be a qualification to this rule in one particular and that was where the foreign court made a mistake in regard to English law applicable to the case and involved in the foreign decision.

Novelli v. *Rossi* (1831) 2 Barn. & Ad. 757.

But now the English courts reject this qualification.

Godard v. *Gray*, L. R. 6 Q. B. 139; *Castrique* v. *Imrie*. L. R. 4 H. L. 414, 434, 435; Freem. Judgm. (4th ed.) § 595.

In *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 370, Fry, J., undertakes to state with precision the circumstances under which the courts of England will hold the judgment of the foreign tribunal conclusive, *viz.*:—1. Where the defendant is a subject of a foreign country in which the judgment has been obtained. 2. Where he was resident in the foreign country when the action began. 3. Where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued. 4. Where he has voluntarily appeared. 5. Where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly. 6. Where the defendant has real estate within the foreign jurisdiction, in respect to which the cause of action arose whilst he was within that jurisdiction.

Russell v. *Smyth*, 9 Mees. & W. 810, 819; *Williams* v. *Jones*, 13 Mees. & W. 628, 633; *Copin* v. *Adamson*, L. R. 9 Exch. 345; *Becquet* v. *MacCarthy*, 2 Barn. & Ad. 951.

The court of queen's bench in *Schibsby* v. *Westenholz* (1870), L. R. 6 Q. B. 159, 161, follows and reinforces the decision in *Godard* v. *Gray*, L. R. 6 Q. B. 139.

The same rule of decision is declared in *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Boissiere* v. *Brockner*, 6 Times L. Rep. 85, Q. B. Div. 1889; *Williams* v. *Jones*, 13 Mees. & W. 633; *Russell* v. *Smyth*, 9 Mees. & W. 810; *Trafford* v. *Blanc*, L. R. 36 Ch. Div. 600; *Voinet* v. *Barrett*, 55 L. J. Q. B. 39.

The English court in *Voinet* v. *Barrett*, *supra*, expressly held that it was no answer to an action on a judgment of a foreign court that the defendant appeared in the foreign court as a defendant merely to protect his property from

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seizure in case judgment by default should be given against him by the foreign court. Such an appearance was held to be voluntary and under duress.

And the judges cite with approval *De Cosse Brissac* v. *Rathbone*, 6 Hurlst. & N. 301, where it was held that if a defendant voluntarily appears in a foreign court and takes the chances of a judgment in his favor he is bound by the judgment against him. The English law, therefore, now is that where the foreign court has jurisdiction of the parties and the subject-matter of the controversy, its judgment is final and conclusive, unless it can be impeached for fraud.

The cases of *Abouloff* v. *Oppenheimer* (1882) L. R. 10 Q. B. Div. 295, and *Vadala* v. *Lawes* (1890) L. R. 25 Q. B. Div. 310, do not impair the authority of the above decisions.

The decisions of the American courts are not so plain or uniform. In many cases the earlier rule, which once obtained in England as well as here, has been simply followed or assumed to be still the law. The American cases containing *dicta* to this effect are very numerous, but, as stated by Mr. Bigelow in his work on Estoppel (5th ed.) p. 264, only two of them (*Burnham* v. *Webster*, 1 Woodb. & M. 172, and *Rankin* v. *Goddard*, 54 Me. 28, 89 Am. Dec. 718) are direct adjudications on this point.

1 Greenl. Ev. §§ 540, 546, 547, purports to give the state of American law on the subject. Freem. Judgm. (4th ed.) § 596, states the American rule.

The greater number of the American courts have declared in favor of the law as it is stated in *Phillips* v. *Hunter*, 2 H. Bl. 410, and by which the foreign judgment is regarded as examinable on the merits.

Burnham v. *Webster*, 1 Woodb. & M. 172; *Thurber* v. *Blackbourne*, 1 N. H. 242.

A recent case in Maine (1866) seems to hold that foreign judgments are impeachable only for fraud or want of jurisdiction, and is cited by Freeman as tending in that direction.

Rankin v. *Goddard*, 54 Me. 28, 89 Am. Dec. 718, 55 Me. 391; *Taylor* v. *Bryden*, 8 Johns. 173; Freem. Judgm. (4th ed.) § 597.

In *Lazier* v. *Westcott*, 26 N. Y. 146, 82 Am. Dec. 404, the rule was broadly laid down that the same principles and decisions which we have made as to judgments from the courts of other states of the Union should be applied to foreign judgments.

Konitzky v. *Meyer*, 49 N. Y. 571.

In *Lazier* v. *Westcott*, *supra*, the court says:

"The rule may now be regarded as firmly settled in England that the judgment is conclusive, so far as to preclude a retrial upon the merits. It remains competent for the defendant to show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained."

Konitzky v. *Meyer*, *supra*.

The rule declared in *Lazier* v. *Westcott* is now the established law in New York, and it cannot be shown to defeat the effect of a foreign judgment that it is unjust, or that the court refused the application of the defendant to take the depositions of wi'nesses abroad.

Dunstan v. *Higgins* (1898) 138 N. Y. 70, 74, 20 L. R. A. 668.

There is no decisive authority on this question by the courts of the United States.

Hanley v. *Donoghue*, 116 U. S. 4 (29: 536); *Buckner* v. *Finley*, 27 U. S. 2 Pet. 592 (7: 581); *McElmoyle* v. *Cohen*, 38 U. S 13 Pet. 312, 324 (10: 177, 183); *D'Arcy* v. *Ketchum*, 52 U. S. 11 How. 165, 176 (13: 648, 653); *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290, 305 (18: 475, 479); *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 (21: 897).

The case of *Hanley* v. *Donoghue* did not involve a judgment recovered in a foreign country, but related wholly to a judgment recovered in a sister state. And it does not appear that the attention of the court was called to the more recent rule established in England and in New York.

In *Christmas* v. *Russell*, 72 U. S. 5 Wall. 304 (18: 479), this court refers to the change of the law of England made by the then recent decision of *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

In *McMullen* v. *Richie*, a case now under review in this court, 41 Fed. Rep. 502, the circuit court of the United States for the sixth circuit followed the new rule.

The case of *De Brimont* v. *Penniman*, 10 Blatchf. 437, may be cited on the other side.

But it is of no weight or authority on the question as applied to this judgment against these plaintiffs in error based upon purely commercial transactions.

In the Federal courts, besides the cases above referred to, *dicta* may be found on this question.

McElmoyle v. *Cohen*, 38 U. S. 13 Pet. 324 (10: 177), by Washington, J.; *Croudson* v. *Leonard*, 8 U. S. 4 Cranch, 434 (2: 670), by Ware, J.; *Burnham* v. *Webster*, 2 Ware, 246, by McCrary, J.: *Wiggins Ferry Co.* v. *Chicago & A. R. Co.* 11 Fed. Rep. 383, by Gray, J.; *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 292 (32: 244), and an early decision in admiralty, by Hopkinson, J.; *Lang* v. *Holbrook* (1837), Crabbe, 179, favoring the old rule and a *dictum* by Coxe, J.; *New York, L. E. & W. R. Co.* v. *McHenry*, 21 Blatchf. 400, approving the new rule.

In *McEwan* v. *Zimmer*, 38 Mich. 772, 31 Am. Rep. 332, the supreme court of Michigan seems to recognize the authority of the recent English cases, although the case before them turned on a question of the jurisdiction of the foreign court over the party sought to be bound.

In *Baker* v. *Palmer*, 83 Ill. 568, the supreme court of Illinois has in a carefully prepared opinion declared in favor of the new rule.

To sum up this part of the subject, it is safe to say that while the earlier American cases have generally followed the old rule of English courts and held foreign judgments, when sued on, re-examinable on their merits, yet in *Lazier* v. *Westcott*, 26 N. Y. 146, 82 Am. Dec. 404, the court of appeals of New York adopted the views of Kent and Story and the modern English cases, and held a foreign judgment conclusive on the merits, and that court still adheres to that view (*Dunstan* v. *Higgins*, 138 N. Y. 70, 20 L. R. A. 668), and the courts of

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Michigan and Illinois have adopted or favor the adoption of the same view.

And in the Federal courts the question is not embarrassed by any decisive authority, but the drift of modern opinion is in favor of the new rule. The fraud which will vitiate a judgment is fraud extrinsic to the matter tried in the cause, and fraud upon the party or upon the court whereby judgment was improperly procured to be entered; not a fraud committed in the matter tried or examinable in the action.

As applied to judgments even where directly attacked by bill in equity to set them aside, the rule is limited to such frauds as are extrinsic or collateral to the matter tried by the court rendering the judgment sought to be impeached.

United States v. *Throckmorton*, 98 U. S. 64 (25: 94); *Vance* v. *Burbank*, 101 U. S. 514 (25: 929); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 (27: 226); *Pearce* v. *Olney*, 20 Conn. 544; *Wierich* v. *De Zoya*, 7 Ill. 385; *Kent* v. *Ricards*, 3 Md. Ch. 392; *Smith* v. *Lowry*, 1 Johns. Ch. 320; *De Louis* v. *Meek*, 2 G. Greene, 55. 50 Am. Dec. 491; Wells, Res Adjudicata, § 499.

In *Moffat* v. *United States*, 112 U. S. 24 (28: 623), *Mr. Justice* Field says: "A strenuous effort is made by counsel to bring these cases within the doctrine declared in *United States* v. *Throckmorton*, and *Vance* v. *Burbank*, *supra*, but without success. It was held in those cases that the fraud which will justify the setting aside of the judgment of a tribunal specially appointed to determine particular facts, must be such as prevented the unsuccessful party from fully presenting his case, or which operated as an imposition upon the jurisdiction of the tribunal. Mere false testimony or forged documents are not enough if the disputed matter has been actually presented to and considered by the tribunal."

United States v. *Minor*, 114 U. S. 233 (29: 110); *Pacific R. Co.* v. *Missouri P. R. Co.* 111 U. S. 520 (28: 503); *Marshall* v. *Holmes*, 141 U. S. 589 (35: 870).

The rule adopted by the Federal courts is not peculiar, but the same rule is established by the state courts.

Greene v. *Greene*, 2 Gray, 361, 61 Am. Dec. 454; *Ross* v. *Wood*, 70 N. Y. 8; *Ward* v. *Southfield*, 102 N. Y. 287; *Sanders* v. *Soutter*, 126 N. Y. 199.

Further illustrations of the kind of fraud that will vitiate a judgment are reported in the case of *Price* v. *Dewhurst*, 8 Sim. 279, where the fraud consisted in this, that the foreign court was composed of persons interested in the controversy, and *Ochsenbein* v. *Papelier*, L. R. 8 Ch. 695, where one party led the other to believe that the suit was abandoned and went on and obtained a judgment in his absence.

Abouloff v. *Oppenheimer*, L. R. 10 Q. B. Div. 295, and *Vadala* v. *Lawes*, L. R. 25 Q. B. Div. 310, are directly in conflict with the case of *United States* v. *Throckmorton*, 98 U. S. 64 (25: 94), and introduced a new and very important exception in the law of England in the doctrine of *res judicata*. So far as they bear upon the argument of the present case, however, they are directly in point as establishing the rule, which they do not shake, but on the contrary affirm, that the same rule with regard to fraud, as vitiating a judgment, applies to a foreign as to a domestic judgment. These cases have not escaped adverse criticism, both in this country and in England. See Van Fleet, Collateral Attack of Judicial Proceedings (1892) § 558; Pigott, Foreign Judgments (2d ed. 1884), 106 *et seq;* English Law Quarterly Review, 460.

The other matters set up in the answer in the suit at law, and of which proof was offered as impeaching the judgments, are clearly insufficient for that purpose.

One Hundred and Twenty-Five Baskets of Champagne v. *United States* ("*Cliquot's Champagne*), 70 U. S. 3 Wall. 114 (18: 116); *Boissiere* v. *Brockner*, 6 Times L. Rep. 85, Q. B. Div. 1889.

It is no objection to the conclusiveness of a foreign judgment that the defendant in the suit appeared merely because he could not otherwise protect his property within the jurisdiction from seizure to satisfy the judgment.

Voinet v. *Barrett*, 54 L. J. Q. B. 521, 55 L. J. Q. B. 39; *De Cosse Brissac* v. *Rathbone*, 6 Hurlst. & N. 301.

The peculiar circumstances of this case clearly bring it within the present rule as to conclusiveness of foreign judgments.

Castrique v. *Imrie*, L. R. 4 H. L. 445.

The plaintiffs in error as traders in France were under the protection of its laws and owed a temporary allegiance to France, and were in every sense bound by its laws, its commercial usages, and its rules of procedure.

See *Bank of Australasia* v. *Harding*, 9 C. B. 660.

The point made by the plaintiffs in error, that France does not enforce judgments of foreign states against its own subjects, is wholly immaterial.

That principle has been repudiated as a gound of decision by this court where the law of this country is positive and established.

National Steam Nav. Co. v. *Dyer* ("*The Scotland*") 105 U. S. 33 (26: 1004).

Our courts are open to foreigners as well as to our own citizens. It is utterly immaterial in a suit by a foreigner where or when his right of property which he seeks to enforce arose, whether it be the right to the possession of a chattel or a right to the enforcement of a written obligation. The courts never inquire, as a test of his standing in court, whether it arose under a domestic or foreign law. They give it the effect which it has under the foreign law as a matter of course. The decisions upon which we rely have placed rights acquired under foreign law by force of foreign judgments upon the same precise plane.

Baker v. *Palmer*, 83 Ill. 568.

Some recent cases decided by the court of appeals of New York illustrate in a very forcible way the extent to which, in modern times, private rights acquired under foreign laws are recognized and enforced.

These cases proceed upon the broad ground that rights acquired under foreign law in personal property will be respected and enforced by our courts unless there is something in the disposition of the property which is violative of good morals, or unless the courts are forbidden by positive statute to recognize such

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rights when acquired under foreign law, even although the rights so acquired are larger than by the laws of the state can be created under similar instruments, acts, or records.

Cross v. *United States Trust Co.* 131 N. Y. 330, 15 L. R. A. 606; *Dammert* v. *Osborn*, 140 N. Y. 30.

There was no error in the court below in giving judgment for that part of the claim included in the French judgments, which consisted of the half differences for the years 1877 and 1878, on account of any supposed violation of the revenue laws of the United States, or in the rejection of any evidence offered by the plaintiffs in error for the purpose of establishing such defense. But if this objection should be sustained by the court, the defendants in error should be permitted to remit the amount of that part of the verdict which is subject to this objection.

Northern P. R. Co v. *Herbert*, 116 U. S. 642, 646 (29:755, 758); *Arkansas Valley Land & C. Co.* v. *Mann*, 130 U. S. 79 (32:857); *Washington & G. R. Co.* v. *Tobriner* ("*Washington & G. R. Co.* v. *Harmon*") 147 U. S. 590 (37:291), and cases cited.

The rule of law with regard to consigned goods, that is, goods not obtained by purchase by the shipper, was that they should be invoiced at their actual market value. The rule with regard to purchased goods was that they should be invoiced at their actual cost.

One Hundred and Twenty-Five Baskets of Champagne v. *United States* ("*Cliquot's Champagne*") 70 U. S. 3 Wall. 114 (18:116); *Three Thousand, One Hundred and Nine Cases of Champagne*, 1 Ben. 241; *United States* v. *Auffmordt*, 122 U. S. 206 (30:1184).

It was not error to give judgment for the whole amount recovered in the French courts, although those courts allowed a compounding of interest down to the time of the entry of the judgment.

Staples v. *Nott*, 128 N. Y. 403.

Mr. Justice **Gray** delivered the opinion of the court:

These two cases, the one at law and the other in equity, of *Hilton* v. *Guyot*, and the case of *Ritchie* v. *McMullen*, which has been under advisement at the same time, present important questions relating to the force and effect of foreign judgments, not hitherto adjudicated by this **163**]court, which have been *argued with great learning and ability, and which require for their satisfactory determination a full consideration of the authorities. To avoid confusion in indicating the parties, it will be convenient first to take the case at law of *Hilton* v. *Guyot*.

International law in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. *Frémont* v. *United States*, 58 U. S. 17 How. 542, 557 [15: 241, 245]; *Sears* v. *The Scotia*, 81 U. S. 14 Wall. 170, 188 [20: 822, 826]; *Respublica* v. *De Longchamps*, 1 U. S. 1 Dall. 111, 116 [1: 59, 62]; *Moultrie* v. *Hunt*, 23 N. Y. 394, 396.

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticised, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute *obligation on the one hand, [**164** nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, treating of the question in what department of the government of any state, in the absence of any clear declaration of the sovereign will, resides the authority to determine how far the laws of a foreign state shall have effect, and observing that this differs in different states, according to the organization of the departments of the government of each, says: "In England and America the courts of justice have hitherto exercised the same authority in the most ample manner; and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times as they have arisen; and so far as the practice of nations, or the *jus gentium privatum*, has been supposed to furnish any general principle, it has been followed out." Story, Conf. Laws, §§ 23, 24.

Afterwards, speaking of the difficulty of applying the positive rules laid down by the continental jurists, he says that "there is indeed great truth" in these remarks of Mr. Justice Porter, speaking for the supreme court of Louisiana: "They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a

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question which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of 165] her legislation, her policy, and the *character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court which decides will prefer the laws of its own country to that of the stranger." Story, Conf. Laws, § 28; *Saul* v. *His Creditors* (1827) 5 Mart. N. S. 569, 596, 16 Am. Dec. 212.

Again, *Mr. Justice* Story says: "It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy, as a matter of paramount moral duty. Now, assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." And, after further discussion of the matter, he concludes: "There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." Story, Conf. Laws, §§ 33-38.

Chief Justice Taney, likewise, speaking for this court while *Mr. Justice* Story was a member of it, and largely adopting his words, said: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. . . . The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. . . . It is not the comity of the 166] courts, but the comity *of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided." *Bank of Augusta* v. *Earle* (1839) 38 U. S. 13 Pet. 519, 589 [10: 274, 308]; Story, Conf. Laws, § 38.

Mr. Wheaton says: "All the effect which foreign laws can have in the territory of a state depends absolutely on the express or tacit consent of that state. . . . The express consent of a state, to the application of foreign laws within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other states. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists. There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of states—*ex comitate, ob reciprocam utilitatem.*" Wheat. International Law (8th ed.) §§ 78, 79. "No sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another state; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable. The general comity, utility, and convenience of nations have, however, established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries." § 147.

Chancellor Kent says: "The effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty." 2 Kent, Com. (6th ed.) 120.

In order to appreciate the weight of the various authorities cited at the bar, it is important to distinguish different kinds of judgments. Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered *by a court having jurisdic- [167 tion of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction proceedings, and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

A judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by *Chief Justice* Marshall: "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no co-ordinate tribunal is capable of making the inquiry." *Williams* v. *Armroyd*, 11 U. S. 7 Cranch, 423, 432 [3: 392, 395]. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. *Croudson* v. *Leonard*, 8 U. S. 4 Cranch, 434 [2: 670]; *Williams* v. *Armroyd*, above cited; *Ludlow* v. *Dale*, 1 Johns. Cas. 16. But the same rule applies to judgments *in rem* under municipal law. *Hudson* v. *Guestier*, 8 U. S. 4 Cranch, 293 [2: 625]; *Ennis* v. *Smith*, 55 U. S. 14 How. 400, 430 [14: 472, 485]; *Wisconsin* v. *Pelican Ins. Co.* 127

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U. S. 265, 291 [32: 239, 243]; *Scott* v. *McNeal*, 154 U. S. 34, 46 [38: 896, 901]; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Monroe* v. *Douglas*, 4 Sandf. Ch. 126.

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. *Cottington's Case*, 2 Swanst. 326, *note*; *Roach* v. *Garvan*, 1 Ves. Sr. 157; *Harvey* v. *Farnie*, L. R. 8 App. Cas. 43; *Cheely* v. *Clayton*, 110 U. S. 701 [28: 298]. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in *Cottington's Case*, above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign coun-**168**]tries, till they be reversed by the law, *and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."

Other judgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. Story, Conf. Laws (2d ed.) § 592*a*. And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." *Gold* v. *Canham* (1678-9) 2 Swanst. 325, 1 Ch. Cas. 311. See also *Tarleton* v. *Tarleton*, 4 Maule & S. 20; *Konitzky* v. *Meyer*, 49 N. Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. Story, Conf. Laws, §§ 330-341; *May* v. *Breed*, 7 Cush. 15, 54 Am. Dec. 700. Such was the case, cited at the bar, of *Burroughs* or *Burrows* v. *Jamineau* or *Jemino*, Moseley, 1, 2 Strange, 733, 2 Eq. Cas. Abr. 525, pl. 7, 12 Vin. Abr. 87, pl. 9, Sel. Cas. Ch. 69, 1 Dick. 48.

In that case, bills of exchange drawn in London were negotiated, indorsed, and accepted at Leghorn in Italy, by the law of which an acceptance became void if the drawer failed **169**]*without leaving effects in the acceptor's hands. The acceptor, accordingly, having received advices that the drawer had failed before the acceptances, brought a suit at Leghorn against the last indorsees, to be discharged of his acceptances, paid the money into court and obtained a sentence there, by which the acceptances were vacated as against those indorsees and all the indorsers and negotiators of the bills, and the money deposited was returned to him. Being afterwards sued at law in England by subsequent holders of the bills, he applied to the court of chancery and obtained a perpetual injunction. Lord Chancellor King, as reported by Strange, "was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated, and the plaintiff's acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that sentence was conclusive and bound the court of chancery here;" as reported in Viner, that "the court at Leghorn had jurisdiction of the thing, and of the persons;" and, as reported by Moseley, that, though "the last indorsees had the sole property of the bills, and were therefore made the only parties to the suit at Leghorn, yet the sentence made the acceptance void against the now defendants and all others." It is doubtful, at the least, whether such a sentence was entitled to the effect given to it by Lord Chancellor King. See *Novelli* v. *Rossi*, 2 Barn. & Ad. 757; *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 435, 2 Smith, Lead. Cas. (2d ed.) 450.

The remark of Lord Hardwicke, *arguendo*, as Chief Justice, in *Boucher* v. *Lawson* (1734), that "the reason gone upon by Lord Chancellor King in the case of *Burroughs* v. *Jamineau* was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the cases, makes a determination, it is conclusive to all other courts," evidently had reference, as the context shows, to judgments of a court having jurisdiction of the thing; and did not touch the effect of an executory judgment for a debt. Cas. *t.* Hardw. 85, 89, Cunningham, 144, 148.

In former times, foreign decrees in admiralty *in personam* were executed, even by imprisonment of the defendant, by the court of admiralty in England, upon letters rogatory from the foreign sovereign, without a new suit. Its right to *do so was recognized by the court of[**170** king's bench in 1607, in a case of habeas corpus, cited by the plaintiffs, and reported as follows: "If a man of Frizeland sues an Englishman in Frizeland before the governor there, and there recovers against him a certain sum, upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the governor sends his letters missive into England, *omnes magistratus infra regnum Angliæ rogans*, to make execution of the said judgment,—the judge of the admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of England takes notice of this law, and the judge of the admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B. R., *Weir's Case*, resolved upon an habeas corpus, and remanded." 1 Rolle, Abr. 530, pl. 12; 6 Vin. Abr. 512, pl. 12. But the only question there raised or decided was of the power of the English court of admiralty, and

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not of the conclusiveness of the foreign sentence; and in later times the mode of enforcing a foreign decree in admiralty is by a new libel. See *The City of Mecca*, 5 Prob. Div. 28, and 6 Prob. Div. 106.

The extraterritorial effect of judgments *in personam*, at law or in equity, may differ according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. *Ricardo* v. *Garcias*, 12 Clark & F. 368; *The Griefswald*, Swab. Adm. 430, 435; *Barber* v. *Lamb*, 8 C. B. N. S. 95; *Lea* v. *Deakin*, 11 Biss. 23.

The effect to which a judgment purely execu-[171] tory,* rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country,—as is the case now before us,—presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century, it was settled in England that a foreign judgment on a debt was considered, not like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed, but as a simple contract only.

This clearly appears in *Dupleix* v. *De Roven* (1706) where one of two merchants in France recovered a judgment there against the other for a sum of money, which not being paid, he brought a suit in chancery in England for a discovery of assets and satisfaction of the debts and the defendant pleaded the statute of limitations of six years, and prevailed, Lord Keeper Cowper saying, "Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit* or an *insimul computassent;* so that the statute of limitations is pleadable in this case. 2 Vern. 540.

Several opinions of Lord Hardwicke define and illustrate the effect of foreign judgments, when sued on or pleaded in England.

In *Otway* v. *Ramsay* (1738) in the king's bench, Lord Hardwicke treated it as worthy of consideration, "what credit is to be given by one court to the courts of another nation, proceeding both by the same rules of law," and said: "It is very desirable, in such case, that the judgment given in one kingdom should be considered as *res judicata* in another." But it was held that debt would not lie in Ireland upon an English judgment, because "Ireland must be considered as a provincial kingdom, part of the dominions of the Crown of England, but no part of the realm," and an action of debt on a judgment was local. 4 Barn. & C. 414-416, *note*, 14 Vin. Abr. 569, pl. 5, 2 Strange, 1090.

A decision of Lord Hardwicke as chancellor [172] was mentioned* in *Walker* v. *Witter* (1778) 1 Dougl. 1, 6, by Lord Mansfield, who said: "He recollected a case of a decree on the chancery side in one of the courts of great sessions in Wales, from which there was an appeal to the House of Lords, and the decree affirmed there; afterwards, a bill was filed in the court of chancery, on the foundation of the decree so affirmed, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of the House of Lords, because the original decree was in the court of Wales, whose decisions were clearly liable to be examined." And in *Galbraith* v. *Neville* (1789) 1 Dougl. 6, *note*, Mr. Justice Buller said: "I have often heard Lord Mansfield repeat what was said by Lord Hardwicke in the case alluded to from Wales; and the ground of his lordship's opinion was this: when you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are in the wrong; and it was on that account, that he said, he would examine into the propriety of the decree." The case before Lord Hardwicke, mentioned by Lord Mansfield, would appear (notwithstanding the doubt of its authenticity expressed by Lord Kenyon in *Galbraith* v. *Neville*) to have been a suit to recover a legacy, briefly reported, with reference to Lord Hardwicke's note book, and to the original record as *Morgan* v. *Morgan* (1787-8) West. Ch. 181, 597, 1 Atk. 53, 408.

In *Gage* v. *Bulkeley* (1744) briefly reported in 3 Atk. 215, cited by the plaintiffs, a plea of a foreign sentence in a commissary court in France was overruled by Lord Hardwicke, saying, "It is the most proper case to stand for an answer, with liberty to except, that I ever met with." His reasons are fully stated in two other reports of the case. According to one of them, at the opening of the argument he said: "Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority,* and have a different sov-[173] ereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act. . . . But though foreign sentence cannot be used by way of a plea in the courts here, yet it may be taken advantage of in the way of evidence. . . . You cannot, in this kingdom, maintain debt upon judgment obtained for money in a foreign jurisdiction; but you may on assumpsit in nature of debt upon a simple contract, and give the judgment in evidence, and have a verdict. So that the distinction seems to be, where such foreign sentence is used as a plea to bind the courts here as a judgment, and when it is made use of in evidence as binding the justice of the case only." And afterwards, in giving his decision, he said: "The first question is whether the subject-matter of the plea is good. The second is whether it is well pleaded. The first question depends upon this, whether the sentence or judgment of a foreign court can be used by way of plea in a court of justice in England. And no authority, either at law or in equity, has been produced to show that it may be pleaded; and therefore I shall be very cautious how I establish such a precedent. . . . It is true, such sentence is an evi-

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dence which may affect the right of this demand when the cause comes to be heard; but if it is no plea in a court of law to bind their jurisdiction, I do not see why it should be so here." Ridgeway Cas. t. Hardw. 263, 264, 270, 278. A similar report of his judgment is in 2 Ves. Sr. (Belt's Supp.) 409, 410.

In *Roach* v. *Garvan* (1748) where an infant ward of the court of chancery had been married in France by her guardian to his son before a French court, and the son "petitioned for a decree for cohabitation with his wife, and to have some money out of the bank," Lord Hardwicke said, as to the validity of the marriage: "It has been argued to be valid from being established by the sentence of a court in France having proper jurisdiction. And it is true that, if so, it is conclusive, whether in a foreign court or not, from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain. But the question is whether this is a proper sentence, in a proper cause, and between proper **174**] parties, of *which it is impossible to judge, without looking farther into the proceedings; this being rather the execution of the sentence than the sentence itself." And after observing upon the competency of the French tribunal, and pointing out that the restitution of conjugal rights was within the jurisdiction of the ecclesiastical court, and not of the court of chancery, he added: "Much less will I order any money out of the bank to be given him." 1 Ves. Sr. 157, 159. He thus clearly recognized the difference between admitting the effect of a foreign judgment as adjudicating the status of persons, and executing a foreign judgment by enforcing a claim for money.

These decisions of Lord Hardwicke demonstrate that, in his opinion, whenever the question was of giving effect to a foreign judgment for money in a suit in England between the parties, it did not have the weight of a domestic judgment, and could not be considered as a bar, or as conclusive, but only as evidence of the same weight as a simple contract, and the propriety and justice of the judgment might be examined.

In *Sinclair* v. *Fraser* (1771) the appellant, having as attorney in Jamaica made large advances for his constituent in Scotland, and having been superseded in office, brought an action before the supreme court of Jamaica, and, after appearance, obtained judgment against him; and afterwards brought an action against him in Scotland upon that judgment. The court of session determined that the plaintiff was bound to prove before it the ground, nature, and extent of the demand on which the judgment in Jamaica was obtained; and therefore gave judgment against him. But the House of Lords (in which, as remarked by one reporter, Lord Mansfield was then the presiding spirit, acting in concert with or for the Lord Chancellor, in disposing of the Scotch appeals) "ordered and declared that the judgment of the supreme court of Jamaica ought to be received as evidence prima facie of the debt; and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly obtained;" and therefore reversed the judgment of the court of session. 2 Paton, IX. 253, Morison Dict. Dec. 4542, 1 Dougl. 5, *note*.

*Accordingly, in *Crawford* v. *Witten* [**175** (1773) a declaration in assumpsit, in an action in England upon a judgment recovered in the mayor's court of Calcutta in Bengal, without showing the cause of action there, was held good on demurrer. Lord Mansfield considered the case perfectly clear. Mr. Justice Aston, according to one report, said: "The declaration is sufficient; we are not to suppose it an unlawful debt;" and, according to another report: "They admitted the assumpsit by their demurrer. When an action comes properly before any court, it must be determined by the laws which govern the country in which the action accrued." And Mr. Justice Ashurst said: "I have often known assumpsit brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise." Lofft, 154, same case, *nom. Crawford* v. *Whittal*, 1 Dougl. 4, *note*.

In *Walker* v. *Witter* (1778) an action of debt was brought in England upon a judgment recovered in Jamaica. The defendant pleaded *nil debet*, and *nul tiel record*. Judgment was given for the plaintiff, Lord Mansfield saying: "The plea of *nul tiel record* was improper. Though the plaintiffs had called the judgment a record, yet by the additional words in the declaration, it was clear they did not mean that sort of record to which implicit faith is given by the courts of Westminster Hall. They had not misled the court nor the defendant, for they spoke of it as a record of a court in Jamaica. The question was brought to a narrow point; for it was admitted on the part of the defendant, that *indebitatus assumpsit* would have lain; and on the part of the plaintiffs, that the judgment was only prima facie evidence of the debt. That being so, the judgment was not a specialty, but the debt only a simple contract debt; for assumpsit will not lie on a specialty. The difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law. That description is confined properly to certain courts in England, and their judgments cannot be controverted. Foreign courts, and courts in England not of record, have not that privilege, nor the courts in Wales, etc. But the doctrine in the case of *Sinclair* v. *Frazer* was unquestionable. Foreign judgments are a *ground of action everywhere, but they [**176** are examinable." Justices Willes, Ashurst, and Buller concurred, the two latter saying that wherever *indebitatus assumpsit* will lie debt will also lie. 1 Dougl. 1, 5, 6.

In *Herbert* v. *Cook* (1782), again, in an action of debt upon a judgment of an inferior English court, not a court of record, Lord Mansfield said that it was "like a foreign judgment, and not conclusive evidence of the debt." Willes, 36, *note*.

In *Galbraith* v. *Neville* (1789) upon a motion for a new trial after verdict for the plaintiff in an action of debt on a judgment of the supreme court of Jamaica, Lord Kenyon expressed "very serious doubts concerning the doctrine laid down in *Walker* v. *Witter*, that foreign judgments are not binding on the parties here." But Mr. Justice Buller said: "The doctrine which was laid down in *Sinclair* v. *Fraser* has always been considered as the

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true line ever since; namely, that the foreign judgment shall be prima facie evidence of the debt, and conclusive till it be impeached by the other party." As to actions of this sort, see how far the court could go, if what was said in *Walker* v. *Witter* were departed from. It was there held that the foreign judgment was only to be taken to be right prima facie; that is, we will allow the same force to a foreign judgment that we do to those of our own courts not of record. But if the matter were carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has never been considered as a record. It cannot be declared on as such, and a plea of *nul tiel record*, in such a case, is a mere nullity. How, then, can it have the same obligatory force? In short, the result is this: that it is prima facie evidence of the justice of the demand in an action of assumpsit, having no more credit than is given to every species of written agreement, *viz.*, that it shall be considered as good till it is impeached." 1 Dougl. 6, *note*. And the court afterwards unanimously refused the new trial because, "without entering into the question how far a foreign judgment was impeachable, it was at all events clear that it was prima facie evidence of the 177] debt; and they were of opinion *that no evidence had been adduced to impeach this." 5 East, 475, *note*.

In *Messin* v. *Massareene* (1791) the plaintiff, having obtained a judgment against the defendants in a French court, brought an action of assumpsit upon it in England, and, the defendants having suffered a default, moved for a reference to a master, and for a final judgment on this report, without executing a writ of inquiry. The motion was denied, Lord Kenyon saying: "This is an attempt to carry the rule farther than has yet been done, and as there is no instance of the kind I am not disposed to make a precedent for it;" and Mr. Justice Buller saying: "Though debt will lie here on a foreign judgment, the defendant may go into the consideration of it." 4 T. R. 493.

In *Bayley* v. *Edwards* (1792) the judicial committee of the privy council, upon appeal from Jamaica, held that a suit in equity pending in England was not a good plea in bar to a subsequent bill in Jamaica for the same matter; and Lord Camden said: "In *Gage* v. *Bulkeley*" (evidently referring to the full report in Ridgeway, above quoted, which had been cited by counsel) "Lord Hardwicke's reasons go a great way to show the true effect of foreign sentences in this country. And all the cases show that foreign sentences are not conclusive bars here, but only evidence of the demand." 3 Swanst. 703, 708, 710.

In *Phillips* v. *Hunter* (1795) the House of Lords, in accordance with the opinion of the majority of the judges consulted, and against that of Chief Justice Eyre, decided that a creditor of an English bankrupt, who had obtained payment of his debt by foreign attachment in Pennsylvania, was liable to an action for the money by the assignees in bankruptcy in England. But it was agreed, on all hands, that the judgment in Pennsylvania and payment under it were conclusive as between the garnishee and the plaintiff in that suit. And the distinction between the effect of a foreign judgment which vests title, and one which only declares that a certain sum of money is due, was clearly stated by Chief Justice Eyre, as follows:

*"This judgment against the garnishee [178 in the court of Pennsylvania was recovered properly or improperly. If, notwithstanding the bankruptcy, the debt remained liable to an attachment according to the laws of that country, the judgment was proper; if, according to the laws of that country, the property in the debt was devested out of the bankrupt debtor, and vested in his assignees, the judgment was improper. But this was a question to be decided, in the cause instituted in Pennsylvania, by the courts of that country, and not by us. We cannot examine their judgment, and if we could, we have not the means of doing it in this case. It is not stated upon this record, nor can we take notice, what the law of Pennsylvania is upon this subject. If we had the means, we could not examine a judgment of a court in a foreign state, brought before us in this manner.

"It is in one way only, that the sentence or judgment of a court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps in the country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration prima facie sufficient to raise a promise. We examine it as we do all other considerations or promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law." 2 H. Bl. 402, 409, 410.

In *Wright* v. *Simpson* (1802) Lord Chancellor Eldon said: "Natural law requires the courts of this country to give credit to those of another for the inclination and power to do justice; but not, if that presumption is proved to be ill founded in that transaction, which is the subject of it; and if it appears in evidence that persons suing under similar circumstances neither had met, nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption." 6 Ves. Jr. 714, 730.

*Under Lord Ellenborough, the distinc [179 tion between a suit on a foreign judgment in favor of the plaintiff against the defendant, and a suit to recover money which the plaintiff had been compelled to pay under a judgment abroad, was clearly maintained.

In *Buchanan* v. *Rucker* (1807), in assumpsit upon a judgment rendered in the island of Tobago, the defendant pleaded *non assumpsit*, and prevailed, because it appeared that he was not a resident of the island, and was neither personally served with process nor came in to defend, and the only notice was, according to the practice of the court, by nailing up a copy of the declaration at the court-house door. It was argued that "the presumption was in favor of a foreign judgment, as well as of a judgment obtained in one of the courts of this country." To which Lord Ellenborough an-

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swered: "That may be so if the judgment appears, on the face of it, consistent with reason and justice; but it is contrary to the first principles of reason and justice, that, either in civil or criminal proceedings, a man should be condemned before he is heard. . . . There might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that it could not raise an assumpsit, and, if submitted to the jurisdiction of the courts of this country, could not be enforced." 1 Campb. 63, 66, 67. A motion for a new trial was denied. 9 East, 192. And see *Sadler* v. *Robins* (1808) 1 Campb. 253, 256.

In *Hall* v. *Odber* (1809), in assumpsit upon a judgment obtained in Canada, with other counts on the original debt, Lord Ellenborough and Justices Grose, Le Blanc, and Bayley agreed that a foreign judgment was not to be considered as having the same force as a domestic judgment; but only that of a simple contract between the parties, and did not merge the original cause of action, but was only evidence of the debt, and therefore assumpsit would lie, either upon the judgment or upon the original cause of action. 11 East, 118.

In *Tarleton* v. *Tarleton* (1815), on the other hand, the action was brought upon a covenant of indemnity in an agreement for dissolution of [180] a partnership, to recover a sum which *the plaintiff had been compelled to pay under a decision in a suit between the parties in the island of Grenada. Such was the case of which Lord Ellenborough, affirming his own ruling at the trial, said: "I thought that I did not sit at *nisi prius* to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defense. The plaintiff, by his neglect, has been obliged to pay the money in order to avoid a sequestration." The distinction was clearly brought out by Mr. Justice Bayley, who said: "As between the parties to the suit, the justice of it might be again litigated; but as against a stranger it cannot." 4 Maule & S. 20, 22, 23.

In *Harris* v. *Saunders* (1825) Chief Justice Abbott (afterwards Lord Tenterden) and his associates, upon the authority of *Otway* v. *Ramsay*, above cited, held that, even since the act of union of 39 & 40 Geo. III. chap. 67, assumpsit would lie in England upon a judgment recovered in Ireland, because such a judgment could not be considered a specialty debt in England. 4 Barn. & C. 411, 6 Dowl. & R. 471.

The English cases above referred to have been stated with the more particularity and detail, because they directly bear upon the question, What was the English law, being then our own law, before the Declaration of Independence? They demonstrate that by that law, as generally understood, and as declared by Hardwicke, Mansfield, Buller, Camden, Eyre, and Ellenborough, and doubted by Kenyon only, a judgment recovered in a foreign country for a sum of money, when sued upon in England, was only prima facie evidence of the demand, and subject to be examined and impeached. The law of England, since it has become to us a foreign country, will be considered afterwards.

The law upon this subject, as understood in the United States at the time of their separation from the mother country, was clearly set forth by Chief Justice Parsons, speaking for the supreme judicial court of Massachusetts, in 1813, and by *Mr. Justice* Story, in his Commentaries on the Constitution of the United States, published in 1833. Both *those [181] eminent jurists declared that by the law of England the general rule was that foreign judgments were only prima facie evidence of the matter which they purported to decide; and that by the common law, before the American Revolution, all the courts of the several colonies and states were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments; and their merits re-examinable in another colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England. And they noted that in order to remove that inconvenience, statutes had been passed in Massachusetts and in some of the other colonies, by which judgments rendered by a court of competent jurisdiction in a neighboring colony could not be impeached. *Bissell* v. *Briggs*, 9 Mass. 462, 464, 465, 6 Am. Dec. 88; Mass. Stat. 1773-4, chap. 16; 5 Prov. Laws, 323, 369; Story, Const. (1st ed.) §§ 1301, 1302; Story, Const. (4th ed.) §§ 1306, 1307.

It was because of that condition of the law as between the American colonies and states, that the United States, at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the states of the Union in the courts of another of those states.

By the Articles of Confederation of 1777, art. 4, § 3, "full faith and credit shall be given, in each of these states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state." 1 Stat. at L. 4. By the Constitution of the United States, art. 4, § 1, "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." And the first Congress of the United States under the Constitution, after prescribing the manner in which the records and judicial proceedings of the courts of any state shall be authenticated and proved, enacted that "the said records and judicial proceedings, authenticated as aforesaid, shall have *such faith and credit [182] given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act of May 26, 1790, chap. 11, (1 Stat. at L. 122); Rev. Stat. § 905.

The effect of these provisions on the Constitution and the laws of the United States was at first a subject of diverse opinions, not only in the courts of the several states, but also in circuit courts of the United States; *Mr. Justice* Cushing, *Mr. Justice* Wilson, and *Mr. Justice* Washington holding that judgments of the courts of a state had the same effect throughout the Union as within that state; but *Chief*

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Justice Marshall (if accurately reported) being of opinion that they were not entitled to conclusive effect, and that their consideration might be impeached. *Armstrong* v. *Carson* (1794) 2 U. S. 2 Dall. 302 [1: 391]; *Green* v. *Sarmiento* (1811) 3 Wash. C. C. 17, 21, Pet. C. C. 74, 78; *Peck* v. *Williamson* (reported as in November, 1813, apparently a mistake for 1812) 1 N. C. Law Repos. 53.

The decisions of this court have clearly recognized that judgments of a foreign state are prima facie evidence only, and that, but for these constitutional and legislative provisions, judgments of a state of the Union, when sued upon in another state, would have no greater effect.

In *Croudson* v. *Leonard* (1808), in which this court held that the sentence of a foreign court of admiralty *in rem*, condemning a vessel for breach of blockade, was conclusive evidence of that fact in an action on a policy of insurance, *Mr. Justice* Washington, after speaking of the conclusiveness of domestic judgments generally, said: "The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is prima facie evidence. But it is to be remarked that, in such a case, the judgment is no more conclusive as to the right it establishes than as to the fact it decides." 8 U. S. 4 Cranch, 434, 442 [2: 670, 672].

In *Mills* v. *Duryee* (1813), in which it was established that, by virtue of the Constitution and laws of the United States, the judgment of a court of one of the states was conclusive 183]*evidence, in every court within the United States, of the matter adjudged; and therefore *nul tiel record*, and not *nil debet*, was a proper plea to an action brought in a court of the United States in the District of Columbia upon a judgment recovered in the court of the state of New York,—this court, speaking by *Mr. Justice* Story, said: "The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record conclusive between the parties, it cannot be denied but by the plea of *nul tiel record;* and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences. . . . Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect." 11 U. S. 7 Cranch, 481, 484, 485 [3: 411, 413].

In *Hampton* v. *McConnel* (1818) the point decided in *Mills* v. *Duryee* was again adjudged, without further discussion, in an opinion delivered by *Chief Justice* Marshall. 16 U. S. 3 Wheat. 234 [4: 378].

The *obiter dictum* of *Mr. Justice* Livingston in *Hopkins* v. *Lee* (1821) 19 U. S. 6 Wheat. 109, 114 [5: 218, 220], repeated by *Mr. Justice* Daniel in *Pennington* v. *Gibson* (1853) 57 U. S. 16 How. 65, 78 [14: 847, 852] as to the general effect of foreign judgments, has no important bearing upon the case before us.

In *McElmoyle* v. *Cohen* (1839) *Mr. Justice* Wayne, discussing the effect of the act of Congress of 1790, said that "the adjudications of the English courts have now established the rule to be, that foreign judgments are prima facie evidence of the right and matter they purport to decide." 38 U. S. 13 Pet. 312, 325 [10: 177, 183.]

In *D'Arcy* v. *Ketchum* (1850), in which this court held that the provisions of the Constitution and laws of the United States gave no effect in one state to judgments rendered in another state by a court having no jurisdiction of the cause of the parties, *Mr. Justice* Catron said: "In construing the act of 1790, the law as it stood when the act was passed must enter *into that construction; so that the exist- [184 ing defect in the old law may be seen, and its remedy by the act of Congress comprehended. Now it was most reasonable, on general principles of comity and justice, that, among states and their citizens united as ours are, judgments rendered in one should bind citizens of other states, where defendants had been served with process, or voluntarily made defense. As these judgments, however, were only prima facie evidence, and subject to be inquired into by plea, when sued on in another state, Congress saw proper to remedy the evil, and to provide that such inquiry and double defense should not be allowed. To this extent, it is declared in the case of *Mills* v. *Duryee*, Congress has gone in altering the old rule." 52 U. S. 11 How. 165, 175, 176 [13: 648, 652, 653].

In *Christmas* v. *Russell* (1866), in which this court decided that, because of the Constitution and laws of the United States, a judgment of a court of one state of the Union, when sued upon in a court of another, could not be shown to have been procured by fraud, *Mr. Justice* Clifford, in delivering the opinion, after stating that, under the rules of the common law, a domestic judgment, rendered in a court of competent jurisdiction, could not be collaterally impeached or called in question, said: "Common-law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules, a foreign judgment was prima facie evidence of the debt, and it was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained." 72 U. S. 5 Wall. 290, 304 [18: 475, 479].

In *Bischoff* v. *Wethered* (1869), in an action on an English judgment rendered without notice to the defendant, other than by service on him in this country, this court, speaking by *Mr. Justice* Bradley, held that the proceeding in England "was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a prima facie character." 76 U. S. 9 Wall. 812, 814 [19: 829, 830].

*In *Hanley* v. *Donoghue* (1885) 116 U. S. [185 1, 4 [29: 535, 536], and in *Wisconsin* v. *Pelican Ins. Co.* (1888) 127 U. S. 265, 292 [32: 239, 244], it was said that judgments recovered in one state of the Union when proved in the courts of another differed from judgments recovered in a

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foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.

But neither in those cases, nor in any other, has this court hitherto been called upon to determine how far foreign judgments may be re-examined upon their merits, or be impeached for fraud in obtaining them.

In the courts of the several states, it was long recognized and assumed as undoubted and indisputable, that by our law, as by the law of England, foreign judgments for debts were not conclusive, but only prima facie, evidence of the matter adjudged. Some of the cases are collected in the margin.*

In the leading case of *Bissell* v. *Briggs*, above cited, Chief Justice Parsons said: "A foreign judgment may be produced here by a party to it, either to justify himself by the execution of that judgment in the country in which it was rendered, or to obtain the execution of it from our courts. . . . If the foreign court rendering the judgment had jurisdiction of the cause, yet the courts here will not execute the 186] judgment without first *allowing an inquiry into its merits. The judgment of a foreign court, therefore, is by our laws considered only as presumptive evidence of a debt, or as prima facie evidence of a sufficient consideration of a promise, where such court had jurisdiction of the cause; and if an action of debt be sued on any such judgment, *nil debet* is the general issue; or, if it be made the consideration of a promise, the general issue is *non assumpsit*. On these issues, the defendant may impeach the justice of the judgment by evidence relative to that point. On these issues, the defendant may also, by proper evidence, prove that the judgment was rendered by a foreign court, which had no jurisdiction; and if his evidence be sufficient for this purpose, he has no occasion to impeach the justice of the judgment." 9 Mass. 463, 464, 6 Am. Dec. 88.

In a less known case, decided in 1815, but not published until 1879, the reasons for this view were forcibly stated by Chief Justice Jeremiah Smith speaking for the supreme court of New Hampshire, as follows:

"The respect which is due to judgments, sentences, and decrees of courts in a foreign state, by the law of nations, seems to be the same which is due to those of our own courts. Hence the decree of an admiralty court abroad is equally conclusive with decrees of our admiralty courts. Indeed, both courts proceed by the same rule, are governed by the same law—the maritime law of nations: Collectanea Juridica, 100; which is the universal law of nations, except where treaties alter it.

"The same comity is not extended to judgments or decrees which may be founded on the municipal laws of the state in which they are pronounced. Independent states do not choose to adopt such decisions without examination. These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the state where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself. Wherever, then, the court may have proceeded on municipal *law, the rule is that the judgments are [187 not conclusive evidence of debt, but prima facie evidence only. The proceedings have not the conclusive quality which is annexed to the records or proceedings of our own courts, where we approve both of the rule and of the judges who interpret and apply it. A foreign judgment may be impeached; defendant may show that it is unjust, or that it was irregularly or unduly obtained. 1 Dougl. 5, *note*." *Bryant* v. *Ela*, Smith (N. H.) 396, 404

From this review of the authorities, it clearly appears that, at the time of the separation of this country from England the general rule was fully established that foreign judgments *in personam* were prima facie evidence only, and not conclusive of the merits of the controversy between the parties. But the extent and limits of the application of that rule do not appear to have been much discussed, or defined with any approach to exactness, in England or America, until the matter was taken up by Chancellor Kent and by *Mr. Justice* Story.

In *Taylor* v. *Bryden* (1811), an action of assumpsit brought in the supreme court of the state of New York, on a judgment obtained in the state of Maryland against the defendant as indorser of a bill of exchange, and which was treated as a foreign judgment, so far as concerned its effect in New York (the decision of this court to the contrary in *Mills* v. *Duryee*, 11 U. S. 7 Cranch, 481 [3: 411], not having yet been made), Chief Justice Kent said: "The judgment in Maryland is presumptive evidence of a just demand; and it was incumbent upon the defendant, if he would obstruct the execution of the judgment here, to show, by positive proof, that it was irregularly or unduly obtained. . . . To try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent. It would be the same as granting a new trial in every case, and upon every question of fact. Suppose a recovery in another state, or in any foreign court, in an action

* Bartlet v. Knight (1805) 1 Mass. 401, 405, 2 Am. Dec. 36; Buttrick v. Allen (1811) 8 Mass. 273, 5 Am. Dec. 105; Bissell v. Briggs (1813) 9 Mass. 462, 464, 6 Am. Dec. 88; Hall v. Williams (1828) 6 Pick. 232, 238, 17 Am. Dec. 356; Gleason v. Dodd (1842) 4 Met. 333, 336; Wood v. Gamble (1853) 11 Cush. 8, 59 Am. Dec. 135; McKim v. Odom (1835) 12 Me. 94, 96; Middlesex Bank v. Butman (1848) 29 Me. 19, 21; Bryant v. Ela (1815) Smith (N. H.) 396, 404; Thurber v. Blackbourne (1818) 1 N. H. 242; Robinson v. Prescott (1828) 4 N. H. 450; Taylor v. Barron (1855) 30 N. H. 78, 95, 64 Am. Dec. 281; King v. Van Gilder (1791) 1 D. Chip. 59; Rathbone v. Terry (1837) 1 R. I. 73, 76; Aldrich v. Kinney (1822) 4 Conn. 380, 382, 10 Am. Dec. 151; Hitchcock v. Aicken (1803) 1 Caj. 460; Smith v. Lewis (1808) 3 Johns. 157, 159, 3 Am. Dec. 469; Taylor v. Bryden (1811) 8 Johns. 173; Andrews v. Montgomery (1821) 19 Johns. 162, 165, 10 Am. Dec. 213; Starbuck v. Murray (1830) 5 Wend. 148, 155, 21 Am. Dec. 172; Benton v. Burgot (1823) 10 Serg. & R. 240-242; Barney v. Patterson (1824) 6 Har. & J. 182, 202, 203; Taylor v. Phelps (1827) 1 Har. & G. 492, 503; Rogers v. Coleman (1808) Hardin, 413, 414, 3 Am. Dec. 733; Williams v. Preston (1830) 3 J. J. Marsh. 600, 601, 20 Am. Dec. 179.

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188] for a *tort, as for an assault and battery, false imprisonment, slander, etc., and the defendant was duly summoned and appeared, and made his defense, and the trial was conducted orderly and properly, according to the rules of a civilized jurisprudence, is every such case to be tried again here on the merits? I much doubt whether the rule can ever go to this length. The general language of the books is that the defendant must impeach the judgment by showing affirmatively that it was unjust by being irregularly or unfairly procured." But the case was decided upon the ground that the defendant had done no more than raised a doubt of the correctness of the judgment sued on. 8 Johns. 173, 177, 178.

Chancellor Kent, afterwards, treating of the same subject in the first edition of his Commentaries (1827), put the right to impeach a foreign judgment somewhat more broadly, saying: "No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by a suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment [for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty]. In the former case [of a suit to enforce a foreign judgment], the rule is that the foreign judgment is to be received, in the first instance, as prima facie evidence of the debt; and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained. This was the principle declared and settled by the House of Lords, in 1771, in the case of *Sinclair* v. *Fraser*, upon an appeal from the court of sessions in Scotland." 2 Paton, IX. 253, Morison, Dict. Dec. 4542, 1 Dougl. 5, *note*. In the second edition (1832), he inserted the passages above printed in brackets; and in a note to the fourth edition (1840), after citing recent conflicting opinions in Great Britain, and referring to *Mr. Justice* Story's reasoning in his Commentaries on the Conflict of Laws, § 607, in favor of the conclusiveness of foreign judgments, he added: "And that is certainly the more convenient and the safest rule, and the most consistent with sound principle, except in cases in which the court which pronounced the judgment has not 189] due jurisdiction of the case, or of *the defendant, or the proceeding was in fraud, or founded in palpable mistake or irregularity, or bad by the law of the *rei judicatæ;* and in all such cases the justice of the judgment ought to be impeached." 2 Kent, Com. (1st ed.) 102; 2 Kent, Com. (later eds.) 120.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, first published in 1834, after reviewing many English authorities, said: "The present inclination of the English courts seems to be to sustain the conclusiveness of foreign judgments"—to which, in the second edition in 1841, he added, "although certainly there yet remains no inconsiderable diversity of opinion among the learned judges of the different tribunals." § 606.

He then proceeded to state his own view of the subject, on principle, saying: "It is, indeed, very difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex æquo et bono?* Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put *to show the in- [190] trinsic difficulties of the subject. Indeed, the rule that the judgment is to be prima facie evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction; or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular and bad by the local law, *fori rei judicatæ.* To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits." § 607.

He then observed: "The general doctrine maintained in the American courts in relation to foreign judgments certainly is that they are prima facie evidence, but that they are impeachable. But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn." § 608.

After stating the effect of the Constitution of the United States, and referring to the opinions of some foreign jurists, and to the law of France, which allows the merits of foreign judgments to be examined, *Mr. Justice* Story concluded his treatment of the subject as follows: "It is difficult to ascertain what the prevailing rule is in regard to foreign judgments in some of the other nations of continental Europe; whether they are deemed conclusive evidence, or only prima facie evidence.

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Holland seems, at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity 191] with regard to Dutch *judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." § 618.

In *Bradstreet* v. *Neptune Ins. Co.* (1839) in the circuit court of the United States for the district of Massachusetts, *Mr. Justice* Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice." 8 Sumn. 600, 608, 609.

In *Burnham* v. *Webster* (1845), in an action of assumpsit upon a promissory note, brought in the circuit court of the United States for the district of Maine, the defendant pleaded a former judgment in the province of New Brunswick in his favor in an action there brought by the plaintiff; the plaintiff replied that the note was withdrawn from that suit, by consent of parties and leave of the court, before verdict and judgment; and the defendant demurred to the replication. *Judge* Ware, in overruling the demurrer, said: "Whatever differences of opinion there may be as to the binding force of foreign judgments, all agree that they are not entitled to the same authority as the judgments of domestic courts of general jurisdiction. They are but evidence of what they purport to decide, and liable to be controlled by counter evidence, and do not, like domestic judgments, import absolute verity and remain incontrovertible and conclusive until reversed." And he added that, if the question stood entirely clear from authority, he should be of opinion that the plaintiff could not be allowed to deny the validity of the proceedings of a court whose authority he had invoked. 2 Ware, 240, 241.

At a subsequent trial of that case before a jury, —(1846) 1 Woodb. & M. 172,—the defendant proved the judgment in New Brunswick. The plaintiff then offered to prove the facts stated in his replication, and that any entry on the record of the judgment in New Brunswick concerning this note was therefore by mistake 192]or inadvertence. This evidence *was excluded and a verdict taken for the plaintiff subject to the opinion of the court. Mr. Justice Woodbury in granting a new trial delivered a thoughtful and discriminating opinion upon the effect of foreign judgments, from which the following passages are taken:

"They do, like domestic ones, operate conclusively, *ex proprio vigore*, within the governments in which they are rendered, but not elsewhere. When offered and considered elsewhere they are, *ex comitate*, treated with respect, according to the nature of the judgment and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract, and hence to be respected elsewhere by analogy according to the *lex loci contractus*. With these views I would go to the whole extent of the cases decided by Lords Mansfield and Buller; and where the foreign judgment is not *in rem*, as it is in admiralty, having the subject-matter before the court and acting on that rather than the parties, I would consider it only prima facie evidence as between the parties to it." p. 175.

"By returning to that rule, we are enabled to give parties at times most needed and most substantial relief, such as in judgments abroad against them without notice, or without a hearing on the merits, or by accident or mistake of facts, as here, or on rules of evidence and rules of law they never assented to, being foreigners and their contracts made elsewhere, but happening to be traveling through a foreign jurisdiction, and being compelled *in invitum* to litigate there." p. 177.

"Nor would I permit the prima facie force of the foreign judgment to go far, if the court was one of a barbarous or semi-barbarous government, and acting on no established principles of civilized jurisprudence, and not resorted to willingly by both parties, or both not inhabitants and citizens of the country. Nor can much comity be asked for the judgments of another nation, which like France pays no respect to those of other countries,—except, as before remarked, on the principle of the parties belonging there, or assenting to a trial there." p. 179.

*"On the other hand, by considering a [193 judgment abroad as only prima facie valid, I would not allow the plaintiff abroad who had sought it there to avoid it, unless for accident or mistake as here. Because, in other respects, having been sought there by him voluntarily it does not lie in his mouth to complain of it. Nor would I, in any case, permit the whole merits of the judgment recovered abroad to be put in evidence as a matter of course; but being prima facie correct, the party impugning it, and desiring a hearing of its merits, must show first, specifically, some objection to the judgment's reaching the merits, and tending to prove they had not been acted on; or [as?] by showing there was no jurisdiction in the court, or no notice, or some accident or mistake, or fraud, which prevented a full defense, and has entered into the judgment; or that the court either did not decide at all on the merits, or was a tribunal not acting in conformity to any set of legal principles, and was not willingly recognized by the party as suitable for adjudicating on the merits. After matters like these are proved, I can see no danger, but rather great safety in the administration of justice, in permitting to every party before us at least one fair opportunity to have the merits of his case fully considered, and one fair adjudication upon them, before he is estopped forever." p. 180.

In *De Brimont* v. *Penniman* (1873) in the circuit court of the United States for the southern district of New York, *Judge* Woodruff said: "The principle on which foreign judgments receive any recognition from our courts is one of comity. It does not require, but

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rather forbids it, where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens." And he declined to maintain an action against a citizen of the United States, whose daughter had been married in France to a French citizen, upon a decree of a French court requiring the defendant, then resident in France and duly served with process there, to pay an annuity to his son-in-law. 10 Blatchf. 436, 441.

Mr. Justice Story and Chancellor Kent, as appears by the passages above quoted from their **194**] Commentaries, concurred in *the opinion that, in a suit upon a foreign judgment, the whole merits of the case could not, as matter of course, be re-examined anew; but that the defendant was at liberty to impeach the judgment, not only by showing that the court had no jurisdiction of the case or of the defendant, but also by showing that it was procured by fraud, or was founded on clear mistake or irregularity, or was bad by the law of the place where it was rendered. Story, Conf. Laws, § 607; 2 Kent, Com. (6th ed.) 120.

The word "mistake" was evidently used by Story and Kent, in this connection, not in its wider meaning of error in judgment, whether upon the law or upon the facts, but in the stricter sense of misapprehension or oversight, and as equivalent to what, in *Burnham* v. *Webster*, before cited, Mr. Justice Woodbury spoke of as "some objection to the judgment's reaching the merits, and tending to prove that they had not been acted on;" "some accident or mistake," o · "that the court did not decide at all on the merits." 1 Woodb. & M. 180.

The suggestion that a foreign judgment might be impeached for error in law of the country in which it was rendered is hardly consistent with the statement of *Chief Justice* Marshall, when, speaking of the disposition of this court to adopt the construction given to the laws of a state by its own courts, he said: "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute." *Elmendorf* v. *Taylor* (1825) 23 U. S. 10 Wheat. 152, 159, 160 [6: 289, 292].

In recent times, foreign judgments rendered **195**] within the *dominions of the English Crown and under the law of England, after a trial on the merits, and no want of jurisdiction and no fraud or mistake being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine, and Illinois. *Lazier* v. *Westcott* (1862) 26 N. Y. 146, 150, 82 Am. Dec. 404; *Dunstan* v. *Higgins* (1893) 138 N. Y. 70, 74, 20 L. R. A. 668; *Rankin* v *Goddard* (1866) 54 Me. 28, 89 Am. Dec. 718, and (1868) 55 Me. 389; *Baker* v. *Palmer* (1876) 83 Ill. 568. In two early cases in Ohio it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. *Silver Lake Bank* v. *Harding* (1832) 5 Ohio, 545, 547; *Anderson* v. *Anderson* (1837) 8 Ohio, 108, 110. But in a later case in that state it was said that they were only prima facie evidence of indebtedness. *Pelton* v. *Platner* (1844) 13 Ohio, 209, 217, 42 Am. Dec. 197. In *Jones* v. *Jamison* (1860) 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff.

The result of the modern decisions in England, after much diversity, not to say vacillation of opinion, does not greatly differ (so far as concerns the aspects in which the English courts have been called upon to consider the subject) from the conclusions of Chancellor Kent and of Justices Story and Woodbury.

At one time it was held that, in an action brought in England upon a judgment obtained by the plaintiff in a foreign country, the judgment must be assumed to be according to the law of that country, unless the contrary was clearly proved,—manifestly implying that proof on that point was competent. *Becquet* v. *McCarthy* (1831) 2 Barn. & Ad. 951, 957; *Alivon* v. *Furnival* (1834) 1 Cromp. M. & R. 277, 293, 4 Tyrw. 751, 768.

Lord Brougham, in the House of Lords, as well as Chief Justice Tindal and Chief Justice Wilde (afterwards Lord Chancellor Truro) and their associates in the common bench, considered it to be well settled that an Irish or colonial judgment or a foreign judgment was not, like a judgment of a domestic court of record, conclusive evidence, but only, like a *simple contract, prima facie evidence of [**196** a debt. *Houlditch* v. *Donegal* (1834) 8 Bligh, N. S. 301, 342, 346, 2 Clark & F. 470, 476-479; *Don* v. *Lippman* (1837) 5 Clark & F. 1, 20-22; *Smith* v. *Nicolls* (1839) 7 Scott, 147, 166-170, 5 Bing. N. C. 208, 220-226, 7 Dowl. P. C. 282; *Bank of Australasia* v. *Harding* (1850) 9 C. B. 661, 686, 687.

On the other hand, Vice Chancellor Shadwell, upon an imperfect review of the early cases, expressed the opinion that a foreign judgment was conclusive. *Martin* v. *Nicolls* (1830) 3 Sim. 458.

Like opinions were expressed by Lord Denman speaking for the court of queen's bench, and by Vice Chancellor Wigram, in cases of Irish or colonial judgments, which were subject to direct appellate review in England. *Ferguson* v. *Mahon* (1839) 11 Ad. & El. 179, 183, 3 Perry & D. 143, 146; *Henderson* v. *Henderson* (1844) 6 Q. B. 288, 298, 299; *Henderson* v. *Henderson* (1843) 3 Hare, 100, 118.

In *Bank of Australasia* v. *Nias* (1851), in an action upon an Australian judgment, pleas that the original promises were not made, and that those promises, if made, were obtained by fraud, were held bad on demurrer. Lord Campbell, in delivering judgment, referred to Story on Conflict of Laws, and adopted substantially his course of reasoning in § 607, above quoted, with regard to foreign judgments. But he distinctly put the decision upon

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the ground that the defendant might have appealed to the judicial committee of the privy council, and thus have procured a review of the colonial judgment. And he took the precaution to say: "How far it would be permitted to a defendant to impeach the competency or the integrity of a foreign court from which there was no appeal, it is unnecessary here to inquire." 16 Q. B. 717, 784-787.

The English courts, however, have since treated that decision as establishing that a judgment of any competent foreign court could not, in an action upon it, be questioned, either because that court had mistaken its own law, or because it had come to an erroneous conclusion upon the facts. *De Cosse Brissac* v. *Rathbone* (1861) 6 Hurlst. & N. 301; *Scott* v. 197] *Pilkington* *(1862) 2 Best. & S. 11, 41, 42; *Vanquelin* v. *Bouard* (1863) 15 C. B. N. S. 341, 368; *Castrique* v. *Imrie* (1870) L. R. 4 H. L. 414, 429, 430; *Godard* v. *Gray* (1870) L. R. 6 Q. B. 139, 150; *Ochsenbein* v. *Papelier* (1873) L. R. 8 Ch. 695, 701. In *Meyer* v. *Ralli* (1876) a judgment *in rem*, rendered by a French court of competent jurisdiction, was held to be reexaminable upon the merits, solely because it was admitted by the parties, in the special case upon which the cause was submitted to the English court, to be manifestly erroneous in regard to the law of France. L. R. 1 C. P. Div. 358.

In view of the recent decisions in England, it is somewhat remarkable that, by the Indian Code of Civil Procedure of 1877, "no foreign judgment [which is defined as a judgment of "a civil tribunal beyond the limits of British India, and not having authority in British India, nor established by the governor general in council"] . . . shall operate as a bar to a suit in British India, . . . if it appears on the face of the proceeding to be founded on an incorrect view of international law," or "if it is, in the opinion of the court before which it is produced, contrary to natural justice." Pigott, Foreign Judgments (2d ed.) 380, 381.

It was formerly understood in England that a foreign judgment was not conclusive if it appeared upon its face to be founded upon a mistake or disregard of English law." *Arnott* v. *Redfern* (1825-6) 2 Car. & P. 88, 3 Bing. 353, 11 J. B. Moore, 209; *Novelli* v. *Rossi* (1831) 2 Barn. & Ad. 757; 3 Burge, Colonial and Foreign Laws, 1065; 2 Smith, Lead. Cas. (2d ed.) 448; *Reimers* v. *Druce* (1856) 23 Beav. 145.

In *Simpson* v. *Fogo* (1860) 1 Johns. & H. 18, and (1862) 1 Hem. & M. 195, Vice Chancellor Wood (afterwards Lord Hatherley) refused to give effect to a judgment *in personam* of a court in Louisiana, which had declined to recognize the title of a mortgagee of an English ship under the English law. In delivering judgment upon demurrer he said: "The state of Louisiana may deal as it pleases with foreign law; but if it asks courts of this country to respect its law, it must be on a footing of paying a like respect to ours. Any comity between the courts of two nations holding such 198] *opposite doctrines as to the authority of the *lex loci* is impossible. While the courts of Louisiana refuse to recognize a title acquired here, which is valid according to our law, and hand over to their own citizens property so acquired, they cannot at the same time expect us to defer to a rule of their law which we are no more bound to respect than a law that any title of foreigners should be disregarded in favor of citizens of Louisiana. The answer to such a demand must be, that a country which pays so little regard to our laws as to set aside a paramount title acquired here must not expect at our hands any greater regard for the title so acquired by the citizens of that country." 1 Johns. & H. 28, 29. And upon motion for a decree, he elaborated the same view, beginning by saying, "Whether this judgment does so err or not against the recognized principles of what has been commonly called the comity of nations, by refusing to regard the law of the country where the title to the ship was acquired, is one of the points which I have to consider;" and concluding that it was "so contrary to law and to what is required by the comity of nations," that he must disregard it. 1 Hem. & M. 222-247. See also *Liverpool Marine Credit Co.* v. *Hunter* (1867) L. R. 4 Eq. 62, 68, and (1868) L. R. 3 Ch. 479, 484.

In *Scott* v. *Pilkington* (1862) *Chief Justice* Cockburn treated it as an open question whether a judgment recovered in New York for a debt could be impeached on the ground that the record showed that the foreign court ought to have decided the case according to English law, and had either disregarded the comity of nations by refusing to apply the English law, or erred in its view of English law. 2 Best. & S. 11, 42. In *Castrique* v. *Imrie* (1870) the French judgment which was adjudged not to be impeachable for error in law, French or English, was, as the House of Lords construed it, a judgment *in rem*, under which the ship to which the plaintiff in England claimed title had been sold. L. R. 4 H. L. 414. In *Godard* v. *Gray* (1870) shortly afterwards, in which the court of queen's bench held that a judgment *in personam* of a French court could not be impeached because it had put a *construction erroneous, according to [199 English law, upon an English contract, the decision was put by Justices Blackburn and Mellor upon the ground that it did not appear that the foreign court had "knowingly and perversely disregarded the rights given by the English law," and by Justice Hannen, solely upon the ground that the defendant did not appear to have brought the English law to the knowledge of the foreign court. L. R. 6 Q. B. Div. 139, 149, 154. In *Messina* v. *Petrococchino* (1872) Sir Robert Phillimore, delivering judgment in the privy council, said: "A foreign judgment of a competent court may indeed be impeached if it carries on the face of it a manifest error." L. R. 4 P. C. 144, 157.

The result of the English decisions, therefore, would seem to be that a foreign judgment *in personam* may be impeached for a manifest and wilful disregard of the law of England.

Lord Abinger, Baron Parke, and Baron Alderson were wont to say that the judgment of a foreign court of competent jurisdiction for a sum certain created a duty or legal obligation to pay that sum; or, in Baron Parke's words, that the principle on which the judgments of foreign and colonial courts are supported and enforced was "that where a court of competent jurisdiction has adjudicated a certain sum

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to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." *Russell* v. *Smyth* (1842) 9 Mees. & W. 810, 818, 819; *Williams* v. *Jones* (1845) 13 Mees. & W. 628, 633, 634.

But this was said in explaining why, by the technical rules of pleading, an action of assumpsit or of debt would lie upon a foreign judgment, and had no reference to the question how far such a judgment was conclusive of the matter adjudged. At common law an action of debt would lie on a debt appearing by a record, or by any other specialty, such as a contract under seal; and would also lie for a definite sum of money due by simple contract. Assumpsit would not lie upon a record or other specialty, but would lie upon any other contract whether expressed by the party or implied by law. In an action upon a record, or upon a contract under seal, a lawful consideration was conclusively presumed to exist, [200] and could not be denied; *but in an action, whether in debt or in assumpsit, upon a simple contract, express or implied, the consideration was open to inquiry. A foreign judgment was not considered, like a judgment of a domestic court of record, as a record or specialty. The form of action, therefore, upon a foreign judgment, was not in debt grounded upon a record or a specialty, but was either in debt as for a definite sum of money due by simple contract, or in assumpsit upon such a contract. A foreign judgment, being a security of no higher nature than the original cause of action, did not merge that cause of action. The plaintiff might sue either on the judgment or on the original cause of action; and in either form of suit the foreign judgment was only evidence of a liability equivalent to a simple contract, and was therefore liable to be controlled by such competent evidence as the nature of the case admitted. See cases already cited, especially *Walker* v. *Witter*, 1 Dougl. 1; *Phillips* v. *Hunter*, 2 H. Bl. 402, 410; *Bissell* v. *Briggs*, 9 Mass. 463, 464, 6 Am. Dec. 88; *Mills* v. *Duryee*, 11 U. S. 7 Cranch, 481, 485 [3: 411, 413]; *D'Arcy* v. *Ketchum*, 52 U. S. 11 How. 165, 176 [13: 648, 653]; *Hall* v. *Odber*, 11 East, 118; *Smith* v. *Nicolls*, 7 Scott, 147, 5 Bing. N. C. 208. See also *Grant* v. *Easton*, L. R. 13 Q. B. Div. 302, 303; *Lyman* v. *Brown*, 2 Curt. 559.

Mr. Justice Blackburn, indeed, in determining how far a foreign judgment could be impeached, either for error in law or for want of jurisdiction, expressed the opinion that the effect of such a judgment did not depend upon what he termed "that which is loosely called 'comity,'" but upon the saying of Baron Parke, above quoted; and consequently "that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defense to the action." *Godard* v. *Gray* (1870) L. R. 6 Q. B. 139, 148, 149; *Schibsby* v. *Westenholz*, (1870) L. R. 6 Q. B. 155, 159. And his example has been followed by some of other English judges. Fry, J. in *Rousillon* v. *Rousillon* (1880) L. R. 14 Ch. Div. 351, 370; North, J. in *Nouvion* v. *Freeman* (1887) L. R. 35 Ch. Div. 704, 714, 715; Cotton and Lindley, L. JJ. in *Nouvion* v. *Freeman* (1887) 37 Ch. Div. 244, 250, 256.

*But the theory that a foreign judgment [201] imposes or creates a duty or obligation is a remnant of the ancient fiction assumed by Blackstone, saying that "upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it." 3 Bl. Com. 160. That fiction, which embraced judgments upon default or for torts, cannot convert a transaction wanting the assent of parties into one which necessarily implies it. *Louisiana* v. *New Orleans*, 109 U. S. 285, 288 [27: 936, 937]. While the theory in question may help to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law, public or private, and of the comity of our own country and of foreign nations. It might be safer to adopt the maxim applied to foreign judgments by Chief Justice Weston, speaking for the supreme judicial court of Maine, *Judicium redditur in invitum*, or as given by Lord Coke, *in præsumptione legis judicium redditur in invitum*. *Jordan* v. *Robinson* (1838) 15 Me. 167, 168; Co. Lit. 248*b*.

In *Russell* v. *Smyth*, above cited, Baron Parke took the precaution of adding, "Nor need we say how far the judgment of a court of competent jurisdiction, in the absence of fraud, is conclusive upon the parties." 9 Mees. & W. 819. He could hardly have contemplated erecting a rule of local procedure into a canon of private international law, and a substitute for "the comity of nations," on which, in an earlier case, he had himself relied as the ground for enforcing in England a right created by a law of a foreign country. *Alivon* v. *Furnival*, 1 Cromp. M. & R. 277, 296, 4 Tyrw. 751, 771.

In *Abouloff* v. *Oppenheimer* (1882) Lord Coleridge and Lord Justice Brett carefully avoided apopting the theory of a legal obligation to pay a foreign judgment as the test in determining how far such a judgment might be impeached. L. R. 10 Q. B. Div. 295, 300, 305. In *Hawksford* v. *Giffard* (1886) in the privy council, on appeal from the royal court of Jersey, Lord Herschell said: "This action is brought upon an English judgment, which, until a judgment was obtained in Jersey, was in *that coun- [202] try no more than evidence of a debt." L. R. 12 App. Cas. 122, 126. In *Nouvion* v. *Freeman*, in the House of Lords (1889), Lord Herschell, while he referred to the reliance placed by counsel on the saying of Baron Parke, did not treat a foreign judgment as creating or imposing a new obligation, but only as declaring and establishing that a debt or obligation existed. His words were: "The principle upon which I thinJ our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where, according to its established procedure, the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or ay have waived any of their rights, a final adjudication has been given that a debt or obligation exists, which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be

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said that, giving credit to the courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation." And Lord Bramwell said: "How can it be said that there is a legal obligation on the part of a man to pay a debt, who has a right to say, 'I owe none, and no judgment has been established against me that I do?' I cannot see." The foreign judgment in that case was allowed no force for want of finally establishing the existence of a debt. L. R. 15 App. Cas. 1, 9, 10, 14.

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England following the lead of Kent and Story, we are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not [203] allow it full effect, *the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants therefore cannot be permitted upon the general ground to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants that they should be held bound by the judgment.

Upon the question, What should be considered such a voluntary appearance as to amount to a submission to the jurisdiction of a foreign court? there has been some difference of opinion in England.

In *General Steam Nav. Co.* v. *Guillon* (1843), in an action at law to recover damages to the plaintiffs' ship by a collision with the defendant's ship through the negligence of the master and crew of the latter, the defendant pleaded a judgment by which a French court, in a suit brought by him, and after the plaintiffs had been cited, had appeared, and had asserted fault on his defendant's part, had adjudged that it was the ship of these plaintiffs, and not that of this defendant, which was in fault. It was not shown or suggested that the ship of these plaintiffs was in the custody or possession of the French court. Yet Baron Parke, delivering a considered judgment of the court of exchequer (Lord Abinger and Barons Alderson and Rolfe concurring), expressed a decided opinion that the pleas were bad in substance for these reasons: "They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance, or domicil, or temporary presence, by a decision of a French court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers who put forward the negligence *of the defend- [204] ant as an answer in an adverse suit in a foreign country whose laws they were under no obligation to obey." 11 Mees. & W. 877, 894, 13 L. J. Exch. 168, 176.

But it is now settled in England that while an appearance by the defendant in a court of a foreign country for the purpose of protecting his property already in the possession of that court may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. *De Cosse Brissac* v. *Rathbone* (1861) 6 Hurlst. & N. 301, 30 L. J. Exch. 238; *Schibsby* v. *Westenholz* (1870) L. R. 6 Q. B. 155, 162; *Voinet* v. *Barrett* (1885) 1 Cab. & El. 554, 54 L. J. Q. B. 521, and 55 L. J. Q. B. 39.

The present case is not one of a person traveling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the state of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants.

It is next objected that in those courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party, and that the defendants were therefore deprived of safeguards which are by our law considered essential to secure honesty and to detect fraud in a witness, and also that documents and papers were admitted in evidence, with which the defendants had no *connection, and which [205] would not be admissible under our own system of jurisprudence. But it having been shown by the plaintiffs, and hardly denied by the defendants, that the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is of itself a sufficient ground for impeaching the foreign judgment.

It is also contended that a part of the plaintiff's claim is affected by one of the contracts between the parties having been made in violation of the revenue laws of the United States, requiring goods to be invoiced at their actual market value. U.S. Rev. Stat. § 2854. It may be

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assumed that, as the courts of a country will not enforce contracts made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract. *Armstrong* v. *Toler*, 24 U. S. 11 Wheat. 258 [6: 468]; *De Brimont* v. *Penniman*, 10 Blatchf. 436; *Lang* v. *Holbrook*, Crabbe, 179; Story, Conf. Laws, §§ 244, 246; Whart. Conf. Laws, § 656. But as this point does not affect the whole claim in this case, it is sufficient for present purposes to say that there does not appear to have been any distinct offer to prove that the invoice value of any of the goods sold by any of the plaintiffs to the defendants was agreed between them to be, or was in fact, lower than the actual market value of the goods.

It must, however, always be kept in mind that it is the paramount duty of the court before which any suit is brought to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party.

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause and of the parties, and upon due allegations and proofs and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear [206] and formal *record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law and by the comity of our own country it should not be given full credit and effect.

There is no doubt that both in this country, as appears by the authorities already cited, and in England, a foreign judgment may be impeached for fraud.

Shortly before the Declaration of Independence, the House of Lords upon the trial of the Dutchess of Kingston for bigamy put to the judges the question whether—assuming a sentence of the ecclesiastical court against a marriage, in a suit for jactitation of marriage, to be conclusive evidence so as to prevent the counsel for the Crown from proving the marriage upon an indictment for polygamy—"the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion." Chief Justice De Grey, delivering the opinion of the judges, which was adopted by the House of Lords, answering this question in the affirmative, said: "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within, yet, like all other acts of the highest judicial authority, it is impeachable from without, although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an intrinsic collateral act which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal." 20 How. St. Tr. 537, 543, *note*, 2 Smith, Lead. Cas. 424.

All the subsequent English authorities concur in holding that any foreign judgment, whether *in rem* or *in personam*, may be impeached upon the ground that it was fraudulently obtained. *White* v. *Hall* (1806) 12 Ves. Jr. 321, 324; *Bowles* v. *Orr* (1835) 1 Younge & C. 464, 473; *Price* v. *Dewhurst* (1837) 8 Sim. 279, 302-305; *Don* v. *Lippman* (1837) 5 Clark & *F. [207] 1, 20; *Bank of Australasia* v. *Nias* (1851) 16 Q. B. 717, 785; *Reimers* v. *Druce* (1856) 23 Beav. 145, 150; *Castrique* v. *Imrie* (1870) L. R. 4 H. L. 414, 445, 446; *Godard* v. *Gray* (1870) L. R. 6 Q. B. 139, 149; *Messina* v. *Petrococchino* (1872) L. R. 4 P. C. 144, 157; *Ochsenbein* v. *Papelier* (1873) L. R. 8 Ch. 695.

Under what circumstances this may be done does not appear to have ever been the subject of judicial investigation in this country.

It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before and passed upon by it. *United States* v. *Throckmorton*, 98 U. S. 61, 65, 66 [25: 93, 95]; *Vance* v. *Burbank*, 101 U. S. 514, 519 [25: 929, 931]; *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447, 453 [27: 226, 228]; *Moffat* v. *United States*, 112 U. S. 24, 32 [28: 623, 625]; *United States* v. *Minor*, 114 U. S. 233, 242 [29: 110, 113]. And in one English case, where a ship had been sold under a foreign judgment, the like restriction upon impeaching that judgment for fraud was suggested; but the decision was finally put upon the ground that the judicial sale passed the title to the ship. *Cammell* v. *Sewell* (1858-60) 3 Hurlst. & N. 617, 646, 5 Hurlst. & N. 728, 729, 742.

But it is now established in England, by well considered and strongly reasoned decisions of the court of appeal, that foreign judgments may be impeached if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.

In *Abouloff* v. *Oppenheimer* (1882) the plaintiff had recovered a judgment at Tiflis in Russia, ordering the defendants to return certain goods or to pay their value. The defendants appealed to a higher Russian court which confirmed the judgment, and ordered the defendants to pay, besides the sum awarded below, an additional sum for costs and expenses. In an action in the English high court *of justice [208] upon those judgments, the defendants pleaded that they were obtained by the gross fraud of the plaintiff, in fraudulently representing to the Russian courts that the goods in question were not in her possession when the suit was commenced and when the judgment was given and during the whole time the suit was pending, and by fraudulently concealing from those courts the fact that those goods, as the fact was, and as she well knew, were in her actual possession. A demurrer to this plea

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was overruled, and judgment entered for the defendants. And that judgment was affirmed in the court of appeal by Lord Chief Justice Coleridge, Lord Justice Baggallay, and Lord Justice Brett, all of whom delivered concurring opinions, the grounds of which sufficiently appear in the opinion delivered by Lord Justice Brett (since Lord Esher, Master of the Rolls), who said: "With regard to an action brought upon a foreign judgment, the whole doctrine as to fraud is English, and is to be applied in an action purely English. I am prepared to hold, according to the judgment of the House of Lords adopting the proposition laid down by De Grey, Ch. J., that if the judgment upon which the action is brought was procured from the foreign court by the successful fraud of the party who is seeking to enforce it, the action in the English court will not lie. This proposition is absolute and without any limitation, and, as the Lord Chief Justice has pointed out, is founded on the doctrine that no party in an English court shall be able to take advantage of his own wrongful act, or, as it may be stated in other language, that no obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation. . . . I will assume that in the suit in the Russian courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the high court of justice is satisfied that the al- [209] legations of the defendants are true, *and that the fraud was committed, the defendants will be entitled to succeed in the present action. It has been contended that the same issue ought not to be tried in an English court which was tried in the Russian courts; but I agree that the question whether the Russian courts were deceived never could be an issue in the action tried before them. . . . In the present case, we have had to consider the question fully; and according to the best opinion which I can form, fraud committed by a party to a suit, for the purpose of deceiving a foreign court, is a defense to an action in this country, founded upon the judgment of that foreign court. It seems to me that if we were to accede to the argument for the plaintiff, the result would be that a plausible deceiver would succeed, whereas a deceiver who was not plausible would fail. I cannot think that plausible fraud ought to be upheld in any court of justice in England. I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the courts of this country; and further, that nothing ought to persuade an English court to enforce a judgment against one party, which has been obtained by the fraud of the other party to the suit in the foreign court." L. R. 10 Q. B. Div. 295, 305-308.

The same view was affirmed and acted on in the same court by Lord Justices Lindley and Bowen in *Vadala* v. *Lawes* (1890) L. R. 25 Q. B. Div. 310, 317-320, and by Lord Esher and Lord Justice Lopes in *Crozat* v. *Brogden* (1894) 2 Q. B. 30, 34, 35.

In the case at bar the defendants offered to prove, in much detail, that the plaintiffs presented to the French court of first instance and to the arbitrator appointed by that court, and upon whose report its judgment was largely based, false and fraudulent statements and accounts against the defendants, by which the arbitrator and the French courts were deceived and misled, and their judgments were based upon such false and fraudulent statements and accounts. This offer, if satisfactorily proved, would, according to the decisions of the English court of appeal in *Abouloff* v. *Oppenheimer*, *Vadala* v. *Lawes*, and *Crozat* v. *Brogden*, above cited, *be a sufficient ground for im- [210] peaching the foreign judgment, and examining into the merits of the original claim.

But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

In France, the royal ordinance of June 15, 1629, art. 121, provided as follows: "Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall have no lien or execution in our kingdom. Thus the contracts shall stand for simple promises; and, notwithstanding the judgments, our subjects against whom they have been rendered may contest their rights anew before our judges." Touillier, Droit Civil, lib. 3, tit. 3, chap. 6, § 3, no. 77.

By the French Code of Civil Procedure, art. 546, "Judgments rendered by foreign tribunals, and acts acknowledged before foreign officers, shall not be capable of execution in France except in the manner and in the cases provided by articles 2123 and 2128 of the Civil Code," which are as follows: by article 2123, "A lien cannot arise from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal, without prejudice to provisions to the contrary which may exist in public laws and treaties;" by article 2128, "Contracts entered into in a foreign country cannot give a lien upon property in France, if there are no provisions contrary to this principle in public laws or in treaties." Touillier, *ubi supra*, no. 84.

The defendants, in their answer, cited the above provisions of the statutes of France, and alleged, and at the trial offered to prove, that, by the construction given to *these stat- [211] utes by the judicial tribunals of France, when the judgments of tribunals of foreign countries against the citizens of France are sued upon in the courts of France, the merits of the controversies upon which those judgments are based are examined anew, unless a treaty to the contrary effect exists between the Republic of

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France and the country in which such judgment is obtained (which is not the case between the Republic of France and the United States) and that the tribunals of the Republic of France give no force and effect, within the jurisdiction of that country, to the judgments duly rendered by courts of competent jurisdiction of the United States against citizens of France after proper personal service of the process of those courts have been made thereon in this country. We are of opinion that this evidence should have been admitted.

In *Odwin* v. *Forbes* (1817) President Henry, in the court of Demerara, which was governed by the Dutch law, and was, as he remarked, "a tribunal foreign to and independent of that of England," sustained a plea of an English certificate in bankruptcy, upon these grounds: "It is a principle of their law, and laid down particularly in the ordinances of Amsterdam, . . . that the same law shall be exercised towards foreigners in Amsterdam as is exercised with respect to citizens of that state in other countries; and upon this principle of reciprocity, which is not confined to the city of Amsterdam, but pervades the Dutch laws, they have always given effect to the laws of that country which has exercised the same comity and indulgence in admitting theirs. . . . That the Dutch bankrupt laws proceed on the same principles as those of the English; that the English tribunals give effect to the Dutch bankrupt laws; and that, on the principle of reciprocity and mutual comity, the Dutch tribunals, according to their own ordinances, are bound to give effect to the English bankrupt laws when duly proved, unless there is any express law or ordinance prohibiting their admission." And his judgment was affirmed in the privy council on appeal. Case of *Odwin* v. *Forbes*, pp. 89, 159-161, 173-176, same case, (1818) Buck, Bankr. Cas. 57, 64.

212]* President Henry, at page 76 of his Treatise on Foreign Law, published as a preface to his report of that case, said: "This comity, in giving effect to the judgments of other tribunals, is generally exercised by states under the same sovereign, on the ground that he is the fountain of justice in each, though of independent jurisdiction; and it has also been exercised in different states of Europe with respect to foreign judgments, particularly in the Dutch states, who are accustomed by the principle of reciprocity to give effect in their territories to the judgments of foreign states, which show the same comity to theirs; but the tribunals of France and England have never exercised this comity to the degree that those of Holland have, but always required a fresh action to be brought, in which the foreign judgment may be given in evidence. As this is a matter of positive law and internal policy in each state, no opinion need be given; besides, it is a mere question of comity, and perhaps it might be neither politic nor prudent, in two such great states, to give indiscriminate effect to the judgment of each other's tribunals, however the practice might be proper or convenient in Federal states, or those under the same sovereign."

It was that statement, which appears to have called forth the observations of *Mr. Justice* Story, already cited: "Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." Story, Conf. Laws, § 618.

This rule, though never either affirmed or denied by express adjudication in England or America, has been indicated, more or less distinctly, in several of the authorities already cited.

Lord Hardwicke threw out a suggestion that the credit to be given by one court to the judgment of a foreign court might well *be [213 affected by "their proceeding both by the same rules of law." *Otway* v. *Ramsay*, 4 Barn. & C. 414-416, *note*.

Lord Eldon, after saying that "natural law" (evidently intending the law of nations) "requires the courts of this country to give credit to those of another for the inclination and power to do justice," added that "if it appears in evidence that persons suing under similar circumstances neither had met nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption." *Wright* v. *Simpson*, 6 Ves. Jr. 714, 730.

Lord Brougham, presiding as Lord Chancellor in the House of Lords, said: "The law in the course of procedure abroad sometimes differs so mainly from ours in the principles upon which it is bottomed, that it would seem a strong thing to hold that our courts were bound conclusively to give execution to the sentence of foreign courts, when, for aught we know, there is not any one of those things which are reckoned the elements or the corner stones of the due administration of justice present to the procedure in these foreign courts." *Houlditch* v. *Donegal*, 8 Bligh, N. S. 301, 338.

Chief Justice Smith, of New Hampshire, in giving reasons why foreign judgments or decrees founded on the municipal laws of the state in which they are pronounced are not conclusive evidence of debt, but prima facie evidence only, said: "These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the state where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself." *Bryant* v. *Ela*, Smith (N. H.) 396, 404.

Mr. Justice Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice." *Bradstreet* v. *Neptune Ins. Co.* 3 Sumn. 600, 608.

Mr. Justice Woodbury said that judg-[214 ments *in personam*, rendered under a foreign government, "are, *ex comitate*, treated with respect, according to the nature of the judgment,

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and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments; and added, "Nor can much comity be asked for the judgments of another nation which, like France, pays no respect to those of other countries." *Burnham* v. *Webster*, 1 Woodb. & M. 172, 175, 179.

Mr. Justice Cooley said: "True comity is equality; we should demand nothing more, and concede nothing less." *McEwan* v. *Zimmer*, 38 Mich. 765, 769, 31 Am. Rep. 332.

Mr. Wheaton said: "There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of states—*ex comitate, ob reciprocam utilitatem*. . . . The general comity, utility, and convenience of nations have, however, established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution." Wheat. International Law (8th ed.) §§ 79, 147.

Since Story, Kent, and Wheaton wrote their commentaries, many books and essays have been published upon the subject of the effect to be allowed by the courts of one country to the judgments of another, with references to the statutes and decisions in various countries. Among the principal ones are Foelix, Droit International Privé (4th ed. by Demangeat, 1866) lib. 2, tit. 7, 8; Moreau, Effets Internationaux des Jugements (1884); Pigott, Foreign Judgments (2d ed. 1884); Constant, de l'Execution des Jugements Etrangers (2d ed. 1890), giving the text of the articles of most of the modern codes upon the subject, and of French treaties with Italian, German, and Swiss states; and numerous papers in Clunet's Journal de Droit International Privé, established in 1874, and continued to the present time. For the reasons stated at the outset of this opinion, we have not thought it important to state the conflicting theories of continental commentators 215]*and essayists as to what each may think the law ought to be, but have referred to their works only for evidence of authoritative declarations, legislative or judicial, of what the law is.

By the law of France, settled by a series of uniform decisions of the court of cassation, the highest judicial tribunal, for more than half a century, no foreign judgment can be rendered executory in France without a review of the judgments *au fond*,—to the bottom,—including the whole merits of the cause of action on which the judgment rests. Pardessus, Droit Commercial, § 1488; Bard, Précis de Droit International (1883) nos. 234-239; Story, Conf. Laws, §§ 615-617; Pigott, Foreign Judgments, 452; Westlake, Private International Law (3d ed. 1890) 350.

A leading case was decided by the court of cassation on April 19, 1819, and was as follows: A contract of partnership was made between Holker, a French merchant, and Parker, a citizen of the United States. Afterwards, and before the partnership accounts were settled, Parker came to France, and Holker sued him in the tribunal of commerce of Paris. Parker excepted, on the ground that he was a foreigner, not domiciled in France, and obtained a judgment, affirmed on appeal, remitting the matter to the American courts—*obtint son renvoi devant les tribunaux Americains*. Holker then sued Parker in the circuit court of the United States for the district of Massachusetts, and in 1814 obtained a judgment there ordering Parker to pay him $529,949. One branch of the controversy had been brought before this court in 1813. *Holker* v. *Parker*, 11 U. S. 7 Cranch, 436 [3: 396]. Holker, not being able to obtain execution of that judgment in America, because Parker had no property there and continued to reside in Paris, obtained from a French judge an order declaring the judgment executory. Upon Parker's application to nullify the proceeding, the royal court of Paris, reversing the judgment of a lower court, set aside that order, assigning these reasons: "Considering that judgments rendered by foreign courts have neither effect nor authority in France; that this rule is doubtless more particularly *applicable in favor of [216 Frenchmen, to whom the King and his officers owe a special protection; but that the principle is absolute, and may be invoked by all persons without distinction, being founded on the independence of states; that the ordinance of 1629, in the beginning of its article 121, lays down the principle in its generality, when it says that judgments rendered in foreign kingdoms and sovereignties, for any cause whatever, shall have no execution in the Kingdom of France; and that the Civil Code, art. 2123, gives to this principle the same latitude when it declares that a lien cannot result from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal; which is not a matter of mere form, like the granting in past times of a *pareatis* from one department to another for judgments rendered within the kingdom; but which assumes, on the part of the French tribunals, a cognizance of the cause, and a full examination of the justice of the judgment presented for execution, as reason demands, and that this has always been practised in France, according to the testimony of our ancient authorities; that there may result from this an inconvenience, where the debtor, as is asserted to have happened in the present case, removes his property and his person to France, while keeping his domicil in his native country; that it is for the creditor to be watchful, but that no consideration can impair a principle on which rests the sovereignty of governments, and which, whatever be the case, must preserve its whole force." The court therefore adjudged that, before the tribunal of first instance, Holker should state the grounds of his action, to be contested by Parker, and to be determined by the court upon cognizance of the whole cause. That judgment was confirmed, upon deliberate consideration, by the court of cassation, for the reasons that the ordinance of 1629 enacted, in absolute terms and without exception, that foreign judgments should not have execution in France; that it was only by the Civil Code and the Code of Civil Procedure that the French tribunals had been authorized to declare them executory; that therefore the ordinance of 1629 had no application; that the articles of the Codes, re-

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217] ferred *to, did not authorize the courts to declare judgments rendered in a foreign country executory in France without examination; that such an authorization would be as contrary to the institution of the courts as would be the award or the refusal of execution arbitrarily and at will; would impeach the right of sovereignty of the French government, and was not in the intention of the legislature; and that the Codes made no distinction between different judgments rendered in a foreign country, and permitted the judges to declare them all executory; and therefore those judgments, whether against a Frenchman or against a foreigner, were subject to examination on the merits. *Holker* v. *Parker*, Merlin, Questions de Droit Jugement, § 14, no. 2.

The court of cassation has ever since constantly affirmed the same view. Moreau no. 106, *note*, citing many decisions; Clunet, 1882, p. 166. In Clunet, 1894, p. 913, *note*, it is said to be "settled by judicial decisions—*il est de jurisprudence*—that the French courts are bound, in the absence of special diplomatic treaties, to proceed to the revision on the whole merits—*au fond*—of foreign judgments, execution of which is demanded of them," citing, among other cases, a decision of the court of cassation on February 2, 1892, by which it was expressly held to result from the articles of the Codes, above cited, "that judgments rendered in favor of a foreigner against a Frenchman by a foreign court, are subject, when execution of them is demanded in France, to the revision of the French tribunals, which have the right and the duty to examine them, both as to the form and as to the merits." Sirey, 1892, 1, 201.

In Belgium, the Code of Civil Procedure of 1876 provides that if a treaty on the basis of reciprocity be in existence between Belgium and the country in which the foreign judgment has been given, the examination of the judgment in the Belgian courts shall bear only upon the questions whether it "contains nothing contrary to public order, to the principles of the Belgian public order;" whether, by the law of the country in which it was rendered, it has the force of *res judicata;* whether the copy is 218] duly authenticated; whether the *defendant's rights have been duly respected; and whether the foreign court is not the only competent court, by reason of the nationality of the plaintiff. Where, as is the case between Belgium and France, there is no such treaty, the Belgian court of sessions holds that the foreign judgment may be re examined upon the merits. Constant, 111, 116; Moreau, no. 189; Clunet, 1887, p. 217; Clunet, 1888, p. 837; Pigott, Foreign Judgments, 439. And in a very recent case, the civil tribunal of Brussels held that, "considering that the right of revision is an emanation of the right of sovereignty; that it proceeds from the *imperium*, and that as such it is within the domain of public law; that from that principle it manifestly follows that, if the legislature does not recognize executory force in foreign judgments where there exists no treaty upon the basis of a reciprocity, it cannot belong to the parties to substitute their will for that of the legislature, by arrogating to themselves the power of delegating to the foreign judge a portion of sovereignty." Clunet, 1894, pp. 164, 165.

In Holland, the effect given to foreign judgments has always depended upon reciprocity, but whether by reason of Dutch ordinances only, or general principles of jurisprudence, does not clearly appear. *Odwin* v. *Forbes*, Buck, Bankr. Cas. 57, and Henry, Foreign Law, 76, above cited; Story, Conf. Laws, § 618; Foelix, no. 397, *note;* Clunet, 1879, p. 369; 1 Ferguson, International Law, 85; Constant, 171; Moreau, no. 213.

In Denmark, the courts appear to require reciprocity to be shown before they will execute a foreign judgment. Foelix, nos. 328, 345; Clunet, 1891, p. 987; Westlake, *ubi supra*. In Norway the courts re-examine the merits of all foreign judgments, even to those of Sweden. Foelix, no. 401; Pigott, Foreign Judgments, 504, 505; Clunet, 1892, p 296. In Sweden the principle of reciprocity has prevailed from very ancient times; the courts give no effect to foreign judgments, unless upon that principle; and it is doubtful whether they will even then unless reciprocity is secured by treaty with the country in which the judgment was rendered. Foelix, no. 400; Olivecrona, in Clunet, 1880, p. 83; Constant, 191; Moreau, no. 222; Pigott, Foreign Judgments, 503; Westlake, *ubi supra*.

*In the Empire of Germany, as former- [219 ly in the states which now form part of that Empire, the judgments of those states are mutually executed and the principle of reciprocity prevails as to the judgments of other countries. Foelix, nos. 328, 331, 333-341; Moreau, nos. 178, 179; Vierhaus, in Pigott, Foreign Judgments, 460-474; Westlake, *ubi supra*. By the German Code of 1877, "compulsory execution of the judgment of a foreign court cannot take place unless its admissibility has been declared by a judgment of exequatur; . . . the judgment of exequatur is to be rendered without examining whether the decision is conformable to law;" but it is not to be granted "if reciprocity is not guaranteed." Constant, 79-81; Pigott, Foreign Judgments, 466. The reichsgericht, or imperial court, in a case reported in full in Pigott, has held that an English judgment cannot be executed in Germany, because, the court said, the German courts, by the Code, when they execute foreign judgments at all, are "bound to the unqualified recognition of the legal validity of the judgments of foreign courts," and "it is therefore an essential requirement of reciprocity that the law of the foreign states should recognize in an equal degree the legal validity of the judgments of German courts, which are to be enforced by its courts; and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of their execution by the court *ex officio*, nor be allowed by the admission of pleas which might lead to it." Pigott, Foreign Judgments, 470, 471. See also Clunet, 1882, p. 35; Clunet, 1883, p. 246; Clunet, 1884, p. 600.

In Switzerland, by the Federal Constitution, civil judgments in one canton are executory throughout the republic. As to foreign judgments, there is no Federal law, each canton

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having its own law upon the subject. But in the German cantons, and in some of the other cantons, foreign judgments are executed according to the rule of reciprocity only. Constant, 193-204; Pigott, Foreign Judgments, 505-516; Clunet, 1887, p. 762; Westlake, *ubi supra*. The law upon this subject has been clearly stated by Brocher, president of the court of cassation of Geneva, and professor of law in the uni-
220] versity there. In his Nouveau *Traité de Droit International Privé (1876) § 174, treating of the question whether "it might not be convenient that states should execute, without reviewing their merits, judgments rendered on the territory of each of them respectively," he says: "It would certainly be advantageous for the parties interested to avoid the delays, the conflicts, the differences of opinion, and the expenses resulting from the necessity of obtaining a new judgment in each locality where they should seek execution. There might thence arise, for each sovereignty, a judicial or moral obligation to lend a strong hand to foreign judgments. But would not such an advantage be counterbalanced, and often surpassed, by the dangers that might arise from that mode of proceeding? There is here, we believe, a question of reciprocal appreciation and confidence. One must, at the outset, inquire whether the administration of the foreign judiciary whose judgments it is sought to execute without verifying their merits presents sufficient guaranties. If the propriety of such an execution be admitted, there is ground for making it the object of diplomatic treaties. That form alone can guarantee the realization of a proper reciprocity; it furnishes, moreover, to each state the means of acting upon the judicial organization and procedure of other states." In an article in the Journal, after a review of the Swiss decisions, he recognizes and asserts that "it comes within the competency of each canton to do what seems to it proper in such matters." Clunet, 1879, pp. 88, 94. And in a later treatise, he says: "We cannot admit that the recognition of a state as sovereign ought necessarily to have as a consequence the obligation of respecting and executing the judicial decision rendered by its tribunals; in strict right, the authority of such acts does not extend beyond the frontier. Each sovereignty possesses in particular, and more or less in private, the territory subject to its power. No other can exercise there an act of its authority. This territorial independence finds itself, in principle, directly included in the very act by which one nation recognizes a foreign state as sovereign; but there cannot result therefrom a promise to adopt, and to cause to be executed upon the national territory,
221] judgments rendered by *the officials of the foreign state, whoever they may be. That would be an abdication of its own sovereignty, and would bind it in such sort as to make it an accomplice in acts often injurious, and in some cases even criminal. Such obligations suppose a reciprocal confidence; they are not undertaken, moreover, except upon certain conditions and by means of a system of regulations intended to prevent or to lessen the dangers which might result from them." 3 Cours de Droit International Privé (1885) 126, 127.

In Russia, by the Code of 1864, "the judgments of foreign tribunals shall be rendered executory according to the rules established by reciprocal treaties and conventions," and, where no rules have been established by such treaties, are to be "put in execution in the Empire, only after authorization granted by the courts of the Empire;" and "in deciding upon demands of this kind, the courts do not examine into the foundation of the dispute adjudged by the foreign tribunals, but decide only whether the judgment does not contain dispositions which are contrary to the public order, or which are not permitted by the laws of the Empire." Constant, 183-185. Yet a chamber of the senate of St. Petersburg, sitting as a court of cassation and the highest judicial tribunal of the Empire in civil matters, has declined to execute a French judgment, upon the grounds that, by the settled law of Russia, "it is a principle in the Russian Empire that only the decisions of the authorities to whom jurisdiction has been delegated by the sovereign power have legal value by themselves and of full right;" and that "in all questions of international law, reciprocity must be observed and maintained as a fundamental principle." *Adam* v. *Schipoff*, Clunet, 1884, pp. 45, 46, 134. And Professor Englemann, of the Russian University of Dorpat, in an able essay, explaining that and other Russian decisions, takes the following view of them: "The execution of a treaty is not the only proof of reciprocity. . . . It is necessary to commit the ascertainment of the existence of reciprocity to the judicial tribunals for the same reasons for which there is conferred upon them the right to settle all questions incident to the cause to be adjudged. The existence of reciprocity *between two states ought to [222 be proved in the same manner as all the positive facts of the case. . . . It is true that the principle of reciprocity is a principle, not of right, but of policy, yet the basis of the principle of all regular and real policy is also the fundamental principle of right, and the point of departure of all legal order—the *suum cuique*. This last principle comprehends right, reciprocity, utility; and reciprocity is the application of right to policy. . . . Let this principle be applied wherever there is the least guaranty, or even a probability of reciprocity, and the cognizance of this question be committed to the judicial tribunals, and one will arrive at important results which, on their side, will touch the desired end, international accord. But for this it is indispensable that the application of this principle should be entrusted to judicial tribunals accustomed to decide affairs according to right, and not to administrative authorities, which look above all to utility, and are accustomed to be moved by political reasons, intentions, and even passions." Clunet, 1884, pp. 120-122. But it would seem that no foreign judgment will be executed in Russia, unless reciprocity is secured by treaty. Clunet, 1884, pp. 46, 113, 139, 140, 602.

In Poland, the provisions of the Russian Code are in force; and the court of appeal of Warsaw has decided that, where there is no treaty the judgments of a foreign country cannot be executed, because, "in admitting a contrary conclusion, there would be impugned one of the cardinal principles of international

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relations, namely, the principle of reciprocity, according to which each state recognizes juridical rights and relations originating or established in another country, only in the measure in which the latter, in its turn, does not disregard the rights and relations existing in the former." Clunet, 1884, pp. 494, 495.

In Roumania, it is provided by code that "judicial decisions rendered in foreign countries cannot be executed in Roumania, except in the same manner in which Roumanian judgments are executed in the country in question, and provided that they are declared executory by competent Roumanian judges;" and this article seems to be held to require legislative 223] reciprocity. *Moreau, no. 219; Clunet, 1879, p. 351; Clunet, 1885, p. 537; Clunet, 1891, p. 452; Pigott, Foreign Judgments, 495.

In Bulgaria, by a resolution of the supreme court in 1881, "the Bulgarian judges should, as a general rule, abstain from entering upon the merits of the foreign judgment; they ought only to inquire whether the judgment submitted to them does not contain dispositions contrary to the public order, and to the Bulgarian laws." Constant, 129, 130; Clunet, 1886, p. 570. This resolution closely follows the terms of the Russian Code, which, as has been seen, has not precluded applying the principle of reciprocity.

In Austria, the rule of reciprocity does not rest upon any treaty or legislative enactment, but has been long established, by imperial decrees and judicial decisions, upon general principles of jurisprudence. Foelix, no. 331; Constant, 100-108; Moreau, no. 185; Weiss, Traité de Droit International (1886) 980; Clunet, 1891, p. 1003; Clunet, 1894, p. 908; Pigott, Foreign Judgments, 434. In Hungary, the same principles were always followed as in Austria, and reciprocity has been made a condition by a law of 1880. Constant, 109; Moreau, no. 186 and *note;* Pigott, Foreign Judgments, 436; Weiss, *ubi supra.*

In Italy, before it was united into one kingdom, each state had its own rules. In Tuscany and in Modena, in the absence of treaty, the whole merits were reviewed. In Parma, as by the French ordinance of 1629, the foreign judgment was subject to fundamental revision if against a subject of Parma. In Naples, the Code and the decisions followed those of France. In Sardinia, the written laws required above all the condition of reciprocity, and, if that condition was not fulfilled, the foreign judgment was re-examinable in all respects. Fiore, Effetti Internazionali delle Sentenze (1875) 40-44; Moreau, no. 204. In the papal states, by a decree of the Pope in 1820, "the exequatur shall not be granted, except so far as the judgments rendered in the States of his Holiness shall enjoy the same favor in the foreign countries; this reciprocity is presumed if there is no particular reason to doubt it." Toullier, Droit Civil, lib. 3, tit. 3, chap. 6, § 3, no. 93. And see Foelix, no. 343; Westlake, Private International Law, *ubi supra.*

224] In the Kingdom of Italy, *by the Code of Procedure of 1865, "executory force is given to the judgments of foreign judicial authorities by the court of appeal in whose jurisdiction they are to be executed, by obtaining a judgment on an exequatur in which the court examines (*a*) if the judgment has been pronounced by a competent judicial authority; (*b*) if it has been pronounced, the parties being regularly cited; (*c*) if the parties have been legally represented or legally defaulted; (*d*) if the judgment contains dispositions contrary to public order or to the internal public law of the realm." Constant, 157. In 1874, the court of cassation of Turin, "considering that in international relations is admitted the principle of reciprocity, as that which has its foundation in the natural reason of equality of treatment, and, in default thereof, opens the way to the exercise of the right of retaliation;" and that the French courts examine the merits of Italian judgments before allowing their execution in France,—decided that the Italian courts of appeal, when asked to execute a French judgment, ought not only to inquire into the competency of the foreign court, but also to review the merits and the justice of the controversy. *Levi* v. *Pitre,* in Rossi, Esecuzione delle Sentenze Straniere (1st ed. 1875) 70, 284; and in Clunet, 1879, p. 295. Some commentators, however, while admitting that decision to be most authoritative, have insisted that it is unsound and opposed to other Italian decisions to which we have not access. Rossi, *ubi supra* (2d ed. 1890) 92; Fiore, 142, 143; Clunet, 1878, p. 237; Clunet, 1879, pp. 296, 305; Pigott, Foreign Judgments, 483; Constant, 161.

In the principality of Monaco, foreign judgments are not executory, except by virtue of a special ordinance of the Prince, upon a report of the advocate general. Constant, 160; Pigott, Foreign Judgments, 488.

In Spain, formerly, foreign judgments do not appear to have been executed at all. Foelix, no. 398; Moreau, no. 197; Silvela, in Clunet, 1881, p. 20. But by the Code of 1855, revised in 1881 without change in this respect, "judgments pronounced in foreign countries shall have in Spain the force that the respective treaties give them; if there are no special treaties with the nation in which they have been rendered, they shall *have the same [225 force that is given by the laws of that nation to Spanish executory judgments; if the judgment to be executed proceeds from a nation by whose jurisprudence effect is not given to the judgments pronounced by Spanish tribunals, it shall have no force in Spain;" and an "application for the execution of judgments pronounced in foreign countries shall be made to the supreme tribunal of justice, which, after examining an authorized translation of the foreign judgment, and after hearing the party to whom it is directed and the public minister, shall decide whether it ought or ought not to be executed." Constant, 141, 142; Pigott, Foreign Judgments, 499, 500. A case in which the supreme court of Spain in 1880 ordered execution of a French judgment, after reviewing its merits, is reported in Clunet, 1881, p. 365. In another case in 1888, the same court, after hearing the parties and the public minister, ordered execution of a Mexican judgment. The public minister, in his demand for its execution, said: "Our law of civil procedure, inspired to a certain point by the modern theories of international law, which, recognizing among civilized nations a true community of right, and considering

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mankind as a whole in which nations occupy a position identical with that of individuals towards society, gives authority in Spain to executory judgments rendered by foreign tribunals, even in the absence of special treaty, provided that those countries do not proscribe the execution there of our judgments, and under certain conditions which, if they limit the principle, are inspired by the wish of protecting our sovereignty and by the supreme exigencies of justice. When nothing appears, either for or against, as to the authority of the judgments of our courts in the foreign country, one should not put an obstacle to the fulfilment, in our country, of judgments emanating from other nations, especially when the question is of a country which, by its historic origin, its language, its literature, and by almost the identity of its customs, its usages, and its social institutions, has so great a connection with our own, which obliges us to maintain with it the most intimate relations of friendship and courtesy." And he pointed out that Mexico, by its Code, had adopted reciprocity as a fundamental principle. Among [226] *the reasons assigned by the court for ordering the Mexican judgment to be executed was that "there exists in Mexico no precedent of jurisprudence which refuses execution to judgments rendered by the Spanish tribunals." Clunet, 1891, pp. 288-292.

In Portugal, foreign judgments, whether against a Portuguese or against a foreigner, are held to be reviewable upon the merits before granting execution thereof. Foelix, no. 399; Clunet, 1875, pp. 54, 448; Moreau, no. 217; Constant, 176-180; Westlake, *ubi supra*.

In Greece, by the provisions of the Code of 1834, foreign judgments, both parties to which are foreigners, are enforced without examination of their merits; but if one of the parties is a Greek, they are not enforced if found contradictory to the facts proved, or if they are contrary to the prohibitive laws of Greece, Foelix, no. 396; Constant, 151, 152; Moreau, no. 202; Saripolos, in Clunet, 1880, p. 173; Pigott, Foreign Judgments, 475.

In Egypt, under the influence of European jurisprudence, the Code of Civil Procedure has made reciprocity a condition upon which foreign judgments are executed. Constant, 136; Clunet, 1887, pp. 98, 228; Clunet, 1889, p. 322.

In Cuba and Porto Rico, the Codes of Civil Procedure are based upon the Spanish Code of 1855. Pigott, Foreign Judgments, 435, 503. In Hayti, the Code re enacts the provisions of the French Code. Constant, 153; Moreau, no. 203; Pigott, Foreign Judgments, 460.

In Mexico, the system of reciprocity has been adopted by the Code of 1884 as the governing principle. Constant, 168; Clunet, 1891, p. 290.

The rule of reciprocity likewise appears to have generally prevailed in South America. In Peru, foreign judgments do not appear to be executed without examining the merits, unless when reciprocity is secured by treaty. Clunet, 1879, pp. 266, 267; Pigott, Foreign Judgments, 548. In Chili, there appears to have been no legislation upon the subject; but according to a decision of the supreme court of Santiago in 1886, "the Chilian tribunals should not award an exequatur, except upon decisions in correct form, and also reserving the general principle of reciprocity." Clunet, 1889, p. 185; Constant, 131, *132. In Brazil, [227] foreign judgments are not executed, unless because of the country in which they were rendered admitting the principle of reciprocity, or because of a *placet* of the government of Brazil, which may be awarded according to the circumstances of the case. Constant, 124 and *note;* Moreau, no. 192; Pigott, Foreign Judgments, 543-546; Westlake, *ubi supra*. In the Argentine Republic, the principle of reciprocity was maintained by the courts, and was affirmed by the Code of 1878, as a condition *sine qua non* of the execution of foreign judgments, but has perhaps been modified by later legislation. Moreau, no. 218; Palomeque, in Clunet, 1887, pp. 539-558.

It appears, therefore, that there is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller states—Norway, Portugal, Greece, Monaco, and Hayti—the merits of the controversy are reviewed as of course, allowing to the foreign judgment, at the most, no more effect than of being prima facie evidence of the justice of the claim. In the great majority of the countries on the continent of Europe—in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy) and in Spain—as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of *Mr. Justice* Story (in § 618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim.

*In holding such a judgment, for want [228] of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law at the time of the adoption of the Constitution, a foreign judgment was considered as prima facie evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with

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France or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendant's offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of that nation would be re-examinable in the courts of France.

229] *For these reasons, in the action at law the judgment is reversed, and the cause remanded to the circuit court, with directions to set aside the verdict and to order a new trial.

For the same reasons, in the suit in equity between these parties the foreign judgment is not a bar, and therefore the decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

Mr. Chief Justice **Fuller** dissenting:

Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is re-examinable upon the merits. This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party who has had an opportunity to prove his case in a competent court to retry it on the merits; and it seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.

This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment *in personam* which is not open to question on the ground of want of jurisdiction, either intrinsically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held *inter partes*, though recovered abroad, conclusive on the merits.

*Judgments are executory while unpaid, [230 but in this country execution is not given upon foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose.

The principle that requires litigation to be treated as terminated by final judgment properly rendered is as applicable to a judgment proceeded on in such an action as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action as of right, in disregard of the obligation to pay arising on the judgment, and of the rights acquired by the judgment creditor thereby.

That any other conclusion is inadmissible is forcibly illustrated by the case in hand. Plaintiffs in error were trading copartners in Paris as well as in New York, and had a place of business in Paris at the time of these transactions and of the commencement of the suit against them in France. The subjects of the suit were commercial transactions having their origin and partly performed in France, under a contract there made, and alleged to be modified by the dealings of the parties there; and one of the claims against them was for goods sold to them there. They appeared generally in the case, without protest, and by counterclaims relating to the same general course of business, a part of them only connected with the claims against them, became actors in the suit and submitted to the courts their own claims for affirmative relief, as well as the claims against them. The courts were competent and they took the chances of a decision in their favor. As traders in France they were under the protection of its laws and were bound by its laws, its commercial usages, and its rules of procedure. The fact that they were Americans and the opposite parties were citizens of France is immaterial, and there is no suggestion on the record that those courts proceeded on any other ground than that all litigants, whatever their nationality, were entitled to equal justice therein. If plaintiffs in error had succeeded in their cross suit and recovered judgment against defendants in error, and had sued them here on that judgment, defendants in error would not have been permitted to say that the judgment in France was *not conclusive against them. [231 As it was, defendants in error recovered, and I think plaintiffs in error are not entitled to try their fortune anew before the courts of this country on the same matters voluntarily submitted by them to the decision of the foreign tribunal. We are dealing with the judgment of a court of a civilized country whose laws and systems of justice recognize the general rules in respect to property and rights between man and man prevailing among all civilized peoples. Obviously the last persons who should be heard to complain are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts

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appear to have acted "judicially, honestly, and with the intention to arrive at the right conclusion;" and a result thus reached ought not to be disturbed.

The following view of the rule in England was expressed by Lord Herschell in *Nouvion* v. *Freeman*, L. R. 15 App. Cas. 1, 9, quoted in the principal opinion: "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the court of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of a debt or obligation." But in that connection the observations made by Mr. Justice Blackburn in *Godard* v. *Gray*, L. R. 6 Q. B. 139, 148, and often referred to with approval, may usefully again be quoted:

"It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgments of a foreign tribunal. Several of the continental nations (including France) do not enforce the judg-[232] ments of other countries, *unless where there are reciprocal treaties to that effect. But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams* v. *Jones*, 13 Mees. & W. 633: 'Where a court of competent jurisdiction had adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.' And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from a performance of it, must form a good defense to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff, for that would show that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor in *Castrique* v. *Imrie*, L. R. 4 H. L. 445, and to leave those questions to be decided when they arise, only observing in the present case, as in that 'the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them, they came to a conclusion which justified them in France in deciding as they did decide.' . . . Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a *foreign judgment must[233] be demurrable on that ground. The mode of pleading shows that the judgment was considered, not as merely prima facie evidence of that cause of action for which the judgment was given, but as itself giving rise, at least prima facie, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question, but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that original cause of action. If, on the other hand, there is a prima facie obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear that this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal."

In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.

And, without going into the refinements of the publicists on the subject, it appears to me that that law finds authoritative expression in the judgments of courts of competent jurisdiction over parties and subject-matter.

It is held by the majority of the court that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law or *in fact; and the special grounds relied on[234] are *seriatim* rejected. In respect of the last of these, that of fraud, it is said that it is unnecessary in this case to decide whether certain decisions cited in regard to impeaching foreign judgments for fraud could be followed consistently with our own decisions as to impeaching domestic judgments for that reason, "because there is a distinct and independent ground upon which we are satisfied that the

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comity of our nation does not require us to give conclusive effect to the judgments of the courts of France, and that ground is the want of reciprocity on the part of France as to the effect to be given to the judgments of this and other foreign countries." And the conclusion is announced to be "that judgments rendered in France, or in any other foreign country by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim." In other words, that although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud, the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely.

I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered (subject, of course, to the recognized exceptions), therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.

As the court expressly abstains from deciding whether the judgment is impeachable on the ground of fraud, I refrain from any observations on that branch of the case.

235] *Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Jackson** concur in this dissent.

SAMUEL J. RITCHIE, *Plff. in Err.*,
v.
JAMES B. McMULLEN ET AL.

(See S. C. Reporter's ed. 235-243.)

Competency of court—authority of attorney—voluntary appearance—general averments—impeaching foreign judgment—defense of same.

1. An allegation in a complaint that a court is a duly and lawfully constituted court of record, having jurisdiction over all civil matters, and an admission in the answer that the suit was brought in that court, establish the competency of the court.
2. Where an answer expressly admits that certain attorneys entered, or undertook to enter, the appearance of defendant, and does not allege that they were not authorized, it will be taken that they were authorized to do so.
3. Where the answer in one action shows that defendant appeared and answered in another action, and it is not alleged that he did so under compulsion, he will be taken to have voluntarily submitted himself to the jurisdiction of the court.
4. General averments that a judgment is irregular and void and entered without any jurisdiction by the court to enter it on the facts and pleadings, are averments only of legal conclusions.
5. To warrant the impeaching of a foreign judgment because procured by fraud, fraud must be distinctly alleged and charged.
6. In an action upon a Canadian judgment, an answer not denying the court's jurisdiction of the cause or of the defendant, nor alleging fraud in procuring it, or other special ground for not allowing it full effect, but setting up the same defenses which were pleaded and might have been tried in the foreign court, and attempting to reopen and try anew the whole merits, cannot be allowed, since, by the law of England, prevailing in Canada, a judgment of an American court, under like circumstances, would be allowed full and conclusive effect.

[No. 15.]

Argued November 10, 14, 1893. Decided June 3, 1895.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio, to review a judgment sustaining a demurrer, and in favor of James B. McMullen *et al.*, plaintiffs, against Samuel J. Ritchie, defendant, for the amount of a foreign judgment rendered in the province of Ontario and dominion of Canada. *Affirmed.*

See same case below, 41 Fed. Rep. 502.

Statement by *Mr. Justice* **Gray:**

This was an action brought September 21, 1888, in the circuit court of the United States for the northern district of Ohio, by James B. McMullen, a citizen of the state of Illinois, and George W. McMullen, a citizen of the province of Ontario in the Dominion of Canada, against Samuel J. Ritchie, a citizen of the state of Ohio, upon a judgment for the *sum [236 of $238,000 recovered by the plaintiffs against the defendant on February 26, 1888, in the queen's bench division of the high court of justice for the province of Ontario.

The petition alleged that by a contract in writing, dated January 18, 1886, the plaintiffs, being the owners of 210 first-mortgage bonds of the Central Ontario Railway, a corporation of the province of Ontario, for $1,000 each, and of certain coupons thereof, amounting to the sum of $71,250, agreed to sell, and the defendant agreed to purchase, those bonds and coupons for the price of $210,000 of the fully paid-up stock of the Canadian Copper Company, a corporation of the state of Ohio; that on the same day, in part performance of the contract, the defendant accepted five bills of exchange for $5,000 each, drawn by one of the plaintiffs, payable to the other plaintiff's order, at the Bank of Montreal at Picton in the province of Ontario, on July 1, 1886, with an indorsement thereon that the five bonds of the Central Ontario Railway attached to the bills were to be delivered to the defendant upon his paying the acceptances; and it was agreed that the payment by the defendant of those bills should be considered as payment of a like sum upon the contract, and the delivery by the plaintiff of the bonds attached to the bills should be considered as a delivery of so many bonds under the contract.

The petition further alleged that before Oc-

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tober 8, 1887, all things necessary to entitle the plaintiff to the performance of the contract had happened, and the plaintiffs were ready to perform it on their part, and the defendant neglected and refused to perform it on his part; and that on that day the plaintiff commenced an action in the queen's bench division of the high court of justice for Ontario, "a duly and lawfully constituted court of record, having jurisdiction over all civil and criminal matters in and for that part of the Dominion of Canada called the province of Ontario," and caused a writ of summons to be personally served upon the defendant on November 8, 1887; and that on November 28, 1887, the defendant "duly entered his appearance in said action in said court;" that that action was brought upon the contract aforesaid, and that the plaintiffs, in 237] their statement of claim, *"duly delivered to said defendant or his duly constituted solicitors and attorneys, in accordance with the laws of said province of Ontario," prayed for specific performance of the contract, or for damages for the breach thereof.

The petition further alleged that in that action, on November 28, 1887, the defendant, in accordance with those laws, delivered to the plaintiffs his answer, denying the allegations of the plaintiffs' claim, and averring that, before the making of the contract aforesaid, the plaintiffs jointly and the defendant were each the owners of a large number of the bonds of the Central Ontario Railway, and agreed, in order the better to effect a sale of all the bonds, that the plaintiffs' bonds should be assigned to the defendant, in order to enable him to deal with them as the apparent owner, accounting to the plaintiffs for their share of the proceeds; that the contract aforesaid was executed in order to carry out that understanding, and that, if it purported to be an absolute sale to him of the plaintiffs' bonds for a certain sum to be paid by him, it did not faithfully express the agreement between the parties, and should be reformed; that it was no part of the agreement that he should pay the plaintiffs any money in respect of the assignment until he had sold the bonds and received the proceeds; that the defendant's acceptances were given solely for the plaintiffs' accommodation; and that the defendant had not sold any of the bonds, although he had used his best endeavors to do so.

The petition further alleged that on December 18, 1887, issue was joined upon that answer; that on February 29, 1888, that action came on for trial in said court, and judgment was rendered that the plaintiffs recover of the defendant the sum of $238,000 and costs; that the judgment was unreversed and unsatisfied, in whole or in part; and that, by reason of the premises, the defendant became indebted to the plaintiffs in that sum, with interest, and, although payment had been demanded, had not paid the same or any part thereof.

To this action on the judgment, the defendant filed an answer containing the following statements:

The defendant "admits that on January 13, 238]1886, he entered *into a contract in writing with the plaintiffs"—a copy of which was made part of the answer, showing that it was a contract of sale and purchase, as alleged in the petition, and that the bonds and coupons were to be delivered, and the price paid, at the Bank of Montreal at Picton. "And he denies that he entered into any other contract in writing with them upon any subject or touching any matter in contention in this action.

"He admits that an action was commenced against him in the province of Ontario, Canada, for the general purpose stated in the petition, and that service of a summons was in form made upon him in Summit county, Ohio, and that certain attorneys entered, or undertook to enter, the appearance of this defendant in said action.

"He admits that a formal, but an irregular and void, judgment was entered up against him in said court on or about the 29th day of February, 1888, which judgment was entered without his knowledge and in his absence, and without any hearing whatever.

"And this defendant denies each and every other fact, statement, and allegation in said petition.

"And for a further defense this defendant alleges that the said contract entered into between the parties was entered into for the purposes stated in his answer in said original action in the province of Ontario, and for no other purpose; that the contract was altogether an accommodation contract, made between the parties with the full understanding and agreement that it was never to be performed between them; that it was made for the accommodation and convenience of the plaintiffs, to enable them to make use of the bonds described in the petition, and to aid them in the raising of money thereon.

"And this defendant further alleges that the said plaintiffs did not, at the time stated in the petition, nor at any other time, ever undertake to or in fact perform, said contract upon their part, or any part thereof. They never at any time demanded performance upon the part of this defendant of said contract, unless the bringing of said action was a demand of such performance. They never, at any time, tendered the bonds *or coupons in the contract [239 and in the petition mentioned to this defendant, and they never delivered any of the said bonds to this defendant, nor did they ever make delivery nor attempt to make delivery of said bonds in accordance with the terms of said written contract, the said plaintiffs well knowing at all times what the real purpose of said contract was, and that the same was not to be performed upon the part either of the plaintiffs or of this defendant.

"This defendant says that he was not present at the time that said pretended judgment was rendered; but he states the fact to be that there were no facts existing or presented to the court which justified such judgment; that no bonds nor coupons were brought into court for delivery to this defendant, nor are any bonds or coupons upon deposit in the office of the clerk of said court, or in any other depositary, to be delivered to the defendant upon the performance of said contract upon his part, nor is it in the power of the said plaintiffs, or either of them, to make such delivery."

The defendant further alleges that, if he were compelled to pay the judgment, he would be compelled to pay it without any consider-

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ation whatever; that by the wrongful act of the plaintiffs he was compelled to pay three bills of exchange of $5,000 each, which the plaintiffs had delivered to bona fide purchasers; that he never received but ten of the bonds; that the conditions of the contract were dependent conditions; and that the plaintiffs had not performed their part of the contract.

The defendant also "denies that any hearing occurred before said court;" and "denies that there was any showing made by the plaintiffs of their readiness or their ability to perform their contract; but says that said judgment was irregular and without evidence, without performance upon the part of the plaintiffs, entered up against him in his absence, without his knowledge, and without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action."

The plaintiffs demurred to the answer, "because the same does not state facts sufficient to 240 constitute a defense." The *circuit court sustained the demurrer, and rendered judgment for the plaintiffs for the sum sued for, with interest and costs. 41 Fed. Rep. 502. The defendant sued out this writ of error.

Messrs. **Jeremiah M. Wilson** and **Samuel Shellabarger** for plaintiff in error.

Mr. **Samuel E. Williamson** for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

The judgment of the Canadian court is, beyond all doubt, sufficient to support this action, unless it is successfully impeached. Testing the answer in this case by the rules laid down in *Hilton* v. *Guyot*, just decided, no adequate ground for impeaching that judgment is shown.

Upon this record, the queen's bench division of the high court of justice of the province of Ontario must be taken to have been a competent court, so far as the subject-matter or cause of action was concerned, to entertain jurisdiction of the action brought before it by the plaintiffs against the defendant. The petition in the present case alleges that the plaintiffs brought in that court, described as "a duly and lawfully constituted court of record, having jurisdiction over all civil matters" in and for the province of Ontario, an action upon a certain contract in writing between the parties. The defendant, in his answer to this petition, expressly admits that "an action was commenced against him in the province of Ontario, Canada, for the general purpose stated in the petition." The competency of the Canadian court must therefore be deemed to be admitted, and, indeed, was hardly denied at the bar.

Giving to the answer the construction, most favorable to the defendant, of setting up two distinct and independent defenses separated by the words, "And for a further defense," there is nothing in it to show that the Canadian court had not jurisdiction of the person of the defendant. The first part of the answer expressly admits that "certain attorneys entered, 241 *or undertook to enter, the appearance of this defendant in said action." As it does not allege that the attorneys were not authorized to enter the defendant's appearance in that action, they must be taken to have been authorized by him to do so. *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 830 [6: 204, 226]; *Hill* v. *Mendenhall*, 88 U. S. 21 Wall. 453 [22: 616]; *Molony* v. *Gibbons*, 2 Campb. 502. The second part of the answer describes the defense, now undertaken to be made upon the merits of the case, as the one "stated in his answer in said original action in the province of Ontario," thus clearly showing that he had not only appeared, but answered in that action. It is nowhere alleged that he appeared or answered in that court under compulsion, or for any purpose except to contest his personal liability. He must therefore be taken to have voluntarily submitted himself to the jurisdiction of the court.

The defendant, indeed, in the first part of his answer, alleges that the "judgment was entered without his knowledge and in his absence, and without any hearing whatever;" and, likewise, in the second part of his answer, "says that he was not present at the time that said pretended judgment was rendered," and "denies that any hearing occurred before said court," and "says that said judgment was irregular and without evidence," and "entered up against him in his absence, and without his knowledge." But, as he had once submitted himself to the jurisdiction of the court, all these allegations and denials are quite consistent with the position taken by the plaintiffs at the argument here, that the defendant at the time appointed for the hearing failed to appear and made default, and therefore no hearing or evidence was necessary to entitle the court to proceed to judgment.

The general averments, in the first part of the answer, that the judgment was "an irregular and void judgment," and, in the second part, that "said judgment was irregular," and "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action," are but averments of legal conclusions, and wholly insufficient to impeach the judgment without specifying the grounds upon which it is supposed to be *irregular and 242 void, or without jurisdiction or authority to enter it. *Cowan* v. *Braidwood*, 1 Man. & G. 882, 2 Scott, N. R. 138.

To warrant the impeaching of a foreign judgment because procured by fraud, fraud must be distinctly alleged and charged. *White* v. *Hall*, 12 Ves. Jr. 321; *Wallingford* v. *Mutual Society*, L. R. 5 App. Cas. 685, 697, 701; *Ambler* v. *Choteau*, 107 U. S. 586, 591 [27: 322, 324]. This answer does not even contain a general charge that the judgment was procured by fraud, or any equivalent allegation. And the only matters specified, from which fraud is sought to be inferred, are those already considered, which have no tendency to prove it; and the knowledge which the plaintiffs had of the real purpose of the contract, which is referred to, not as a ground for charging fraud in procuring the judgment, but only as incidental to and in explanation of the allegation that the plaintiffs never tendered, or delivered, or attempted to deliver, any bonds to the defendant, in accordance with the written contract. To treat the loose and imperfect allegations of

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this answer as duly setting up a defense of fraud would be inconsistent with all precedent, and would ignore the duty of giving the other party notice of the defenses which he must be prepared to meet.

By the law of England, prevailing in Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect. *Scott* v. *Pilkington*, 2 Best & S. 11; *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. Div. 295, 307; *Vadala* v. *Lawes*, L. R. 25 Q. B. Div. 310, 316; *Nouvion* v. *Freeman*, L. R. 15 App. Cas. 1, 10; *Fowler* v. *Vail*, 27 U. C. C. P. 417, 4 Ont. App. Rep. 267.

The defenses set up in the answer to this action upon the Canadian judgment reduce themselves to an attempt, without any sufficient allegation of want of jurisdiction of the cause or of the defendant, or of fraud in procuring that judgment, or of any other special ground for not allowing the judgment full effect, but upon general allegations setting up the same matters of defense which were pleaded and might have been tried in the foreign court, to reopen and try anew the whole merits of the original claim in an action upon *the [243 judgment. This, for the reasons stated in *Hilton* v. *Guyot*, *ante*, 95, cannot be allowed.

Upon principle, therefore, as well as upon authority, comity requires that the judgment sued on should be held conclusive of the matter adjudged.

Judgment affirmed.

Mr. Chief Justice **Fuller** concurring:

Mr. Justice **Harlan**, *Mr. Justice* **Brewer**, and myself concur in the judgment in this case, but not on all the grounds stated in the opinion of the court. Our views on the general subject are indicated in the dissenting opinion in *Hilton* v. *Guyot*, *ante*, 95.

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

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FOLLOWING ARE MEMORANDA

OF

ALL CASES DISPOSED OF AT OCTOBER TERM, 1894,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

TENTH RULE.

THE CLEVELAND FENCE CO., *Appt.*, *v.* THE INDIANAPOLIS FENCE CO. *et al.* [No. 32.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. Augustus L. Mason for appellant. *Mr. Chester Bradford* for appellees.

October 11, 1894. Dismissed with costs, pursuant to the 10th Rule.

ROLAND H. SMITH *et al.*, *Appts.*, *v.* THE PITTSBURG GAS CO. [No. 42.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Mr. D. F. Patterson for appellants. *Mr. W. Bakewell* for appellee.

October 12, 1894. Dismissed with costs, pursuant to the 10th Rule.

NICHOLAS MAZARAKOS, *Plff. in Err.*, *v.* THE UNITED STATES. [No. 569.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Woodbury Blair for plaintiff in error. *The Atty. Gen.* for defendant in error.

October 23, 1894. Dismissed pursuant to the 10th Rule.

H. G. YOUNG *et al.*, *Appts.*, *v.* H. L. FOX *et al.* [No. 68.]

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Mr. Henry De Witt for appellants. *Mr. Jeff. Chandler* for appellees.

November 7, 1894. Dismissed with costs, pursuant to the 10th Rule.

GEORGE S. WHEELER, *Plff. in Err.*, *v.* WM. AUGUSTUS WHITE. [No. 71.]

In Error to the Supreme Court of the state of New York.

Mr. James Stikeman for plaintiff in error. No counsel entered for defendant in error.

November 8, 1894. Dismissed with costs, pursuant to the 10th Rule.

GEORGE S. WHEELER, executor, *Plff. in Err.*, *v.* LUCY MARIA TERREL. [No. 72.]

In Error to the Supreme Court of the state of New York.

Mr. James Stikeman for plaintiff in error. No counsel entered for defendant in error.

November 9, 1894. Dismissed with costs, pursuant to the 10th Rule.

J. J. MALLAN *et al.*, *Plffs. in Err.*, *v.* JOHN W. BRANSFORD, treasurer, etc. [No. 79.]

In Error to the Supreme Court of Appeals of the state of Virginia.

Mr. W. W. Larkin for plaintiffs in error. No counsel entered for defendant in error.

November 12, 1894. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM H. JONES, *Plff. in Err.*, *v.* THE COMMONWEALTH OF VIRGINIA. [No. 78.]

In Error to the Supreme Court of Appeals of the state of Virginia.

Mr. W. W. Larkin for plaintiff in error. *Mr. R. Taylor Scott* for defendant in error.

November 12, 1894. Dismissed with costs, pursuant to the 10th Rule.

CHARLES SCHEELE, *Appt.*, *v.* JEREMIAH LORDAN, chief of police, etc. [No. 80.]

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Mr. J. M. Burroughs for appellant. No counsel entered for appellee.

November 12, 1894. Dismissed with costs, pursuant to the 10th Rule.

CHARLES A. MILLER, treasurer, etc., *Plff. in Err.*, *v.* THE WESTERN UNION TELEGRAPH CO. [No. 88.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. Thomas McDougall for plaintiff in error. *Mr. Lawrence Maxwell, Jr.*, for defendant in error.

November 14, 1894. Dismissed with costs, pursuant to the 10th Rule.

J. J. DILLARD, *Plff. in Err.*, *v.* E. S. MOORMAN, treasurer, etc. [No. 96.]

In Error to the Corporation Court of Lynchburg, Va.

Mr. W. W. Larkin for plaintiff in error. No counsel entered for defendant in error.

November 21, 1894. Dismissed with costs, pursuant to the 10th Rule.

MAYER HALFF *et al.*, *Appts.*, *v.* JOHN W. PHILLIPS *et al.* [No. 98.]

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Mr. Rufus H. Thayer for appellants. *Messrs. Wm. Allen Butler, Adrian H. Joline,* and *Gist Blair* for appellees.

November 22, 1894. Dismissed with costs, pursuant to the 10th Rule.

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THE WORSWICK MANUFACTURING CO. *et al.*, *Appts.*, *v.* KANSAS CITY, and GEORGE C. HALE. [No. 106.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Messrs. M. D. Leggett, L. L. Leggett and *Albert E. Lynch* for appellants. *Messrs. F. F. Rozzelle* and *Jos. R. Edson* for appellees.

December 7, 1894. Dismissed with costs, pursuant to the 10th Rule.

DANIEL BENTON, *alias* WILLIAM NEWBY, *Plff. in Err.*, *v.* THE UNITED STATES. [No. 698.]

In Error to the District Court of the United States for the Southern District of Illinois.

Mr. James McCartney for plaintiff in error. *The Atty. Gen.* for defendant in error.

December 10, 1894. Dismissed, pursuant to the 10th Rule.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON *et al.*, *Appts.*, *v.* THE METROPOLITAN TRUST COMPANY OF NEW YORK *et al.* [No. 127.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Messrs. W. H. Rossington, C. B. Smith, and *E. J. Dallas* for appellants. *Mr. M. A. Low* for appellees.

December 14, 1894. Dismissed with costs, pursuant to the 10th Rule.

HUGH YOUNG *et al. Appts.*, *v.* EMANUEL FOERSTER. [No. 134.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Edwin H. Brown for appellants. *Mr. A. V. Briesen* for appellee.

December 17, 1894. Dismissed with costs, pursuant to the 10th Rule.

JEROME F. MANNING, *Appt.*, *v.* IRVINE G. MCLARREN, as special administrator, etc. [No. 62.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. Jerome F. Manning, in propria persona. Mr. Jos. B. Warner for appellee.

January 9, 1895. Dismissed with costs, pursuant to the 10th Rule.

THE HAT SWEAT MANUFACTURING CO., *Appt.*, *v.* THE DAVIS SEWING MACHINE CO., *et al.* [No. 145.]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Mr. John R. Bennett for appellant. No counsel for appellees.

January 11, 1895. Dismissed with costs, pursuant to the 10th Rule.

THE GREENWOOD DISTRICT OF SEBASTIAN COUNTY, *Plff. in Err.*, *v.* THE MISSOURI & ARKANSAS MINING & LUMBER CO. [No. 147.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Mr. John H. Rogers for plaintiff in error. *Mr. E. D. Kenna* for defendant in error.

January 11, 1895. Dismissed with costs, pursuant to the 10th Rule.

GEORGE A. GINDELE *et al.*, *Plffs. in Err.*, *v.* JOHN CORRIGAN. [No. 157.]

In Error to the Supreme Court of the State of Illinois.

Mr. C. E. Kremer for plaintiffs in error. *Mr. H. T. Gilbert* for defendant in error.

January 14, 1895. Dismissed with costs, pursuant to the 10th Rule.

THE INLAND & COASTWISE TRANSPORTATION CO. OF BALTIMORE *et al.*, *Appts.*, *v.* JOSEPH CORNELL *et al.* [No. 159.]

Appeal from the Supreme Court of the District of Columbia.

Mr. W. Willoughby for appellants. *Mr. J. A. Hyland* for appellees.

January 15, 1895. Dismissed with costs, pursuant to the 10th Rule.

THOMAS MADDOCK, *Appt.*, *v.* JONATHAN COXON *et al.* [No. 163.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. F. C. Lowthorp for appellant. *Mr. W. B. Preble, Jr.*, for appellee.

January 16, 1895. Dismissed with costs, pursuant to the 10th Rule.

JOHN A. BENTLEY, *Appt.*, *v.* THE UNITED STATES. [No. 184.]

Appeal from the Court of Claims.

Mr. A. G. Safford for appellant. *The Atty. Gen.* for appellee.

January 24, 1895. Dismissed with costs, pursuant to the 10th Rule.

ROBERT HITCHCOCK *et al.*, *Appts.*, *v.* THE WANZER LAMP CO. *et al.* [No. 177.]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Mr. Anthony Pollok for appellants. *Mr. E. H. Brown* for appellees.

January 24, 1895. Dismissed with costs, pursuant to the 10th Rule.

THOMAS DEVLIN *Appt.*, *v.* WILLIAM HEISE *et al.* [No. 187.]

Appeal from the Circuit Court of the United States for the District of Maryland.

Mr. Benjamin Price for appellant. *Messrs. W. B. H. Dorse* and *John R. Bennett* for appellees.

January 25, 1895. Dismissed with costs, pursuant to the 10th Rule.

THE DUBUQUE & SIOUX CITY RAILROAD CO. *et al.*, *Plffs. in Err.*, *v.* THOMAS SNELL. [No. 201.]

In Error to the Supreme Court of the State of Iowa.

Messrs. E. S. Bailey and *Theo. Hawley* for plaintiffs in error. No counsel for defendant in error.

January 28, 1895. Dismissed with costs, pursuant to the 10th Rule.

HERMAN ROYER, *Plff. in Err.*, *v.* THE SHULTZ BELTING CO. [No. 213.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Mr. J. O. Broadhead for plaintiff in error. *Mr. C. H. Krum* for defendant in error.

January 29, 1895. Dismissed with costs, pursuant to the 10th Rule.

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THE L. E. WATERMAN CO., *Appt.*, *v.* CHARLES B WEBSTER *et al.* [No. 206.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. W. S. Logan for appellant. *Mr. A. V. Briesen* for appellees.

January 29, 1895. Dismissed with costs, pursuant to the 10th Rule.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON *et al.*, *Appts.*, *v.* THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK *et al.* [No. 231.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Messrs. W. H. Rossington, C. B. Smith and *E. J. Dallas* for appellants. No counsel for appellees.

March 25, 1895. Dismissed with costs, pursuant to the 10th Rule.

DIEFENTHAL & SALOMON, *Appts.*, *v.* THE HAMBURG-AMERICKANISCHER PACKETFAHRT AKTIEN GESELLSHAFT. [No. 237.]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Mr. J. R. Beckwith for appellants. No counsel for appellee.

March 26, 1895. Dismissed with costs, pursuant to the 10th Rule.

EDWIN T. WILLIAMS *et al.*, *Appts.*, *v.* THE PASSUMPSIC SAVINGS BANK. [No. 242.]

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Mr. H. Bisbee for appellants. No counsel for appellee.

March 27, 1895. Dismissed with costs, pursuant to the 10th Rule.

J. W. SEXTON *et al.*, *Appts.*, *v.* HENRY JONES *et al.* [No. 246.]

Appeal from the Circuit Court of the United States for the District of Oregon.

Mr. Frank V. Drake for appellants. No counsel for appellees.

March 28, 1895. Dismissed with costs, pursuant to the 10th Rule.

W. D. KENNER, *Appt.*, *v.* STEPHEN BITELY. [No. 279.]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Mr. John A. Buchanan for appellant. No counsel for appellee.

April 8, 1895. Dismissed with costs, pursuant to the 10th Rule.

E. B. TREDWAY, *Plff. in Err.*, *v.* WILLIAM RILEY. [No. 286.]

In Error to the Supreme Court of the state of Nebraska.

Messrs. O. C. Tredway and *Wm. E. Gantt* for plaintiff in error. *Mr. W. L. Joy* for defendant in error.

April 8, 1895. Dismissed with costs, pursuant to the 10th Rule.

THE OAKLAND ELECTRIC LIGHT & MOTOR CO. *Plff. in Err.*, *v.* NATHANIEL S. KEITH. [No. 287.]

In Error to the Circuit Court of the United States for the Northern District of California.

Mr. M. A. Wheaton for plaintiff in error. *Messrs. M. M. Estee, W. W. Dudley, L. T. Michener* and *J. H. Miller* for defendant in error.

April 9, 1895. Dismissed with costs, pursuant to the 10th Rule.

CLEMENT T. HYDE *et al.*, *Appts.*, *v.* ANDREW HOGUE *et al.* [No. 288.]

Appeal from Circuit Court of the United States for the District of West Virginia.

Mr. T. B. Swann for appellants. *Mr. J. F. Brown* for appellees.

April 9, 1895. Dismissed with costs, pursuant to the 10th Rule.

MARIANO BARELA, *Appt.*, *v.* GUADALUPE S. DE GARCIA Y PEREA. [No. 290.]

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. F. W. Clancy for appellant. *Mr. S. B. Newcomb* for appellee.

April 10, 1895. Dismissed with costs, pursuant to the 10th Rule.

M. H. MEEKS, *Appt.*, *v.* CHRISTINA SHALL *et al.* [No. 294.]

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

Mr. J. M. Head for appellant. No counsel for appellees.

April 11, 1895. Dismissed with costs, pursuant to the 10th Rule.

GEORGE S. WHEELER *et.al.*, *Plffs. in Err.*, *v.* CATHARINE MALLON. [No. 302.]

In error to the city court of Brooklyn in the state of New York.

Mr. W. E. Osborne for plaintiffs in error. *Mr. Louis W. Frost* for defendant in error.

April 15, 1895. Dismissed with costs, pursuant to the 10th Rule.

EDWARD S. RITCHIE, *Appt.*, *v.* GEORGE W. MERRILL *et al.* [No. 315.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. C. A. Peabody and *C. H. Drew* for appellant. No appearance for appellees.

April 23, 1895. Dismissed with costs, pursuant to the 10th Rule.

JOHN BRUCE THOMPSON, *Plff. in Err.* *v.* THE UNITED STATES. [No. 317.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Adolph L. Sanger for plaintiff in error. *The Atty. Gen.* for defendant in error.

April 24, 1895. Dismissed with costs, pursuant to the 10th Rule.

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ROBERT J. CHESTER *et al.*, *Plffs. in Err.*, *v.* J. H. AND B. T. HILLSMAN *et al.* [No. 329.]
In Error to the Supreme Court of the State of Tennessee.
Mr. J. B. Heiskell for plaintiffs in error. No counsel for defendants in error.
April 26, 1895. Dismissed with costs, pursuant to the 10th Rule.

PATRICK MCALEER *et al.*, *Plffs. in Err.*, *v.* ALICE S. HILL, Executrix, etc. [No. 331.]
In Error to the Supreme Court of the state of Washington.
Messrs. M. D. Brainard, C. K. Jenner and *Louis Henry Legg* for plaintiffs in error. *Mr. J. J. Darlington* for defendant in error.
April 29, 1895. Dismissed with costs, pursuant to the 10th Rule.

JOHN S. STANTON *et al.*, *Appts.*, *v.* THE UNION TRUST CO. OF NEW YORK *et al.* [No. 335.]
Appeal from the Circuit Court of the United States for the District of Kansas.
Mr. Lucien Birdseye for appellants. No counsel for appellees.
April 30, 1895. Dismissed with costs, pursuant to the 10th Rule.

CHARLES MCSORLEY *et al.*, *Plffs. in Err.*, *v.* ALICE S. HILL, as Executrix, etc. [No. 340.]
In Error to the Supreme Court of the state of Washington.
Messrs. M. D. Brainard, C. K. Jenner and *Louis Henry Legg* for plaintiffs in error. *Mr. J. J. Darlington* for defendant in error.
April 30, 1895. Dismissed with costs, pursuant to the 10th Rule.

SIXTEENTH RULE.

EDWARD BYRNE, *Appt.*, *v.* THE UNITED STATES. [No. 12.]
Appeal from the Court of Claims.
Messrs. W. J. Moberly, P. B. Thompson and *Allan Rutherford* for appellant. *Assistant Attorney General Dodge* and *Chas. C. Binney* for appellee.
December 17, 1894. Judgment affirmed, pursuant to the 16th Rule.

THE COUNTY COURT OF ST. CHARLES COUNTY *et al.*, *Plffs. in Err.*, *v.* THE UNITED STATES *ex rel.* WILLIAM F. SHELLEY. [No. 183.]
In Error to the Circuit Court of the United States for the Eastern District of Missouri.
Mr. J. H. Overall for plaintiffs in error. *Messrs. W. B. Homer* and *E. B. Sherser* for defendant in error.
January 25, 1895. Dismissed with costs, pursuant to the 16th Rule, on motion of *Mr. W. B. Homer*, for the defendant in error.

THE EASTERN OREGON GOLD MINING CO., Limited, *Plff. in Err.*, *v.* C. S. MILLER. [No. 247.]
In Error to the Circuit Court of the United States for the District of Oregon.
Messrs. John Mullan and *Frank V. Drake* for plaintiff in error. *Messrs. John H. Mitchell* and *John M. Gearin* for defendant in error.
April 3, 1895. Dismissed with costs, pursuant to the 16th Rule, on motion of *Mr. J. H. Mitchell*, for the defendant in error.

NINETEENTH RULE.

GEORGE D. HAVEN, *Plff. in Err.*, *v.* ARCHIBALD BORLAND. [No. 23.]
In Error to the Circuit Court of the United States for the Northern District of California.
Mr. W. W. Cope for plaintiff in error. *Mr. G. W. Towle, Jr.*, for defendant in error.
October 10, 1894. Dismissed with costs, pursuant to the 19th Rule.

J. L. THOMSON, *et al.*, *Appts.*, *v.* THE SMITH & GRIGGS MANUFACTURING CO. *et al.* [No. 13.]
Appeal from the Circuit Court of the United States for the District of Connecticut.
Mr. George W. Hey for appellants. *Mr. C. E. Mitchell* for appellees.
October 10, 1894. Dismissed with costs, pursuant to the 19th Rule.

TWENTY-EIGHTH RULE.

JAMES H. RICE, *Appt.*, *v.* JOHN V. RICE *et al.* [No. 320.]
Appeal from the Circuit Court of the United States for the District of Delaware.
Messrs. Geo. H. Bates and *E. G. Bradford* for appellant. *Mr. Anthony Higgins* for appellees.
May 31, 1894. Dismissed, pursuant to 28th Rule.

THE COUNTY OF ALACHUA, *Appt.*, *v.* HERBERT MURPHY. [No. 148.]
Appeal from the Circuit Court of the United States for the Northern District of Florida.
Mr. S. Y. Finley for appellant. *Mr. W. W. Hampton* for appellee.
June 16, 1894. Dismissed, pursuant to 28th Rule.

OTTO W. ANDERSON, BY SWAN ANDERSON, his Guardian, *Plff. in Err.*, *v.* THE MINNEAPOLIS UNION ELEVATOR CO. [No. 117.]
In Error to the Circuit Court of the United States for the District of Minnesota.
Mr. Jas. N. Castle for plaintiff in error. *Mr. Ralph Whelan* for defendant in error.
August 14, 1894. Dismissed, pursuant to 28th Rule.

THE STEAMBOAT "CITY OF WORCESTER," *Appt.*, *v.* THOMAS A. SCOTT. [No. 185.]
Appeal from the Circuit Court of the United States for the District of Connecticut.
Mr. Harrington Putnam for appellant. *Mr. Walter C. Noyes* for appellee.
September 6, 1894. Dismissed, pursuant to 28th Rule.

LEONARD DANIELS, *Plff. in Err.*, *v.* THEODORE C. CASE *et al.*, Trustees, etc. [No. 211.]
In Error to the Circuit Court of the United States for the Western District of Missouri.
Mr. S. B. Ladd for plaintiff in error. *Mr. D. B. Holmes* for defendants in error.
September 10, 1894. Dismissed, pursuant to 28th Rule.

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MISCELLANEOUS.

THE NORTHERN PACIFIC RAILROAD CO., *Plff. in Err.*, v. HENRY BUSH. [No. 28.]
In Error to the Circuit Court of the United States for the Northern District of Illinois.
Messrs. George Willard, James McNaught, A. H. Garland and *J. C. Bullett, Jr.* for plaintiff in error. No counsel entered for defendant in error.
October 8, 1894. Submission set aside and writ of error dismissed with costs, on motion of *Mr. A. H. Garland*, for plaintiff in error.

THE SOUTHERN PACIFIC RAILROAD CO. *Appt.*, v. THE UNITED STATES. [No. 85.]
Appeal from the Circuit Court of the United States for the Northern District of California.
Messrs. Henry Beard, Chas. H. Tweed and *J. Hubley Ashton*, for appellant. *The Atty. Gen.* for appellee.
October 8, 1894. Dismissed, on motion of *Mr. J. Hubley Ashton*, for the appellant.

THE WORCESTER, NASHUA & ROCHESTER RAILROAD CO. *Plff. in Err.*, v. THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO. [No. 6.]
In Error to the Superior Court of the state of Massachusetts.
Mr. Richard Olney for plaintiff in error. *Mr. Samuel Wells* for defendant in error.
October 8, 1894. Dismissed, per stipulation.

THE WORCESTER, NASHUA & ROCHESTER RAILROAD CO. *Plff. in Err.*, v. ROBERT L. DAY *et al.* [No. 18.]
In Error to the Superior Court of the state of Massachusetts.
Mr. Richard Olney for plaintiff in error. *Messrs. W. A. Munroe* and *G. O. Shattuck* for defendants in error.
October 8, 1894. Dismissed, per stipulation.

THE WORCESTER, NASHUA & ROCHESTER RAILROAD CO., *Plff. in Err.*, v. THE INDIA MUTUAL INSURANCE CO. [No. 73.]
In error to the superior court of the state of Massachusetts.
Mr. Richard Olney for plaintiff in error. *Messrs. W. A. Munroe* and *G. O. Shattuck* for defendants in error.
October 8, 1894. Dismissed, per stipulation.

THE WORCESTER, NASHUA & ROCHESTER RAILROAD CO., *Plff. in Err.*, v. A. A. SWEET. [No. 74.]
In error to the superior court of the state of Massachusetts.
Mr. Richard Olney for defendant in error. *Messrs. W. A. Munroe* and *G. O. Shattuck* for defendants in error.
October 8, 1894. Dismissed, per stipulation.

GEORGE HAYES, *Appt.*, v. VALENTINE FISCHER. [No. 257.]
Appeal from the Circuit Court of the United States for the Southern District of New York.
Mr. Livingston Gifford for appellants. *Mr. Edmund Wetmore* for appellee.
October 8, 1894. Dismissed, per stipulation.

MARGARET W. ALLIS *et al.*, executors, *Plffs. in Err.*, v. THE STATE BANK OF CRETE, NEBRASKA, *et al.* [No. 249.]
In Error to the Circuit Court of the United States for the District of Nebraska.
Mr. T. M. Marquett for plaintiffs in error. *Mr. John L. Webster* for defendants in error.
October 8, 1894. Dismissed, per stipulation.

THE WORCESTER, NASHUA & ROCHESTER RAILROAD CO., *Plff. in Err.*, v. THE PEOPLE'S SAVINGS BANK. [No. 468.]
In Error to the Superior Court of the state of Massachusetts.
Mr. Richard Olney for plaintiff in error. *Mr. W. S. B. Hopkins* for defendant in error.
October 8, 1894. Dismissed, per stipulation.

ARTHUR KIRK, *Appt.*, v. JOHN E. DU BOIS. [No. 259.]
Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.
Mr. W. Bakewell for appellant. No counsel entered for appellee.
October 8, 1894. Dismissed with costs, on authority of counsel for appellant.

JOHN D. MAYFIELD *et al.*, *Plffs. in Err.*, v. M. T. MATTA. [No. 126.]
In Error to the Circuit Court of the United States for the Northern District of Texas.
Mr. E. H. Graham for plaintiffs in error. *Mr. Eugene Williams* for defendant in error.
October 9, 1894. Judgment reversed at cost of plaintiffs in error, per stipulation, and cause remanded to be proceeded in according to law.

THE AMERICAN PRESERVERS CO., *Appt.*, v. EDMUND R. NORRIS *et al.* [No. 254.]
Appeal from the Circuit Court of the United States for the Eastern District of Missouri.
Mr. C. H. Krum for appellant. *Mr. F. N. Judson* for appellees.
October 11, 1894. Dismissed with costs, on authority of counsel for appellant.

H. JULIAN ALLEN *et al.*, *Appts.*, v. G. LEWIS MERRILL *et al.* [No. 256.]
Appeal from the Circuit Court of the United States for the Northern District of New York.
Mr. C. H. Duell for appellants. No counsel entered for appellees.
October 11, 1894. Dismissed with costs, on motion of counsel for appellants.

THE WASHBURN & MOEN MANUFACTURING CO., *Appt.*, v. THE FREEMAN WIRE CO. [No. 23.]
Appeal from the Circuit Court of the United States for the Eastern District of Missouri.
Messrs. Henry Hitchcock, G. A. Finkelnburg and *John R. Bennett* for appellant. No counsel entered for appellee.
October 12, 1894. Dismissed with costs, on motion of *Mr. John R. Bennett*, for the appellant.

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JOHN A. WRIGHT, *Plff. in Err.* v. WILLIAM ROLLINS. [No. 493.]

In Error to the Supreme Court of the State of California.

Mr. Calderon Carlisle for plaintiff in error. *Mr. Thomas D. Riordan* for defendant in error.

October 15, 1894. Dismissed per stipulation, on motion of *Mr. Calderon Carlisle*, for the plaintiff in error.

CHARLES COLLINS BUCK *et al.*, *Plffs. in Err.*, v. THE STATE OF LOUISIANA. [No. 785.]

In Error to the Supreme Court of the State of Louisiana.

Mr. Duane E. Fox for plaintiffs in error. *Messrs. W. Hallett Phillips, M. J. Cunningham* and *H. J. Leovy* for defendant in error.

October 22, 1894. Dismissed, for the want of jurisdiction.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF KINGMAN, KANSAS, *Plff. in Err.*, v. CORNELL UNIVERSITY. [No. 724.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. George Gray for plaintiff in error. *Messrs. Wm. H. Rossington* and *Chas. Blood Smith* for defendant in error.

October 22, 1894. Denied.

THOMAS M. RICHARDSON *et al.* v. CLARINDA GREEN *et al.* [No. 823.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. C. A. Dolph and *Wm. A. Maury* for appellants. *Mr. Lewis L. McArthur* for appellees.

October 22, 1894. Denied.

GEORGE MASON, *Appt.*, v. HARVEY SPALDING. [No. 351.]

Appeal from the Supreme Court of the District of Columbia.

Mr. W. L. Cole for appellant. No counsel entered for appellee.

October 24, 1894. Dismissed with costs, on motion of *Mr. W. L. Cole* for the appellant.

THE NATIONAL CASH REGISTER CO., *Appt.*, v. THE BOSTON CASH INDICATOR & RECORDER CO. [No. 156.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Messrs. C. M. Peck and *Edward Rector* for appellant. *Mr. F. P. Fish* for appellee.

November 1, 1894. Dismissed with costs, on motion of counsel for appellant.

HARRIET S. SELLERS, *Appt.*, v. H. C. MILLER *et al.* [No. 252.]

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Messrs. F. Chas. Hume and *E. H. Graham* for appellant. No counsel entered for appellees.

November 6, 1894. Dismissed with costs, on motion of counsel for appellant.

ALFRED P. THOM, Receiver, etc., *Appt.*, v. JOHN B. PITTARD *et al.* [No. 814.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

No counsel for appellant. *Mr. Robert M. Hughes* for appellees.

November 12, 1894. Denied.

JULIUS UEBERWEG, *Appt.*, v. LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE. [No. 838.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Henry G. Ward for appellant. *Messrs. Robert D. Benedict* and *Edward K. Jones* for appellee.

November 12, 1894. Denied.

WILLIAM B. BURNET, *Appt.*, v. JOHN W JACOBUS, U. S. Marshal, etc. [No. 706.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. George Hoadly for appellant. *The Atty. Gen.* for appellee.

November 22, 1894. Dismissed with costs, on motion of *Mr. George Hoadly* for the appellant.

B. FRANK NEALLEY *et al.*, *Appts.*, v. THE STEAMSHIP "MICHIGAN." [No. 847.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Eugene P. Carver and *Robert H. Smith* for appellants. *Messrs. J. Wilson Leakin* and *Harrington Putnam* for appellee.

December 3, 1894. Denied.

GEORGE T. EMMONS *et al.*, *Plffs. in Err.*, v. THEODORE HALTERN. [No. 69.]

In Error to the District Court of the United States for the District of Alaska.

Messrs. D. A. McKnight and *M. B. Gerry* for plaintiffs in error. *Mr. H. B. Moulton* for defendant in error.

December 3, 1894. Judgment affirmed with costs, by a divided court.

F. M. BILLING *et al.*, Executors, etc., *Appts.*, v. JAMES N. GILMER. [No. 859.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

No counsel for appellants. *Mr. W. A. Gunter* for appellee.

December 10, 1894. Denied.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *Plff. in Err.*, v. S. P. LEEP. [No. 722.]

In Error to the Supreme Court of the State of Arkansas.

Messrs. John F. Dillon and *Winslow S. Pierce* for plaintiff in error. No counsel for defendant in error.

December 10, 1894. Dismissed with costs, on motion of *Mr. John F. Dillon*, for the plaintiff in error.

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THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* JENNIE L. GEIGER. [No. 108.]

In Error to the Supreme Court of the State of Texas.

Mr. John F. Dillon for plaintiff in error. *Mr. T. P. Young* for defendant in error.

December 11, 1894. Dismissed with costs, on motion of *Mr. John F. Dillon*, for the plaintiff in error.

GEORGE M. MACDONALD *et al.*, *Plffs. in Err.* *v.* THE UNITED STATES. [No. 849.]

Petition for writ of certiorari to United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Wm. H. Barnum for plaintiffs in error. No opposition.

December 12, 1894. Denied.

HENRY WINEMAN, JR., *Appt.*, *v.* THE STEAMER "IRON CHIEF," etc. [No. 864.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. H. C. Wisner for appellant. *Mr. Harvey D. Goulder* for appellees.

January 7, 1895. Denied.

JOEL B. ERHARDT, collector, etc., *Plff. in Err.*, *v.* JOSEPHINE W. WUPPERMAN *et al.* [No. 235.]

In Error to the Circuit Court of the United States for the Southern District of New York.

The Atty. Gen. for plaintiff in error. *Mr. Edward Hartley* for defendants in error.

January 7, 1895. Dismissed with costs, on motion of *Mr. Solicitor Gen. Maxwell*, for the plaintiff in error.

W. P. SAYWARD *et al.*, *Plffs. in Err.*, *v.* THOMAS NUNAN *et al.* [No. 881.]

In Error to the Supreme Court of the state of Washington.

Mr. Edward B. Whitney for defendants in error.

January 7, 1895. Docketed and dismissed with costs, on motion of *Mr. Edward B. Whitney*, for defendants in error.

JOHN H. LINCK, *Appt.*, *v.* SALT LAKE CITY *et al.* [No. 882.]

Appeal from the Supreme Court of the Territory of Utah.

January 10, 1895. Docketed and dismissed with costs, on motion of *Mr. J. L. Rawlins* for appellees.

THE CITY OF NEW ORLEANS, *Appt.*, *v.* LOUISVILLE & NASHVILLE RAILROAD CO. *et al.* [No. 38.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Messrs. Carleton Hunt and *E. A. O'Sullivan* for appellant. *Messrs. George Denegre* and *Walter D. Denegre* for appellees.

January 14, 1895. Decree affirmed with costs, for want of prosecution.

DAVID SCHREINER, administrator, etc., *Appt.*, *v.* JULIA S. SMITH *et al.* [No. 210.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Messrs. I. C. Sloan and *A. R. Bushnell* for appellant. *Mr. James L. High* for appellees.

January 16, 1895. Dismissed with costs, on authority of counsel for the appellant.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO., *Plff. in Err.*, *v.* ANDREW BROWN. [No. 202.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Messrs. J. A. Buchanan and *F. B. Jennings* for plaintiff in error. *Mr. F. H. Betts* for defendant in error.

January 17, 1895. Dismissed, per stipulation.

THE CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, *Plff. in Err.*, *v.* THE UNION INSURANCE CO. OF PHILADELPHIA. [No. 241.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Thomas H. Hubbard for plaintiff in error. *Mr. Joseph H. Choate* for defendant in error.

January 17, 1895. Dismissed, per stipulation.

THE UNITED STATES, *Appt.*, *v.* MERVIN B. CONVERSE. [No. 551.]

Appeal from the Court of Claims.

The Atty. Gen. for appellant. *Messrs. W. W. Dudley, L. T. Michener*, and *R. R. McMahon* for appellee.

January 21, 1895. Dismissed, on motion of *Mr. Solicitor Gen. Maxwell*, for the appellant.

THE UNITED STATES ON THE RELATION OF GEORGE G. MERRICK *et al.*, *Plffs. in Err.*, *v.* CHARLES FOSTER, Sec'y of the Treasury. [No. 407.]

In Error to the Supreme Court of the District of Columbia.

Mr. J. M. Wilson for plaintiffs in error. *The Atty. Gen.* for defendant in error.

January 24, 1895. Dismissed with costs, on motion of *Mr. J. M. Wilson*, for the plaintiffs in error.

GEORGE A. BARTLETT, *Appt.*, *v.* THE UNITED STATES. [No. 186.]

Appeal from the Court of Claims.

Mr. Robert A. Howard for appellant. *The Atty. Gen.* for appellee.

January 24, 1895. Dismissed, per stipulation.

R. G. HUSTON *et al.*, *Appts.*, *v.* THE LOOKOUT MOUNTAIN RAILROAD CO. *et al.* [No. 300.]

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Messrs. J. D. Brannan and *J. S. Pilcher* for appellants. No counsel for appellees.

January 24, 1895. Dismissed with costs, on authority of counsel for the appellants.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD CO., *Appt.*, *v.* WILLIAM R. MCKEEN. [No. 892.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Lawrence Maxwell, Jr., for appellant. *Messrs. W. H. H. Miller, F. Winter* and *John B. Elam* for appellee.

January 28, 1895. Denied.

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HARRIET TUTTLE DRAKE *et al.*, *Appts.*, *v.* RACHEL REGGEL *et al.* [No. 856.]

Appeal from Supreme Court of the Territory of Utah.

Messrs. J. G. Sutherland and *J. W. Judd* for appellants. No appearance for appellees.

January 28, 1895. Dismissed with costs, on authority of appellants.

THE UNITED STATES, *Appt.*, *v.* JOHN I. DAVENPORT. [No. 515.]

Appeal from the Court of Claims.

Messrs. Assistant Attorney General Dodge and *Felix Brannigan* for appellant. *Mr. R. R. McMahon* for appellee.

January 28, 1895. Judgment affirmed by a divided court.

THE ÆTNA LIFE INSURANCE CO., *Plff. in Err.*, *v.* THE COUNTY OF LYON, IN THE STATE OF IOWA. [No. 196.]

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Messrs. A. B. Cummins and *F. B. Daniels* for plaintiff in error. *Mr. N. T. Guernsey* for defendant in error.

February 4, 1895. Judgment affirmed with costs, by a divided court.

THE COUNTY COURT OF WAYNE COUNTY, *Plff. in Err.*, *v.* THE SOCIETY FOR SAVINGS. [No. 209.]

In Error to the Circuit Court of the United States for the District of West Virginia.

Mr. James F. Brown for plaintiff in error. *Messrs. H. C. Simms* and *F. B. Enslow* for defendant in error.

February 4, 1895. Judgment affirmed with costs and interest by a divided court.

ALONZO GERARD, *Appt.*, *v.* THE DIEBOLD SAFE & LOCK CO. [No. 843.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Patrick O'Farrell for appellant. No counsel for appellee.

February 4, 1895. Denied.

THE PACIFIC COAST STEAMSHIP CO., ETC., *Appt.*, *v.* THE UNITED STATES. [No. 123.]

Appeal from the Circuit Court of the United States for the District of Washington.

Messrs. Stephen M. White and *Artemas H. Holmes* for appellant. *The Attorney General* for appellee.

February 4, 1895. Dismissed, per stipulation, on motion of *Mr. Assistant Attorney General Conrad*, for the appellee.

JOEL PARKER WHITNEY *et al.*, *Appts.*, *v.* THE UNITED STATES. [No. 900.]

Appeal from the Court of Private Land Claims.

Mr. Assistant Attorney General Conrad for appellee.

February 4, 1895. Docketed and dismissed, on motion of *Mr. Assistant Attorney General Conrad*, for the appellee.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO., *Plff. in Err.*, *v.* LAURA F. RUSH. [No. 207.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Messrs. W. K. Cushing and *C. D. Hine* for plaintiff in error. *Mr. Thos. W. Sanderson* for defendant in error.

February 4, 1895. Dismissed with costs, per stipulation.

THE UNITED STATES, *Appt.*, *v.* LOUIS HUNING. [No. 827.]

Appeal from the Court of Private Land Claims.

The Attorney General for appellant. *Mr. Frank W. Clancy* for appellee.

March 4, 1895. Dismissed, on motion of *Mr. Solicitor General Conrad*, for the appellant.

JOHN J. JOHNSON, Trustee, *Plff. in Err.*, *v.* KATE VAN WYCK. [No. 929.]

In Error to the Court of Appeals of the District of Columbia.

Mr. Wm. F. Mattingly for defendant in error.

March 4, 1895. Docketed and dismissed with costs, on motion of *Mr. William F. Mattingly*, for the defendant in error.

JOHN H. TENNANT *et al.*, *Plffs. in Err.*, *v.* H. W. DUDLEY *et al.* [No. 93.]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Mr. E. H. Graham for plaintiffs in error. *Mr. Eugene Williams* for defendants in error.

March 4, 1895. Dismissed with costs, per stipulation.

THE SOUTHERN PACIFIC RAILROAD CO., *Appt.*, *v.* SAMUEL MCCUTCHEON. [No 115.]

Appeal from the Circuit Court of the United States for the Southern District of California.

Messrs. Henry Beard and *J. Hubley Ashton* for appellant. *Messrs. W. B. Wallace* and *J. H. Call* for appellee.

March 7, 1895. Dismissed with costs, on motion of *Mr. J. Hubley Ashton*, for appellant.

THE SOUTHERN PACIFIC RAILROAD CO., *Appt.*, *v.* JOSEPH R. GRAHAM *et al.* [No. 116.]

Appeal from the Circuit Court of the United States for the Southern District of California.

Messrs. Henry Beard and *J. Hubley Ashton* for appellant. *Messrs. W. B. Wallace* and *J. H. Call* for appellees.

March 7, 1895. Dismissed with costs, on motion of *Mr. J. Hubley Ashton*, for the appellant.

THE NATIONAL DREDGING CO. *Plff. in Err.*, *v.* THE STATE OF ALABAMA. [No. 522.]

In Error to the Supreme court of the State of Alabama.

Messrs. Gaylord B. Clark and *Anthony Higgins* for plaintiff in error. No counsel for defendant in error.

March 8, 1895. Dismissed with costs, on motion of counsel for plaintiff in error.

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CHARLES MORAN *et al.*, *Appts.* v. J. C. HAGERMAN, Administrator, etc., *et al.* [No. 909.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Mr. Wheeler H. Peckham for appellants. *Messrs. Horatio C. King, W. E. F. Deal* and *Edmund Tauzky* for appellees.
March 11, 1895. Denied.

ROBERT M. KING, *Appt.*, v. W. S. JACKSON, Sheriff, etc. [No. 334.]
Appeal from the Circuit Court of the United States for the Western District of Tennessee.
Mr. Don M. Dickinson for appellant. No counsel for appellee.
March 14, 1895. Dismissed (the cause having abated, owing to the death of appellant) on motion of *Mr. Don M. Dickinson*, for the appellant.

THE TEXAS & PACIFIC RAILWAY CO. *et al.* *Plffs. in Err.*, v. A. MCELROY. [No. 110.]
In Error to the Court of Appeals of the state of Texas.
Mr. John F. Dillon for plaintiffs in error. No counsel for defendant in error.
March 18, 1895. Dismissed with costs, on motion of *Mr. D. D. Duncan*, in behalf of counsel for the plaintiffs in error.

THE TEXAS & PACIFIC RAILWAY CO. *et al.* *Plffs. in Err.*, v. H. WILSON. [No. 111.]
In Error to the Court of Appeals of the state of Texas.
Mr. John F. Dillon for plaintiffs in error. No counsel for defendant in error.
March 18, 1895. Dismissed with costs, on motion of *Mr. D. D. Duncan*, in behalf of counsel for the plaintiffs in error.

CHARLES A. MORGAN, *Plff. in Err.*, v. THE STATE OF SOUTH DAKOTA. [No. 276.]
In error to the Supreme Court of the state of South Dakota.
Mr. Samuel Wagner for plaintiff in error. *Mr. Robert Dollard* for defendant in error.
March 25, 1895. Dismissed with costs, on motion of counsel for the plaintiff in error.

THOMAS F. LAWSON, *Plff. in Err.*, v. W. S. KELLY. [No. 397.]
In Error to the supreme court of the state of Texas.
Mr. Walter Gresham for plaintiff in error. *Mr. S. R. Fisher* for defendant in error.
March 25, 1895. Dismissed with costs, on authority of counsel for the plaintiff in error.

NATHAN MARCUS, *Plff. in Err.*, v. THE UNITED STATES. [No. 692]
In Error to the Circuit Court of the United States for the Southern District of New York.
Mr. Abram J. Rose for plaintiff in error. *The Atty. Gen.* for defendant in error.
March 28, 1895. Dismissed, per stipulation.

HAVEMEYER & ELDER SUGAR REFINING CO., *Plff. in Err.*, v. DANIEL MAGONE, Collector, etc. [No. 243].
In Error to the Circuit Court of the United States for the Southern District of New York.
Mr. Edwin B. Smith for plaintiff in error.
Mr. Asst. Atty. Gen. Whitney for defendant in error.
April 8, 1895. Judgment affirmed with costs, by a divided court.

ROBERT CHARLSON, *Plff. in Err.*, v. THE UNITED STATES. [No. 980.]
In Error to the District Court of the United States for the Northern District of Alabama.
April 8, 1895. Docketed and dismissed, on motion of *Mr. Solicitor General Conrad*, for the defendant in error.

ALEXANDER FRANKENTHAL *et al.*, *Plffs. in Err.*, v. W. SCOTT COOK. [No. 282]
In Error to the United States court for the Indian territory.
Mr. W. T. Hutchings for plaintiffs in error.
Mr. Frank P. Blair for defendant in error.
April 15, 1895. Judgment affirmed, with costs and interest, by a divided court.

CHARLES P. BARRETT, *Plff. in Err.*, v. THE UNITED STATES. [No. 988.]
In Error to the Circuit Court of the United States for the District of South Carolina.
April 15, 1895. Docketed and dismissed, on motion of *Mr. Solicitor General Conrad* for the defendant in error.

WILLIAM L. HUNTER, *Plff. in Err.*, v. THE UNITED STATES. [No. 989.]
In Error to the Circuit Court of the United States for the Northern District of Georgia.
April 15, 1895. Docketed and dismissed, on motion of *Mr. Solicitor General Conrad*, for the defendant in error.

JAMES T. CAMPBELL *et al.*, *Plffs. in Err.*, v. RICHARD T. CARROLL. [No. 882.]
In Error to the Supreme Court of the state of Missouri.
Mr. John W. Noble for plaintiffs in error. *Mr. J. B. Dennis* for defendant in error.
April 15, 1895. Dismissed with costs, on the authority of counsel for the plaintiffs in error.

THE FERRYBOAT "MONTCLAIR" ETC., *Appt.* v. THE EASTON & AMBOY RAILROAD CO. [No. 984.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Messrs. Geo. Bethune Adams and *Franklin A. Wilcox* for appellant. *Mr. W. W. Goodrich* for appellee.
April 22, 1895. Denied.

THE NEW YORK LIFE INSURANCE CO. *Plff. in Err.*, v. EUDORA V. SMITH, Administratrix, etc. [No. 964.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Mr. George W. Hubbell for plaintiff in error. No counsel for defendant in error.
April 22, 1895. Denied.

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MICHAEL FRANCIS MALOY, *Appt.*, v. HERMANN DUDEN. [No. 985.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. W. D. Davidge, W. McArthur and *D. M. Newberger* for appellant. *Mr. Ronald K. Brown* for appellees.

April 22, 1895. Denied.

WILLIAM W. ARMSTRONG, *Appt.*, v. THE UNITED STATES. [No. 268.]

Appeal from the Court of Claims.

Mr. Thos. C. Fletcher for appellant. *Mr. Asst. Atty. Gen. Dodge* for appellee.

April 22, 1895. Judgment affirmed, on the authority of *United States* v. *Fletcher*, 148 U. S. 84 [37: 378].

HIRAM BARNEY, Collector, etc., *Plff. in Err.*, v. JOSEPH H. WHITE *et al.* [No. 248].

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Asst. Atty. Gen. Whitney for plaintiff in error. *Messrs. S. F. Phillips* and *F. D. McKenney* for defendants in error.

April 22, 1895. Judgment affirmed for the sum of $1039.02, with interest thereon from March 24, 1883, until paid, and costs in said circuit court; each party to pay one half of the costs in this court.

LIPPMAN TOPLITZ *et al.*, *Plffs. in Err.* v. EDWIN A. MERRITT, Collector, etc. [No. 318.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. S. G. Clarke for plaintiffs in error. *The Atty. Gen.* for defendant in error.

April 22, 1895. Dismissed with costs, on authority of counsel for the plaintiffs in error, on motion of *Mr. Solicitor General Conrad*, for the defendant in error.

THE COUNTY OF GRATIOT, *Plff. in Err.*, v. HENRY M. AYLESWORTH. [No. 292.]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Mr. Charles J. Willett for plaintiff in error. *Mr. Thomas S. Jerome* for defendant in error.

April 22, 1895. Judgment affirmed with costs and interest, by a divided court.

D. E. WOOD *et al. Plffs. in Err.*, v. BACH, CORY & CO. [No. 309.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Messrs. C. H. Aldrich, P. V. Hoffman and *N. C. Sears* for plaintiffs in error. *Mr. R. A. Childs* for defendants in error.

April 29, 1895. Judgment affirmed with costs and interest, by a divided court.

STARLING TUCKER, *Plff. in Err.*, v. THE UNITED STATES. [No. 998.]

In Error to the District Court of the United States for the Eastern District of Texas.

April 29, 1895. Docketed and dismissed on motion of *Mr. Solicitor General Conrad* for the defendant in error.

THE NORTHERN PACIFIC RAILROAD CO. *Plff. in Err.*, v. GEORGE C. RAGSDALE. [No. 344.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Messrs. James McNaught and *W. J. Curtis* for plaintiff in error. *Mr. Moses E. Clapp* for defendant in error.

May 1, 1895. Dismissed with costs, on motion of *Mr. R. C. Garland*, for the plaintiff in error.

JAMES C. HAYS, Executor, etc., *Appt.*, v. MAHLON APGAR. [No. 332.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. D. M. Porter for appellant. *Mr. Gilbert Collins* for appellee.

May 3, 1895. Dismissed, each party to pay his own costs, per stipulation.

MARION COUNTY, TEXAS, *Plff. in Err.*, v. W. N. COLES & CO. [No. 992.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. A. H. Garland and *R. C. Garland* for plaintiff in error. *Mr. W. S. Herndon* for defendants in error.

May 6, 1895. Denied.

O. W. RASH, *Plff. in Err.*, v. JOHN W. S. FARLEY. [No. 325.]

In Error to the Court of Appeals of the State of Kentucky.

Mr. John H. Rogers for plaintiff in error. No counsel for defendant in error.

May 6, 1895. Judgment affirmed with costs, on the authority of *Emert v. Missouri*, No. 120 on the docket for the present term, 156 U. S. 296 [39: 430].

THE GULF, COLORADO & SANTA FÉ RAILWAY CO., *Plff. in Err.*, v. P. JOHNSON & SON. [No. 350.]

In Error to the County Court of Coleman County, Texas.

Messrs. A. T. Britton, A. B. Browne, Geo. R. Peck and *J. W. Terry* for plaintiff in error. No counsel for defendants in error.

May 6, 1895. Judgment reversed with costs, on the authority of the *Gulf, Colorado & Santa Fé Railway Company v. Hefley*, No. 255 on the docket for the present term, 158 U. S. 98 [39:910], and cause remanded for further proceedings not inconsistent with the opinion of the court in that case.

H. H. MYERS, *Appt.*, v. J. C. LEAGUE *et al.* [No. 996.]

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. R. R. Briggs for appellant. No opposition.

May 20, 1895. Denied.

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SHERMAN W. KNEVALS, Trustee, *Appt.*, *v.* THE FLORIDA CENTRAL & PENINSULAR RAILROAD CO. *et al.* [No. 1001.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. H. Bisbee, J. E. Padgett and *Edwin Forrest* for appellant. *Messrs. S. F. Phillips, F. D. McKenney* and *Julien Davies* for appellees.

May 20, 1895. Denied.

THE NATIONAL LIFE INSURANCE CO. OF MONTPELIER, VT., *Plff. in Err.*, *v.* THE BOARD OF EDUCATION OF THE CITY OF HURON, S. D. [No. 1005.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. N. T. Guernsey for plaintiff in error. *Mr. R. J. Wells* for defendant in error.

May 20, 1895. Denied.

THE GRAND TRUNK RAILWAY CO., *Plff. in Err.*, *v.* MARY E. TENNANT, Administratrix, etc. [No. 1009.]

Petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Almon A. Strout, Clarence A. Hight, Henry N. Rice and *Melville Church* for plaintiff in error. *Mr. Orville D. Baker* for defendant in error.

May 20, 1895. Denied.

CHARLES W. LEACH *et al.*, *Appts.*, *v.* THE WATERVALE MINING CO. OF CHICAGO. [No. 556.]

Appeal from the Supreme Court of the Territory of Arizona.

Messrs. A. T. Britton and *A. B. Browne* for appellants. No counsel for appellee.

May 20, 1895. Dismissed with costs, on motion of *Mr. A. B. Browne*, for the appellants.

THE ROYAL CLAY MANUFACTURING CO., *Plff. in Err.*, *v.* THE CHICAGO SEWER PIPE & COAL CO. [No. 672.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Messrs. S. S. Gregory, W. M. Booth, and *Jas. S. Harland* for plaintiff in error. No counsel for defendant in error.

May 20, 1895. Dismissed with costs, on authority of counsel for plaintiff in error.

THE UNITED STATES, *Appt.*, *v.* MERCK & CO. [No. 1032].

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Solicitor General Conrad, for appellant. No opposition.

June 3, 1895. Denied.

WALTER R. WIGGS, *Appt.*, *v.* THE SOUTHERN PACIFIC RAILROAD CO. [No. 1046.]

Appeal from the Circuit Court of the United States for the Northern District of California.

June 3, 1895. Docketed and dismissed with costs, on motion of *Mr. J. Hubley Ashton*, of counsel for the appellee.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1895.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

275] STATE OF INDIANA, *Complainant,*
v.
STATE OF KENTUCKY.

(See S. C. Reporter's ed. 275-278.)

Boundary between Indiana and Kentucky.

Appointment of commissioners to ascertain and run the boundary line between the states of Indiana and Kentucky.

[No. 2, Original.]

Submitted October 15, 1895. Decided October 21, 1895.

PETITION for the appointment of commissioners to run the boundary line between the states of Indiana and Kentucky. *Granted.*

This court, at its October term, 1889, gave judgment in the case of the disputed boundary line between the state of Indiana and the state of Kentucky (136 U. S. 479 [34: 329]). At the present term the parties moved for the appointment of commissioners to run the boundary line between said states, in accordance with the said judgment of this court, upon the following petition:—

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The plaintiff, the state of Indiana, and the defendant, the state of Kentucky, show to your honors that they have agreed upon and submit herewith the accompanying draft of an order in conformity to the opinion and order 276] of *the court herein, and move for an order in accordance therewith.

The State of Indiana,
By William A. Ketcham, its Attorney General.
The State of Kentucky,
By Richard H. Cunningham, its Solicitor.
Washington, D. C., October 15, 1895.

In the Supreme Court of the United States, October Term, 1895.

State of Indiana
v.
State of Kentucky. } Original, No. 2.

On the 15th day of October, 1895, comes the state of Indiana, by its attorney general, and also comes the state of Kentucky, by its solicitor, Richard H. Cunningham, and said parties advise and inform the court that, in accordance with the opinion and order hereinbefore entered in that behalf, they have agreed upon the following-named gentlemen to be suggested to this court as commissioners, as stated and set forth in said opinion and order, *viz.:* Gustavus V. Menzies, of Mount Vernon, Ind.; Gaston M. Alves, of Henderson, Ky., and Col. Amos Stickney, of the Engineer Corps of the United States Army; and the court, being fully advised in the premises, does now order and decree that the above-named Gustavus V. Menzies, Gaston M. Alves, and Amos Stickney be, and they are hereby, appointed commissioners to ascertain and run the boundary line between the said states of Indiana and Kentucky as designated in the said opinion of this court heretofore entered herein, and to report to this court with all reasonable despatch their doings in that behalf. It is further ordered by the court that duly certified copies of this order shall be forthwith issued by the clerk of this court, under his hand and seal, to each of the above named commissioners, and before entering upon the discharge of their duties as such commissioners they and *each of [277 them shall be and appear before either the clerk of this court or the clerk of the United States circuit court within and for either the district of Indiana, Kentucky, or Ohio, and take an oath faithfully to discharge the duties required of them as such commissioners, which oaths shall be transmitted to and filed with the clerk of this court and in this cause.

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Mr. **Wm. A. Ketcham,** Attorney General of the State of Indiana, for complainant.

Mr. **Richard H. Cunningham** for defendant.

Mr. Chief Justice **Fuller:**

This cause coming on, on the application of the state of Indiana by its attorney general and of the state of Kentucky by its solicitor, Richard H. Cunningham, for the appointment of commissioners herein, in accordance with the opinion, judgment, and decree hereinbefore filed and entered, and the court being advised and informed by said parties that they have agreed upon the following-named gentlemen to be suggested to this court for such appointment, *viz.:* Gustavus V. Menzies, of Mount Vernon, Indiana, Gaston M. Alves, of Henderson, Kentucky; and Col. Amos Stickney, of the Engineer Corps of the United States Army; and the court, being fully advised in the premises, does now order and decree that the above-named Gustavus V. Menzies, Gaston M. Alves, and Amos Stickney be, and they are hereby, appointed commissioners to ascertain and run the boundary line between the said states of Indiana and Kentucky as designated in the said opinion of this court heretofore filed and judgment and decree heretofore entered herein, and to report to this court with all reasonable despatch their doings in that behalf. It is further ordered by the court that duly certified copies of this order shall be forthwith issued by the clerk of this court, under his hand and the seal of the court, to each of the above-named commissioners, and before entering upon the discharge of their duties as such commissioners they, and each of them, shall be and appear before either the clerk of this court or the clerk of the United States circuit court within and for either the district of Indiana, Kentucky, or Ohio, and take an oath faithfully to discharge the duties required of them as such commissioners, which oaths shall be forthwith transmitted to and filed with the clerk of this court and in this cause.

CHARLES E. SIMMONS, Trustee, ET AL., *Appts.*,

v.

BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY

v.

CHARLES E. SIMMONS, Trustee.

(See S. C. Reporter's ed. 278-292.)

Decree in foreclosure action—right to redeem, when barred by laches.

1. In a foreclosure action, where, in the bill, there is a prayer that a junior mortgagee be decreed to redeem, and the priority of plaintiff's mortgage is established, and a sale is ordered declaring the debtor's right to redeem to be forever barred, a similar order barring the right of redemption of the junior mortgagee is not necessary. If he stands by while the sale is made and confirmed he waives his right to redeem.

2. Where a junior mortgagee is a defendant in a foreclosure action, and he acquiesces in the proceedings and manifests no intention to disturb the title of the purchasers at the foreclosure sale, until more than seven years have elapsed, during which large expenditures have been made by them and undoubtedly third persons have become interested on the faith of their title, his right to redeem cannot be enforced by reason of his laches.

NOTE.—*As to who is entitled to redeem from the lien of a mortgage,* see note to Noyes v. Hall, 24: 909.

As to strict foreclosure of mortgage, see note to Clark v. Reyburn, 19: 354.

[Nos. 11, 12.]

Argued November 1, 1894. Decided October 21, 1895.

APPEALS from a decree of the Circuit Court of the United States for the Southern District of Iowa in a cross suit in equity brought by Charles E. Simmons, as trustee, against the Burlington, Cedar Rapids & Northern Railway Company *et al.* The railway company appeals from so much of the decree as finds the cross-complainant entitled to redeem from a foreclosure sale, and as affirms the validity of certain bonds and holds the railway company bound to account; and the cross-complainant appeals from such portions thereof as find invalid some of the bonds set up in the cross-bill. *Reversed, and case remitted with directions to enter a decree in accordance with the opinion, etc.*

See same case below, 38 Fed. Rep. 682.

The facts are stated in the opinion.

Mr. **Charles A. Clark** for Simmons *et al.*

Messrs. **J. M. Woolworth** and *E. E. Cook* for Burlington, Cedar Rapids & Northern Railway Company.

Mr. William A. Abbott filed a brief for Mr. Henry Clews.

Mr. Justice **Shiras** delivered the opinion of the court:

The Burlington, Cedar Rapids & Minnesota Railway Company was a corporation organized under the laws of the state of Iowa, and, in pursuance of its granted powers, had, prior to the litigation which brings the case before us, constructed *a main line and three branches [279 known as "the Milwaukee Extension," "the Pacific Extension," and "the Muscatine Western." It had, at different times, executed mortgages, one upon the main line, covering the railway, rolling stock, and franchises held or thereafter to be acquired, securing bonds to the amount of $5,400,000; one, subsequent in date, upon the Milwaukee extension, securing bonds to the amount of $2,200,000; one, later in date, upon the Muscatine Western extension, securing bonds to the amount of $800,000; and one, still later in date, upon the Pacific extension, securing bonds in the sum of $1,800,000; and, finally, one known as the income and equipment mortgage, which was a second mortgage upon the railway and branches, and purporting to be a first mortgage upon the income and upon certain rolling stock not covered by the first mortgages.

On the 15th day of May, 1875, Charles L. Frost, as surviving trustee in the "main line" mortgage, filed in the circuit court of the

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United States for the district of Iowa an original bill against the Burlington, Cedar Rapids & Minnesota Railway Company, as sole defendant, to foreclose the mortgage on the main line. By amendment the Farmers' Loan & Trust Company was made a party defendant upon an averment that said company were trustees in a mortgage executed subsequent to the plaintiffs' mortgage, and praying that "their lien on the income and equipment of said road may be declared subsequent to that of the plaintiffs', and they may be decreed to redeem plaintiffs' mortgage or their equity be barred and foreclosed, and for such other relief as the plaintiffs' case may require." A demurrer to this bill had been filed by the railway company, and, after the Farmers' Loan & Trust Company was added as a party defendant, it joined in the demurrer.

280] *The several trustees in the Milwaukee extension mortgage and the Muscatine extension mortgage likewise filed, in the same court, foreclosure bills, in which, by amendment, the Farmers' Loan & Trust Company was made a party defendant, and as to which the same relief was prayed as that contained in the bill filed by Frost, trustee.

On June 23, 1875, the Farmers' Loan & Trust Company, as trustee in the mortgage on the Pacific division and as trustee in the income and equipment mortgage, filed an original bill against the railway company, praying a foreclosure of both of said mortgages. In that portion of the bill that dealt with the income and equipment mortgage it was alleged that said mortgage was a first lien on two engines, known as Nos. 30 and 31, and upon one hundred and thirty box cars, known as the even numbers from 882 to 1140. An answer was filed by the railway company, not traversing or denying the allegations of the bill as respected the mortgage on the Pacific division, but denying that as many equipment or income bonds had been sold as were averred to have been sold. On the 30th of October, 1875, the case came on for hearing, and a final decree was entered, ordering that the property covered by the Pacific division mortgage be sold without appraisement or redemption at public auction, etc., but ordering that "that portion of complainants' bill relating to the income and equipment mortgage, so called, is ordered to be consolidated with the causes pending in this court against said respondent, wherein said Frost, Taylor, and others are respectively complainants."

On the same day on which this decree was entered, there was filed in the cause wherein Charles L. Frost and others, trustees, were plaintiffs, and the Burlington, Cedar Rapids & Minnesota Railway Company was defendant, an answer on behalf of the Farmers' Loan & Trust Company, in which it was admitted that the deed of trust to Frost was a first lien upon the main line and upon the ordinary rolling stock used thereon, not included in the mortgages executed by the company, known as the Pacific, Milwaukee, and Muscatine Western mortgages, and not including also engines Nos. 30 and 31 and box cars Nos. 882 to 1140.

On the same day the Farmers' Loan & Trust Company filed a cross bill against the complainants in the several bills of complaint heretofore mentioned. The prayer of this cross bill was as follows: "Wherefore your orator prays that said several suits be consolidated; that an equitable portion, as *above shown, be [281 decreed as against all of said parties to be included in said deed of trust (the income mortgage), and that the same be properly designated as proper to be sold with said division under said mortgage; and that your orator have a decree declaring its lien upon said two engines 30 and 31 and said 130 box cars, under said mortgage, to be prior and paramount to any held by any of said trustees and parties."

The record discloses that on October 30, 1875, the causes were ordered to be consolidated; the defendant railway company withdrew its demurrers, pleas, and answers in the said several causes; and thereupon "said several causes and said consolidated cause came on for final hearing and trial before the court on the several bills of complaint, the amended bill, the several mortgages and deeds of trust, and the proofs."

The decree found the amount remaining due and unpaid on the bonds secured by the main-line mortgage, and adjudged the defendant to pay the same within ten days, in default of which payment its equity of redemption was to be forever barred, and W. M. Kaiser was appointed a special master to advertise and sell said main line and its franchises and appurtenant property "without redemption or appraisement," and it was ordered that James Grant be a special trustee to purchase the property for all holders of bonds secured by the main-line mortgage who shall assent to such purchase and pay their share of the expenses, and he was ordered to convey the property, under the direction of the court or one of its judges, to such corporation as such bondholders may organize, to hold the title thus acquired for the benefit of the whole or such part as should assent thereto.

Pending the foreclosure proceedings, a new corporation, called the Burlington, Cedar Rapids & Northern Railway Company, was formed for the purpose of purchasing the several mortgaged properties at the foreclosure sales. On the 22d day of June, 1876, the main line was sold by the master to a committee, who purchased for the benefit of all bondholders, and who directed that a conveyance be made by deed to the Burlington, Cedar Rapids & Northern Railway Company. On the same day the Muscatine Western *extension was sold [282 to the same purchasers, and at their request a deed was made to the said new company. Likewise, on the same day, the Pacific division was sold by the master named in that decree, and the purchaser, John I. Blair, acting as trustee for the bondholders of the Pacific division, directed that the conveyance should be made to the said new company.

The masters making these sales executed deeds of the main line and of the several branches to the said the Burlington, Cedar Rapids & Northern Railway Company, conveying in terms an absolute title to the property described in each deed. The reports of the several sales, accompanied by the deeds executed by the masters, were submitted to the court for approval, as required by the de-

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cree, and on July 20, 1876, the circuit court judge approved said sales and deeds, and ordered the property to be delivered to said new company as of July 1, 1876.

The plan of reorganization provided for the execution of a mortgage of the entire property of the new company to the amount of $6,500,000, and such a mortgage, bearing date 1st of September, 1875, was, on November 9, 1876, executed and delivered to the Farmers' Loan & Trust Company as trustee.

It appears that the stock and bonds of the new organization were put upon the market, and have been bought and sold as mercantile securities since their issue in 1876.

In February, 1882, the Farmers' Loan & Trust Company addressed to the holders of the income and equipment bonds of the Burlington, Cedar Rapids & Minnesota Railway Company, and to Hubbard, Clark & Dawley, attorneys of some of said bonds, a communication, resigning as trustee under the income and equipment mortgage.

On April 13, 1883, there was presented to the district judge of the United States for the southern district of Iowa a petition of one Lawrence Turnure and others, claiming to be holders of income and equipment bonds of the Burlington, Cedar Rapids & Minnesota Railway Company. The petition alleged the resig-
283]*nation as trustee of the Farmers' Loan & Trust Company, asked that Charles E. Simmons should be appointed trustee, and that he should be authorized, as such, to file an "amended and supplemental cross bill in the nature of a bill of revivor and supplement," and that he be permitted to bring in new parties in accordance with such amended and supplemental cross bill.

On this petition an order was indorsed by the judge, appointing Simmons trustee and giving him leave to file his cross bill in the nature of a bill of revivor and supplement, "subject to the right of all parties interested to move the vacation of this order after process to or appearance of the defendants."

On the following day the cross bill of Charles E. Simmons, as trustee, succeeding the Farmers' Loan & Trust Company, was filed against Frederick Taylor, as successor to Charles L. Frost, trustee, the Burlington, Cedar Rapids & Minnesota Railway Company, the Burlington, Cedar Rapids & Northern Railway Company, and the Farmers' Loan & Trust Company.

This cross bill set up a history of the proceedings, not differing in substantial particulars from the statement herein previously made, but claimed that in no proceeding had there been any adjudication, determination, decree, or order in any manner affecting or determining the rights of the Farmers' Loan & Trust Company, as trustee under the income and equipment mortgage, or of the bondholders claiming under said mortgage.

The cross bill prayed for an account to be rendered by the Burlington, Cedar Rapids & Northern Railway Company of the earnings of the main line since the said company had had control and management of the same, and prayed for a decree permitting the complainant to redeem the said main line upon payment of the amount bid by the committee of bondholders at the foreclosure sale, less the profits and gains ascertained by the accounting prayed for, and that, upon such redemption, the complainant should be decreed to take the title to said railway franchises and property free and clear from the trust deed of Frost and the decree of the court in *his behalf, and from [284
all rights of the Burlington, Cedar Rapids & Northern Railway Company in the property, and that the trust deed or mortgage from the Burlington, Cedar Rapids & Northern Railway Company to the Farmers' Loan & Trust Company, trustee, and the lien thereof be utterly canceled as to said main line, and as to the complainant and bondholders claiming under said trust deed.

Issue was made by answer filed by the Burlington, Cedar Rapids & Northern Railway Company, in which answer, among other things, that company denied that there had been no adjudication determining the rights of the trustee under the income and equipment mortgage, and denied that any right of redemption remained in the Farmers' Loan & Trust Company, or in its successors, after the sale under the decree of October 30, 1875. This answer likewise denied that the bonds held by those on whose behalf the cross bill was filed by Simmons were ever legally issued.

On November 28, 1883, the Farmers' Loan & Trust Company filed its answer to the cross bill. In this answer it was averred that the Farmers' Loan & Trust Company had, in fact or law, no valid claims to the said engines and box cars, except subject to the prior claims of the other mortgages, and that all such claims were cut off and foreclosed by the sale under the decree of October 30, 1875.

Replications were filed and evidence taken, and on October 28, 1885, an opinion and decree were filed, finding, first, that the income and equipment mortgage was a valid lien upon the main line of the railway, and that the right of redemption under it had not been foreclosed by the decree of October 30, 1875, nor by the sale thereunder; second, that the Burlington, Cedar Rapids & Northern Railway Company was entitled to redeem the main line by paying off the income and equipment mortgage; third, that in event such redemption shall not be made, then the bondholders secured by the income and equipment mortgage shall be entitled to redeem said main line of railway by paying into court the amount due thereon, as the same shall be determined in the manner *provided in the [285
decree; fourth, that in the event of neither of these redemptions taking place, the Burlington, Cedar Rapids & Minnesota Railway Company shall be entitled to redeem said main line by paying off the amount due on the deed of trust, or deeds of trust, against which such redemptions shall be made; fifth, in the event that neither the Burlington, Cedar Rapids & Northern Railway Company nor the Burlington, Cedar Rapids & Minnesota Railway Company shall so redeem, then the income and equipment mortgage shall be foreclosed and a sale of the property had, and the proceeds be applied, first, to the payment of the bonds issued under the main line mortgage, and second, the amount, thereafter to be determined, that shall be due upon the in

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come and equipment mortgage. The cause was then referred to a master to determine sundry matters stated in the decree.

From this decree an appeal was taken to this court, which appeal was dismissed for the reason that the decree appealed from was not a final decree. *Burlington, C. R. & N. R. Co.* v. *Simmons*, 128 U. S. 52 [31: 73]. Subsequently a report was filed by the master, which was excepted to by Simmons, trustee, and by the Burlington, Cedar Rapids & Northern Railway Company. This report and the exceptions thereto were passed upon by the court below in an opinion filed on May 15, 1889, reported in 38 Fed. Rep. 683; and on May 29, 1889, a final decree was entered in accordance with the opinion of the court.

From this decree the Burlington, Cedar Rapids & Northern Railway Company appeals, as well from so much thereof as finds the cross-complainant entitled to redeem at all as from those portions thereof which affirm the validity of any of the bonds and which hold the railway company bound to account; and the cross-complainant appeals from such portions thereof as find invalid some of the bonds asserted in the cross bill.

286] *The decisive questions in this case turn on the character and effect of the decree entered on October 30, 1875. Did that decree leave the rights of the second mortgage, known as the income and equipment mortgage, unadjudicated, and thereby subject the purchasers at the sale under the decree to a future inquiry into those rights, or was the decree final, as respects the property sold thereunder, and do the purchasers, the Burlington, Cedar Rapids & Northern Railway Company, hold the property free from the lien of the second mortgage?

The answer to these questions must be found in the allegations and proofs upon which the decree was based, as well as in the terms of the decree itself.

The record shows that all the parties to be affected by the decree were before the court—the Burlington, Cedar Rapids & Minnesota Railway Company as a mortgage debtor in default, and the trustees in the several mortgages. The property against which the proceedings were aimed was a railroad consisting of a main road and several branches. That the railway company was insolvent and utterly unable to satisfy decrees for the payment of money, was evident.

In such circumstances what kind of a decree would be probable, and in the natural course of events? Would it not be expected that the proceedings would eventuate in a sale, in such a way as to dispose of the questions raised in the several cases, and to vest in the purchasers an unencumbered title to the entire railway system?

We learn from the pleadings and evidence that such a plan of sale was apparently pursued, and resulted in the organization of a new company whose mortgage bonds and stock were distributed among the original bondholders 287] upon terms *satisfactory to all, including a number of those who likewise held bonds secured by the income mortgage. The sales were reported to the court, and, with the deeds in pursuance thereof, were duly approved. The new company went into possession and management of the railroad and branches, and has increased largely their value by important extensions. The bonds and stock of the new company, it is safe to presume, have gone largely into new hands. The possession and title of the Burlington, Cedar Rapids & Northern Railway Company remained undisturbed and unchallenged till April, 1883,—a period of more than seven years,—when the petition of certain alleged bondholders under the income mortgage was filed asking leave to file what is termed "an amended and supplemental cross bill in the nature of a bill of revivor and supplement," the avowed purpose of which is to have the title of the Burlington, Cedar Rapids & Northern Railway Company declared subject to the lien of the income mortgage; to have the mortgage issued in pursuance of the plan of reorganization declared void, as respects the main line; and to hold that company to account for the earnings during the period of its possession.

To constrain a court of equity to grant relief so apparently inconsistent with the previous proceedings, and so destructive of the rights of persons who have since become interested, the case presented should be clear and free from doubt.

What, then, are the reasons urged in favor of the complainant in the amended and supplemental cross bill?

It is claimed, in the first place, that the Farmers' Loan & Trust Company, a party in the cause as trustee named in the income and equipment mortgage, had an equitable right to redeem, and that as the decree of October, 1875, contained no declaration or recital that said trustee was barred of the equity of redemption, and as no time was given to it to redeem from the first mortgages, the rights of the trustee and of the income bondholders were wholly unaffected by the decree and by the sales in accordance therewith. In other words, the proposition is that, in a decree which orders a sale of the property to pay the first mortgage debt, an express order cutting off the *equity [288 of redemption of a junior mortgagee, although a party to the suit, is necessary to devest the latter of his lien and of his right of redemption.

We are unwilling to accept this as a sound statement of the law, or, at all events, to concede it as invariably true. Where a junior mortgagee is a party defendant to a foreclosure bill in which, as in the present case, there is a prayer that he be decreed to redeem, and where the priority of the plaintiff's mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, we do not deem a similar order as to right of redemption by the junior mortgagee to be substantially or even formally necessary. He has, of course, a right to redeem, but if he chooses not to assert such right, and stands by while the sale is made and confirmed, he must, in equity, be deemed to have waived his right.

We think the law was correctly stated by *Mr. Justice* Matthews in *Chicago, V. & D. R. Co.* v. *Fosdick*, 106 U. S. 68 [27: 54], where he said: "In case the proceeding results finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor and all holders of junior encum-

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brances, if made parties to the suit, and is of the whole premises, when necessary to the payment of the amount due, or when the property is not properly divisible; it conveys a clear and absolute title as against all parties to the suit, or their privies, and the proceeds of the sale are distributed after payment of the amount due, for nonpayment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not."

So in *Lansing* v. *Goelet*, 9 Cow. 346, in which case there was an elaborate examination of the subject, the law was expressed in the following terms: "A judicial sale of the estate under the decree of the court, if the court has power to make the decree, whether it be in the form of a decree of sale preceded by a formal decree of foreclosure, or in the form of a decree of sale without the formal decree of foreclosure, effectually bars the right of the mortgagor to redeem, and the purchaser will hold it, 289] under the title he acquires to it by virtue of the sales and conveyance he receives from the master, free and discharged from the equity of redemption. The purchase money then stands in the place of the estate, and will be applicable, as that was, first, to the satisfaction of the debt of the mortgagee, and the overplus and residue, if any, to the use of the mortgagor."

In 3 Pomeroy's Eq. Jur. 1227, it is said that "the sale under a valid decree immediately cuts off, bars and forecloses the rights of the mortgagor, and of all subsequent grantees, owners, encumbrancers and other persons interested, who were made parties defendant, and of all grantees, owners and encumbrancers subsequent to a filing of notice of *lis pendens*, although not made defendant."

It is contended in the next place that the rights of the junior mortgagee were saved by the express terms of the decree. The language relied upon was as follows: "And this decree is made subject to the rights of any intervening creditors now before this court, and the claim of the Farmers' Loan & Trust Company in the income and equipment mortgage to any of the cars and machinery named in that mortgage is to be submitted to this court in term time or vacation, as soon as counsel can agree on the facts in relation thereto." And again: "The court reserves the power to make further orders and directions; and no sale under this decree is to be binding until reported to the court for its approval."

Reliance is also placed upon the language of a subsequent order of the court, on October 26, 1876, in which, after affirming the sales and conveyances, it is said that said order "shall in no wise be taken to affect any claim, right, interest, or lien upon or to the property sold and conveyed by said master's deeds, now pending in this court, but that the said claim, rights, interests, and liens are merely reserved, subject to future adjudication, and the said grantees in said deeds take the property hereby conveyed subject thereto."

The construction sought to be put upon this language, namely, that the court thereby intended to make a future disposition of the 290] claims of the income and *equipment mortgage one of the terms of the sale, is an admissible one, and, if it had been urged by timely action, it might properly have been adopted. But, as we have seen, those interested under the income and equipment mortgage not only failed to embrace the opportunity afforded to redeem as against the first mortgages, but suspended all action for a period of more than seven years. The condition of the record, as it existed before the filing of the amended and supplemental cross bill, disclosed no intention to ask for a redemption, and even if the condition of the case prior to the sale and the terms of the decree left it a debatable matter whether the court intended to bar any right of redemption on the part of the junior mortgage, we think the contemporaneous and subsequent conduct of those interested in that mortgage deprives them of any right, after so long a period, to demand the assistance of a court of equity as against the purchasers and those who may have become interested with them.

We do not find it necessary to determine whether those of the bondholders under the income and equipment mortgage, and who also held first mortgage bonds, estopped themselves from asserting a right of redemption by accepting the new securities issued under the plan of reorganization. If, indeed, those so acting constituted all of the income bondholders, such a determination might be a ready method of disposing of the entire case. But as there seems to have been some who did not receive the new bonds in payment of first-mortgage bonds, and would not, therefore, be brought within the range of the suggested estoppel, we prefer to pass by that question and consider whether all the holders of bonds under the income and equipment mortgage did not, by their inaction and acquiescence under the decree and sale, lose any right to redeem which they might otherwise have had as against the purchasers.

As we have seen, the Farmers' Loan & Trust Company, in its answer and cross bill, as they stood before and at the time of the decree of October 30, 1875, did not assert any right or any intention to redeem, although, in the bill, an opportunity was afforded it so to do. It restricted its *allegations and claims for re- [291 lief entirely to the engines and box cars. When the cases, as well as the case of Frost, trustee, in respect to the foreclosure of the main line, and the other consolidated bills of foreclosure came on to be heard, there was no assertion of any right or wish to redeem. There was record notice to the said trustee that a plan of sale and reorganization was intended which contemplated the issue of stock and bonds. Not only was there a tacit acquiescence in the proceedings, but no sign of any intention to disturb the title of the purchasers was given until more than seven years had elapsed, during which period large expenditures were made, and, beyond a doubt, third persons had become interested on the faith of that title.

The principle upon which this ground of defense rests has been so often vindicated and applied by this court that we do not feel it necessary to further enforce it by argument nor to cite cases so numerous. It is sufficient to refer to *Abraham* v. *Ordway*, 158 U. S. 416 [39: 1036].

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The rule is aptly expressed by 3 Pomeroy's Eq. Jur. p. 2, § 816, as follows: "Acquiescence is an important factor in determining equitable rights and remedies in obedience to the maxims: He who seeks equity must do equity, and, He who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel, — may produce a quasi estoppel upon the rights of remedy." And in § 965: "When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has 292] been no act nor language *properly amounting to an acquiescence, a mere delay, a suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations."

As these views lead to the conclusion that the so-called amended and supplemental cross bill filed by Simmons, trustee, in April, 1888, cannot be maintained against the Burlington, Cedar Rapids & Northern Railway Company, nor against the trustee named in the new mortgage, it is unnecessary for us to enter into questions that arose affecting the title of alleged bondholders under the income and equipment mortgage, and with respect to which a cross appeal was taken from the decree of the court below.

It may be that whatever questions existed between the Burlington, Cedar Rapids & Minnesota Railway Company and the trustee of the income and equipment mortgage were left open as between them, if, indeed, any property remained to which a decree of foreclosure could apply. As to this we express no opinion. But so far as the Burlington, Cedar Rapids & Northern Railway Company and the Farmers' Loan & Trust Company, trustee under the new mortgage, are concerned, the so-called amended and supplemental cross bill should be dismissed.

The decree of the court below, under the said amended and supplemental cross bill, is therefore reversed, and the record remitted with directions to enter a decree in accordance with this opinion, the costs in the court below and in this court to be paid by the appellants in No. 11.

Mr. Justice **Brewer** took no part in the hearing or decision of the case.

DR. S. A. RICHMOND NERVINE COMPANY, *Appt.*, v. SAMUEL A. RICHMOND. [293

(See S. C. Reporter's ed. 293-302.)

Trade-mark when assignable—unreliable testimony.

1. The fact that a trade-mark bears the name and portrait of the one who devised it does not render it unassignable to another.
2. A witness who, at different times, gives different versions of the same transaction, as his interest in the particular litigation may require, justifies the failure of the court to give his testimony the weight to which it would otherwise be entitled.

[No. 59.]

Argued April 30 and May 1, 1895. Decided October 21, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Illinois dismissing a suit in equity brought by the Dr. S. A. Richmond Nervine Company, against Samuel A. Richmond, to enjoin the use of a certain trade-mark and to recover damages and profits for the unlawful use of the same, and also decreeing upon the cross bill that the Nervine Company be enjoined from making or selling the medicine or using the

NOTE.—*As to trade-mark; right to; what may be; infringement; assignment; when protected; misrepresentation in; use of name; remedy in equity; injunction.*—see note to Lawrence Mfg. Co. v. Tennessee Mfg. Co. 34: 997.

As to trade-mark; right to; what may be; transfer of; infringement.—see note to Coats v. Merrick Thread Co. 37: 847.

Trade-mark; right to; what may be; transfer of; use of; infringement.

Equity will not favor protection in the exclusive use of the name of a preparation advertised as a valuable medicine, which is not shown to contain any of the medicinal virtues claimed for it. Siegert v. Abbott, 72 Hun, 243.

A nonprofitable corporation which can by law do no commercial business cannot acquire a trade-mark by use. Gravel Roofers' Exch. v. Turnbull, 8 Nat. Corp. Rep. 490.

A city which manufactures salts from the waters of mineral springs owned by it has a right to indicate their origin by its own name to the extent that a natural person would have such right; and no other manufacturer of salts, even of the same chemical elements, has a right to put them on the market in the name of such city. Carlsbad v. W. T. Thackeray & Co. 57 Fed. Rep. 18.

One who has not been the first to use a name descriptive of a class of goods, either in the United States or in a foreign country, has not the exclusive right to the name. Dr. Jaeger's Sanitary Woolen S. Co. v. Le Boutillier, 5 Misc. 78.

Citizens of Canada having an industrial or commercial establishment in the state of New York are entitled to protection against the use of a trade-name or trade-mark by another in a manner to deceive the trade. Kerry v. Toupin, 67 Pat. Off. Gaz. 931, 60 Fed. Rep. 272.

The provision of the treaty between the United States and Germany does not give any peculiar

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bottles, wrappers, or trade-mark of the portrait of Dr. Richmond surrounded by the four globes, known as the new trade-mark. *Reversed, and the case remanded for further proceedings.*

Statement by *Mr. Justice* **Brown:**

This was a bill in equity filed by the Dr. S. A. Richmond Nervine Company, a Missouri corporation, against Samuel A. Richmond, the founder of the corporation, and a citizen of Illinois, to enjoin the use of a certain trade-mark, and to recover damages and profits for the unlawful use of the same.

The facts of the case were substantially as follows: The defendant, Richmond, prior to December, 1877, being engaged at St. Joseph, Missouri, in the business of making and selling a preparation known as "Samaritan Nervine," a medicine for the relief of epileptic fits and similar diseases, adopted as a trade mark the figure of a man in an epileptic fit falling backwards, with his arms extended, and his cane and hat dropping to the ground, with the word "trade" printed in small capitals on the right side of the figure, and the word "mark" printed in small capitals on the left side. This trade-mark was duly registered in the Patent Office, March 26, 1878, and was imprinted upon the wrappers which inclosed the bottles in which the medicine was sold, and was used from the day of its adoption in 1873 or 1874 continuously until a change in the size and character of the bottle and trade-mark was made in the spring of 1884. Dr. Richmond met with considerable success in the sale of his medicine, and was reasonably prosperous until just prior to 1882, when he became embarrassed and unable to pay his debts, the result of engaging in a hotel venture in St. Joseph, which proved disastrous.

In May, 1882, there was organized by Richmond and two of *his clerks, under the [294 laws of Missouri, a corporation under the name of the "Dr. S. A. Richmond Medical Company," hereinafter called the "Medical Company," for the purpose of manufacturing and selling the Samaritan Nervine and Nervine Pills. The capital stock of the corporation was fixed at five thousand dollars, divided into fifty shares, of which James H. Richmond, a brother of the defendant, was named as the owner of 48, and John Albus and Michael Draut, the other two incorporators, of one share each. The property of Dr. Richmond, *viz.*, the receipt for making the nervine and pills, the right to manufacture them, the trade-mark of the man falling in a fit, the outfit or plant for manufacturing the medicine, with the good will of the business, were assigned by Dr. Richmond to the Medical Company in consideration of five thousand dollars, the amount of the capital stock.

Long prior to this, however, and in December, 1871, defendant Richmond was married to Eva E. Shannon, who appears to have received from her father some money, together with the proceeds of some real estate, which she loaned to her husband to aid him in the prosecution of his business. To secure her for the money thus contributed, James A. Richmond, the doctor's brother, on May 5, 1882, assigned to her 47 shares of the stock he held in the Medical Company. These shares she held until the

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extraterritorial effect to the official acts or laws of Germany, so as to make the acquisition of a right to a trade-mark in Germany an acquisition of that right in the United States. Richter v. Reynolds, 67 Pat. Off. Gaz. 404, 59 Fed. Rep. 577.

The selection of a name for flour by purchasers thereof from an exporter not a manufacturer, and direction to the latter to apply it to the flour bought, do not entitle the latter to the use of such name as a trade-mark. Brower v. Boulton, 58 Fed. Rep. 888.

Manufacturers of cigars acquire no title to a trade-mark designated by the customer for whom they are ordered for his particular use, although such customer refuses to accept the cigars and they are sold by the manufacturer to other dealers. Levy v. Waitt, 65 Pat. Off. Gaz. 898, 56 Fed. Rep. 1016, Aff'd in 25 L. R. A. 190, 61 Fed. Rep. 1008.

No property in a trade-mark or label can be acquired by mere selection, but it must be applied to some vendible commodity either manufactured or sold by the one claiming the trade-mark. Gravel Roofers' Exch. v. Turnbull, 8 Nat. Corp. Rep. 490.

As against innocent parties who have, through a period of years, built up an extensive business in goods bearing a certain name, the fundamental basis of a right of action for violation of a trade-mark in the use of such name is a prior appropriation of the particular mark by occupying the market, so that the public has been or will be defrauded by allowing another to use it; and the mere fact of a prior discovery or selection of the name is insufficent. Levy v. Waitt, 25 L. R. A. 190, 61 Fed. Rep. 1008, Aff'g 65 Pat. Off. Gaz. 898, 56 Fed. Rep. 1016.

The transient use of a brand of flour in the sale of five lots consisting of 220 barrels, in one year, without any further use of the brand for eleven years, does not make such brand a trade-mark Brower v. Boulton, 58 Fed. Rep. 888; Kohler Mfg. Co. v. Beeshore, 67 Pat. Off. Gaz. 678, 59 Fed. Rep. 572.

Sales by a foreign manufacturer in this country to a limited extent, upon special orders to supply particular customers, do not amount to such use of the label upon the article sold in such circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for such article. Richter v. Reynolds, 67 Pat. Off. Gaz. 404, 59 Fed. Rep. 577.

A trade-mark cannot consist of words in common use as designating locality, section, or region of country. Columbia Mill Co. v. Alcorn, 150 U. S. 460 (37: 1144), 65 Pat. Off. Gaz. 1916.

If a device, mark, or symbol was adopted or placed upon an article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. Columbia Mill Co. v. Alcorn, *supra.*

A trade-mark cannot be acquired in the name denoting the nature or chief ingredient of the article to which it is applied. Siegert v. Abbott, 72 Hun, 243.

A label on cigars, stating that they are made by a first-class workman, a member of a certain union, "an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship," is neither immoral nor against public policy, since it attacks no other manufacturer of cigars, and cannot be denied protection as a trade-mark on that ground. Cohn v. People, 149 Ill. 486, 23 L. R. A. 821.

The use of numerals as a short method of identifying the several members of a class of remedies is not the subject of a trade-mark. Humphreys Homeopathic Medicine Co. v. Hilton, 67 Pat. Off. Gaz. 1193, 60 Fed. Rep. 756.

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company made an assignment for the benefit of its creditors and ceased to do business, as hereinafter stated.

Dr. Richmond became the general manager of the company, had charge of its business, superintended the preparation and putting up of the medicine, purchased bottles, wrappers, etc., attended to the advertising and sales, and was paid by the company, for his services, a salary of $200 per month, and in addition was allowed free of cost such medicines made by the company as were needed to supply the patients he was personally treating. He subsequently became president, and also acted as treasurer of the company, which advertised the Samaritan Nervine very extensively, using the trade-mark, bottles, and wrappers assigned to it by Dr. Richmond. The company continued prosperous from its organization in May, 295] *1882, until May 13, 1884, when it made an assignment for the benefit of its creditors under the laws of the state of Missouri.

Before this, however, and in November or December, 1883, Dr. Richmond, who was then president and manager of the company, recommended a change in the size of the bottles, and the adoption of a new trade-mark, to wit, an eight-ounce bottle with his own portrait blown in the side, with the words "Samaritan Nervine" and "New Style," and that the new trade-mark consist of a portrait of himself surrounded by four globes or hemispheres stamped or engraved on the outside wrapper of the bottle. This new style, as it was called, was adopted by the company. Dr. Richmond gave orders to the Kellogg Engraving Company, of Chicago, for engraving the new trade mark, and early in 1884 ordered a large quantity of eight-ounce bottles from a firm in Pittsburg to be made in accordance with the new style adopted by the company, together with cartoons with the trade-mark printed thereon. Upon the adoption of this new style of bottle and trade-mark, a circular was prepared by him notifying customers of the company and the trade generally of the change made by the company in the size of the bottles, the wrapper, and the trade-mark. This circular described the new bottle and the trade mark, announced that they would go into use on the first day of May, 1884, and that medicines put up in any other style would not be genuine. They were sent to the trade generally in the United States and Canada. The old style of bottle and the old trade-mark of a man falling in a fit were discarded, except as to stock on the market, which had been prepared prior to the change.

On May 13, 1884, a meeting of the directors was held, at which Dr. Richmond announced that, owing to certain claims being pressed, which the company could not pay, it was insolvent, and upon his recommendation a resolution was adopted directing him to execute an assignment of the property, effects, assets, and business of the company for the benefit of its creditors. An assignment was executed to one John F. Tyler the same day, including all the property of the *company, advertising [296 materials, printed matter, circulars, electrotypes, medicine bottles, and materials on hand for the

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The words "sarsaparilla and iron" cannot be claimed as a trade-mark for a medicinal compound or beverage including sarsaparilla and iron as ingredients, as against an alleged infringing compound of which the words are equally descriptive, even if the ingredients named are only a small part of the compound. Schmidt v. Brieg, 100 Cal. 672, 22 L. R. A. 790.

The name "bromo-caffeine" does not impart information as to the general characteristics and composition of a preparation consisting of seven different ingredients, one of which is caffeine and another one of twenty or thirty different bromides, so as to render it invalid as a trade-mark. Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467.

The words "Social Register" when chosen, associated together, and applied to a list of the names and residences of certain persons living in a town as of a certain social standing, become a trade-mark entitled to protection as such. Social Register Asso. v. Howard, 67 Pat. Off. Gaz. 1448, 60 Fed. Rep. 270.

The name "Maryland Club Rye Whiskey" is incapable of exclusive appropriation for the purpose of a trade-mark, where the word "Maryland" denotes the geographical origin of the product, "Club" its quality, and "Rye Whiskey" its kind. Cahn v. Hoffman House, 7 Misc. 461.

The word "Columbia" is not the subject of exclusive use as a trade-mark. Columbia Mill Co. v. Alcorn, 150 U. S. 560 (37: 1144), 60 Pat. Off. Gaz. 1916.

The use of labels, marks, and devices so closely resembling those used by one claiming a trade-mark as to deceive purchasers exercising ordinary care constitutes an infringement of his rights, independently of the validity of the trade-mark in question. Schmidt v. Brieg, 100 Cal. 672, 22 L. R. A. 790.

The sale of merchandise in bulk by a manufacturer does not justify the purchaser in using on his retail packages the label which the manufacturer used on the same merchandise only when prepared by himself in smaller packages for the retail trade. Krauss v. Joseph R. Peebles' Sons Co. 58 Fed. Rep. 585, 30 Ohio L. J. 252.

A wholesale liquor dealer who buys whiskey in bulk from a distiller, under the understanding that he may use a label applied by the latter to bottled whiskey of his make, is entitled to continue the use of such label until he has disposed of all the whiskey. Krauss v. Joseph R. Peebles' Sons Co. *supra*.

A license to use a trade label upon whiskey in quart bottles and flasks does not entitle the licensee to use it upon whiskey in bottles of which five are required to hold a gallon. Krauss v. Joseph R. Peebles' Sons Co. *supra*.

A manufacturer who knowingly puts into the hands of retail dealers an article so dressed up that in the latter's hands it is an effective means of deceiving the ultimate purchaser into the belief that he is purchasing an article sold under a trade-mark is guilty of an infringement of the trade-mark. Von Mumm v. Frash, 68 Pat. Off. Gaz. 143, 56 Fed. Rep. 830.

To sustain an action for using a particular brand similar to plaintiff's trade-mark, the similarity of the brands must be such as to mislead the ordinary observer. Columbia Mill Co. v. Alcorn, 150 U. S. 460 (37: 1144), 60 Pat. Off. Gaz. 1916.

Neither the actual deception of any person by an imitation of a trade-mark, nor fraudulent intent to deceive thereby, is necessary to sustain an action to enjoin infringement of such trade-mark. It is sufficient if such imitation threatens injury to the owner's business. Taendsticksfabriks Aktiebolagat Vulcan v. Myers, 139 N. Y. 364.

The trade-mark "One Night Cure" is infringed by the label or trade-mark "Beeshore One Night Cough Cure." Kohler Mfg. Co. v. Beeshore, 67 Pat. Off. Gaz. 678, 59 Fed. Rep. 572.

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manufacture of medicine, and all and every article of property or right belonging to the company.

The assignment appeared to have been entirely unnecessary, and was probably a scheme of defendant's to get possession and control of the company's assets, but it seemed to have been regularly made, and the assets appraised upon an estimate placed upon them by defendant at the sum of $998. Immediately thereafter, to wit, May 16, 1884, the property and assets of the company were sold to one C. W. Wolverton, of Tuscola, Illinois, who was the attorney of James A. Richmond, for the sum of $1,000, two dollars more than the appraised value. Wolverton promptly assigned whatever interest he took by the purchase to one Powell, to whom the assignee refused to deliver the assets, having discovered the fraud, and Powell sued out a writ of replevin, and thereby got possession of such corporeal property as the officer holding the writ could take and deliver.

It appeared that Dr. Richmond went to Chicago in July, 1884, and began there to manufacture the Samaritan Nervine, to use the bottles and trade-marks that had been adopted and procured by the Medical Company before the assignment, including both the old and new trade-mark, and also to use the goodwill of the company. He carried on this business

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The designation of a preparation as "Angostura Aromatic Bitters or Angostura Bitters," infringes no rights of the vendors of "Aromatic Bitters," which name is not a valid trade-mark because indicating nature and ingredients, where the packages and descriptive labels, although similar, are not likely to lead purchasers to mistake the first for the second preparation. Siegert v. Abbott, 72 Hun, 243.

The owner of a trade-mark upon thread is not guilty of fraud in placing the name of a Scotch firm, which such owner believes itself to be the legitimate successor of in this country, upon thread made by that firm in Scotland, although not there completed for the market. Clark Thread Co. v. Armitage, 67 Fed. Rep. 896.

The manufacture of articles similar in construction and general appearance to those made by another which were formerly covered by a patent, and the use of the same name which had been given to the patented article, do not necessarily make a case of deception or unfair competition. Dover Stamping Co. v. Fellows, 163 Mass. 191, 28 L. R. A. 448.

The manager of a business in which a trademark is established, who subsequently becomes a partner in the firm, and by the retirement of his copartner becomes sole proprietor of the business, is the owner of the trade-mark and may maintain a suit for infringement. Cuervo v. Landauer, 63 Fed. Rep. 1008.

One acquires no rights by the use of words as a trade-mark which at the time of his selection have been used by other parties to denote a similar product. St. Louis Carbonating & Mfg. Co. v. Eclipse Carbonating Co. 58 Mo. App. 411.

The name by which manufactured articles are designated in the letters patent covering the same cannot, after the expiration of the patent, be claimed as a common-law trade-mark for the goods manufactured. St. Louis Stamping Co. v. Piper, 12 Misc. 270.

The exclusive right to the use of a name given by a patentee merely to describe his patented article ceases with the expiration of the patent. Dover Stamping Co. v. Fellows, 163 Mass. 191, 28 L. R. A. 448.

The penalty for selling cigars under a label which is a counterfeit of that of the Cigar Makers' International Union, adopted under and protected by N. Y. Act 1889, chap. 385, can be recovered under N. Y. Laws 1893, chap. 219, by any person aggrieved. Bulena v. Newman, 10 Misc. 460.

A geographical name may be acquired as a trade-mark. Gebbie v. Stitt, 82 Hun, 93.

The word "instantaneous," as applied to a preparation of tapioca, distinguished from other preparations of that article by its adaptability for immediate use without preliminary soaking, is descriptive, and cannot constitute a valid trade-mark. Bennett v. McKinley, 65 Fed. Rep. 505.

The word "cottolene," as applied to a substitute for lard, composed of cotton-seed oil and beef fat, though suggesting cotton-seed oil, is not sufficiently descriptive to render it invalid as a trade-mark. N. K. Fairbank Co. v. Central Lard Co. 70 Pat. Off. Gaz. 635, 64 Fed. Rep. 133, 9 Nat. Corp. Rep. 189.

The word "hygienic" as applied to underwear, is not the subject of a trade-mark. Jaros Hygienic Underware Co. v. Fleece Hygienic Underware, 65 Fed. Rep. 424.

The word "Marvel" may be used as a trade-mark to designate a particular brand of flour. Listman Mill Co. v. William Listman Mill. Co. 88 Wis. 334.

The word "Genessee" as applied to salt manufactured in the Genessee valley, cannot be the subject of a trade-mark, although imitation of its use in a certain combination, color, style, or form of letters may be prevented. Genessee Salt Co. v. Burnap, 67 Fed. Rep. 534, 38 Ohio L. J. 261.

The words "fibre chamois," as applied to an interlining for women's dresses, may constitute a valid trade-mark. American Fibre Chamois Co. v. De Lee, 71 Pat. Off. Gaz. 1458, 67 Fed. Rep. 329.

The names "Fig Syrup" and "Syrup of Figs" cannot be claimed as valid trade-marks for a medicine prepared from figs. California Fig Syrup Co. v. Stearns, 67 Fed. Rep. 1008.

The word "Momaja" as applied to coffee is not so descriptive of a composition of Mocha, Maracaibo, and Java coffee as to invalidate it as a trade-mark. American Grocery Co. v. Sloan, 71 Pat. Off. Gaz. 1770, 68 Fed. Rep. 539.

Citizens of France making and exporting to this country a liqueur, who have filed a trade-mark thereon here and complied with the law in that respect, are entitled to protection. Glotin v. Oswald, 65 Fed. Rep. 151.

A corporation succeeding a firm owning a trade-mark sufficiently announces the legal ownership of the business and the origin of the project in continuing the use of such trade-mark by adding its name with the words "successors to" immediately preceding the monogram of the former firm. Pillsbury v. Pillsbury-Washburn Flour Mills Co. 64 Fed. Rep. 841.

The owner of a flouring business who conveys the same to a corporation of which he is a promoter, and subsequently transfers his stock, loses his right to a trade-mark to designate a brand of flour manufactured by him, which was not reserved in conveyance. Listman Mill Co. v. William Listman Mill. Co. 88 Wis. 334.

A trade-mark used by the manufacturers of whiskey, consisting of the words "J. G. Mattingly & Sons, Standard Bourbon, established 1845, Louisville, Ky." may be transferred with the establishment. J. G. Mattingly Co. v. Mattingly, 17 Ky. L. Rep. 1.

One may not legally use means, whether marks or other indicia, or even his own name, for the purpose and to the end of selling his goods as the goods of another. Pillsbury v. Pillsbury-Washburn Flour Mills Co. 64 Fed. Rep. 841.

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under the name of the "World's Medical Association" for about three months, under a pretended lease from Powell, the second vendee from the assignee of the Medical Company.

As soon as the sale of the property and effects of the company for $1,000 became known to the creditors, they filed a petition in the circuit court of Buchanan county, Missouri, to set aside the sale to Wolverton upon the ground that it was fraudulent and void as against creditors; and the court, on hearing the evidence, on June 23, 1884, decided that the sale was fraudulent and void, and ordered that the property be resold for the benefit of creditors, which was done, and on August 28, 1884, James A. Richmond purchased it for $25,000, which sale was subsequently confirmed by the 297] court. *Richmond paid $2,500 on the purchase, and gave security for the balance, $22,500, which, however, was never paid by him. On December 11, 1884, the "Dr. S. A. Richmond Nervine Company," plaintiff, hereinafter called the Nervine Company, was organized under the laws of the state of Missouri by James A. Richmond, Michael Draut, and John Christ, Richmond being elected president. A resolution was then adopted electing Dr. S. A. Richmond treasurer and general manager of the company, at a salary of $200 per month, with power, together with the president of the company, to execute all contracts for carrying on its business.

James A. Richmond transferred to the company his interest in the receipt for the manufacture of the medicine, the trade-mark, and all his personal property, and an assignment was also obtained from Powell of any right he claimed to have acquired by reason of the original sale by the assignee to Wolverton. The Nervine Company then became the sole and exclusive owners of all the property and effects of the original company, which had been assigned to Tyler for the benefit of its creditors, together with the right to manufacture and sell the medicines and to use the trade-marks, bottles, wrappers, etc.

In January, 1886, after the company had been doing business about two years, Dr. Richmond, having become involved in certain legal proceedings, ceased his connection with the company, and was subsequently sent to an asylum, where he remained until November, 1887. During this time his wife, who received seventeen shares in the Nervine Company, took charge of the business and successfully conducted it until it was enjoined by the court below in this suit. After he left the asylum Dr. Richmond did not return to his family, but went to Tuscola, Illinois, began the manufacture of the nervine, as he had done in Chicago, using the trade-marks, bottles, wrappers, and goodwill of the company without its knowledge or consent, claiming that everything was his own in equity at least. He subsequently had the trade-mark, consisting of his portrait surrounded by four globes or hemispheres, registered as his own.

298]* Thereupon the doctor was notified by the company to cease manufacturing the medicine and using the trade mark, and upon his refusal this bill was filed against him, praying for an injunction and an accounting.

To this bill Dr. Richmond filed an answer and a cross bill, denying that the plaintiff company owned or had ever owned the trade-mark in question, or any of the interests claimed by it, or had ever used or had a right to use the eight-ounce bottles, or any trade marks in connection therewith, except by his permission and subject to his right to terminate such use. He averred that the trade-marks and goodwill of the business were his own; that he only leased them to the plaintiff company; denied that his wife ever had any interest in the stock of the old or new company, and that whatever stock she held was his, and held only by her as trustee for him.

Upon a hearing upon pleadings and proofs a decree was entered dismissing the original bill, and decreeing upon the cross bill that the Nervine Company be enjoined from making or selling the medicines or using the bottles, wrappers, or trade-mark of the portrait of Dr. Richmond surrounded by the four globes, known as the new trade-mark. From this decree plaintiff appealed to this court.

Messrs. **Benjamin Butterworth,** *Julian C. Dowell,* and *Houston & Parrish* for appellant.

Mr. **Wm. Henry Browne** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The record in this case presents only questions of fact, in which are involved the ownership of a trade-mark devised by Dr. Richmond in December, 1883, consisting of a portrait of himself, surrounded by four globes. Plaintiff's theory in this connection is that the trade-mark in question was designed by Dr. Richmond while acting as president and manager of the Medical Company; was adopted and, if not used, was advertised as about to be used, by that company prior to its *assign- [299 ment on May 13, 1884; that it passed to Tyler, the assignee of such company, by virtue of the general assignment made upon that day, for the benefit of its creditors; that by him it was sold to James A. Richmond, with the other assets of the Medical Company, August 28, 1884, Richmond in turn assigning and transferring it to the Nervine Company, the plaintiff in this suit.

The theory of the defendant is, as stated in his testimony, that the Medical Company never acquired any property or assets; that he, the defendant, had arranged with his brother, with the two other stockholders of the company and his wife, Eva, before the company was organized; that the transfer of the property was for his own benefit, and the stock all issued in trust for him; that the sale to the Medical Company of the property mentioned was a mere form; that he decided in the fall of 1884 to change the trade-mark and wrapper from the old style to the new style; that he spoke to his brother about it, and stated to the company that he would lease his trade-mark, *viz.*, the portrait of himself surrounded by the four globes, to the company, provided they compromised with one Hubbard of New Haven, to whom the company had become indebted in the sum of $33,000 for advertising; that he had engravings made in Chicago on his own account, for his own benefit, and paid for

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them himself; that he subsequently went to Philadelphia, after the engraving was done, and ordered boxes, cartoons, caddies, etc., for himself, on his own account, and paid for them himself, though he may have used the company's money and signed the company's check for the amount; that the money was, in fact, his; that the company made an assignment, but failed to lease his trade-mark, owing to the claim of Hubbard not being settled or arranged. If, as he swears, the Medical Company was but another name for himself and belonged to him, it is difficult to see why he should have ordered the engravings, bottles, and cartoons on his own account and paid for them with his own money as distinguished from the money of the company, or why he should have talked as he did about separating from the company and entering into business on his own account.

300] *He further states that he did lease the trade-mark in question to the Nervine Company about December 11, 1884, when he became the general manager of the company, and had charge and control of its business up to January, 1886, soon after which he became incapacitated and insane; that, in the latter part of 1887, he notified the Nervine Company to cease using his trade-marks, and finally in 1889, brought suit to compel them to do so.

There is a large amount of testimony in the case which is manifestly irrelevant to the question in issue. While it is entirely possible that the Medical Company may have been organized for the purpose of enabling Dr. Richmond to avoid individual liability, and the stock which properly belonged to him put in the name of the nominal stockholders in pursuance of a scheme to defraud his creditors, the existence of this corporation cannot be ignored in this proceeding. Were the proof never so satisfactory that the 47 shares of stock of the Medical Company transferred by defendant's brother to his wife, Eva, were in fact intended to be held in trust for him, we could not assume that she was not the bona fide owner of the stock standing in her name, as the object of this suit is not to impeach such ownership; nor could it be done in any suit to which she was not a party.

The real question is whether on May 13, 1884, the date of the general assignment to the Medical Company, it was then the owner of the trade-mark in question, since if it were it passed to the assignee of the corporation as a part of its assets. Upon this point there is considerable conflict of testimony. Prior to 1884, the only trade-mark in use by the Medical Company was that of a man falling in a fit, and this, it is admitted, passed to the assignee, and is now the property of the plaintiff. There is no doubt that Dr. Richmond, in November or December, 1883, while acting as president and manager of the company, devised the trade-mark in question and made all the necessary arrangements for the intended change in the size of the bottle and in the trade-mark: that advertisements were put into circulars notifying the trade that the change would take place on the first of May,

301] 1884; that the *bills for engraving this trade-mark were all paid for by the company and charged, not to Dr. Richmond personally, but to the expense account of the company; that the circulars announcing the proposed change were printed and circulated in January and February of that year, under the supervision of Dr. Richmond; that these circulars contained a fac-simile of the cartoon or caddy as it would appear, together with a notice warning the public that none would be genuine unless encased, and bearing the following inscription: "Have Dr. Richmond's picture blown in the bottle, his picture to be printed on two sides of the caddy or cartoon, and the bottle enlarged;" that orders were placed for the new style of bottle with a Pittsburg firm, and were paid for by the company on delivery. Some of these bottles were received about the first of May, while Dr. Richmond continued to be superintendent of the company, and a memorandum of their payment appears upon the cash book of the company. There was also an order placed for cartoons to be used after May 1 for wrapping or encasing the nervine preparations, which were also paid for by the company. These cartoons contained the words: "Put up or prepared by the Dr. S. A. Richmond Medical Company." After Dr. Richmond left St. Joseph and went to Chicago, the words "Prepared by the Dr. S. A. Richmond Nervine Company" were changed to "Prepared by the World's Medical Association," the name under which defendant did business in Chicago. While it is doubtful whether the Medical Company actually sold any medicines put up in the new bottles, and encased in the new wrappers and bearing the new trade-mark, before its assignment, there is no doubt that a large quantity of these bottles, cartoons, and wrappers were on hand at the time of such assignment, which had been paid for and belonged to the company. Nor is there any doubt that after the organization of the Nervine Company, these bottles, wrappers, and trade-marks were made use of by such company, the plaintiff in this case, so long as Dr. Richmond continued to be its general manager. Defendant claims this was done under a lease from himself, which was in writing, but this lease is *neither produced nor [302 accounted for, and in his cross bill only an oral license is claimed. The business done by Dr. Richmond in Chicago from July to October, 1884, under the name of the World's Medical Association, appears to have been a mere episode, as he resumed business in St. Joseph upon the organization of the plaintiff company in December, 1884, and continued with them until January, 1886.

The testimony of Dr. Richmond, who was the main witness in his own behalf, is materially impaired, not only by his own confession that the organization of the Medical Company was procured by himself for the purpose of defrauding his creditors, and that the first appraisement and sale of its assets were also a fraud concocted by him for the same purpose, but by the further fact that, in a suit brought at Columbus, Ohio, against him for advertising, he swore that he owned none of the stock of the Medical Company, and that he had no interest in such stock. A witness who, at different times, gives different versions of the same transaction, and blows hot or cold as his interest in the particular litigation may require, can

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scarcely complain if the court fail to give his testimony the weight to which it would otherwise be entitled.

In fine, we are of the opinion that the Nervine Company is justly entitled to the use of the trade-mark in question.

The fact that such trade-mark bears Dr. Richmond's own name and portrait does not render it unassignable to another. *Kidd* v. *Johnson*, 100 U. S. 617, 620 [25: 769, 770]; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540 [35: 247]; *Hoxie* v. *Chaney*, 143 Mass. 592, 595; *Fish Bros. Wagon Co.* v. *Fish*, 16 L. R. A. 453, 82 Wis. 546.

The decree of the court below must be reversed and the case remanded for further proceedings in conformity with this opinion.

303] JAMES GILFILLAN ET AL., *Appts.*, *v.* HENRY E. McKEE ET AL.

JOHN D. McPHERSON, Exr., *Appt.*, *v.* HENRY E. McKEE ET AL.

(See S. C. Reporter's ed. 303-316.)

Waiver of appeal—appeal from a several decree—discharge of moral obligation—appeal, when reversed.

1. The acceptance by one of a share of a special fund under a decree is not a waiver of his appeal from another part of the decree denying him a share in a general fund which, in the action and decree, is kept as a distinct and separate matter.
2. Where the decree is several, and the interest of each defendant separate and distinct from that of the others, any party may appeal separately to protect his own interest, without the others joining in the appeal, and without a summons and severance.
3. A party has a right to discharge a moral obligation which is not a legal one by reason of incomplete performance of services, by a donation to the widow of the party who performed the services, free from any right of his creditors.
4. Where the decree appealed from is correct so far as a separate appeal by one defendant is concerned, yet it may be reversed on that appeal where the amount of the decree may require readjustment by reason of a reversal on another appeal.

[Nos. 26, 46.]

Argued March 14, 15, 1895. Decided October 21, 1895.

APPEAL from a decree of the Supreme Court of the District of Columbia in a suit in equity brought by Ward. H. Lamon *et al.*, against Henry E. McKee, to enforce equitable rights in an appropriation made by Congress and to carry into effect a former decision of this court in the case of the Choctaw Nation against the United States, and in a suit of interpleader, and upon certain cross bills filed by certain defendants. *Reversed to await the disposition of another case, and for further proceedings.*

Statement by *Mr. Justice* **Brown:**

The litigation involved in this and the following cases was originally instituted by a bill filed July 7, 1888, by Ward H. *Lamon [**305** Chauncey F. Black, survivors of themselves and Jeremiah S. Black (Black, Lamon & Co.), against Henry E. McKee, the object of which was to protect and enforce their equitable rights and interest in an appropriation of $2,858,798.62, made by an Act of Congress approved June 22, 1888 (25 Stat. at L. 239), to carry into effect the decision of this court in the case of the Choctaw Nation against the United States, relating to what is known as the Choctaw net proceeds claim. 119 U. S. 1 [30: 306]. Six days after the filing of this bill by Lamon and Black another bill was filed, July 18, by John H. B. Latrobe against Henry E. McKee and others for the same general purpose of sharing in the sum recovered by McKee.

On July 19, McKee filed a bill of interpleader, which is the subject of the opinion in this case, against a large number of defendants, claiming, under eight or nine different titles, to share in the fund held by him, of which he admitted that they or some of them were entitled to the sum of $161,197.63, which he paid into court. This amount was made up of a general fund of $147,057.63, being five per cent of a commission of thirty per cent, which had been dedicated by the Choctaw Indians to the payment of attorneys and agents in the prosecution of their claims, and which had been received by McKee; and also of a special fund of $14,140, due to the estate of John T. Cochrane, for which a special appropriation had been made by an act of the general council of the Choctaw Nation of February 25, 1888, and which McKee had agreed to pay. The bill prayed that the defendants interplead, and that the court determine to whom the money should be paid.

On October 1, 1889, a decree of interpleader was entered, the defendants were enjoined from instituting or prosecuting any suit or action for the recovery of the money paid into the registry of the court by the complainant, and complainant was dismissed as a party to the suit with his costs to be taxed. The decree, however, was made without prejudice to the rights of any of the defendants to institute any action at law or in equity to recover from the complainant *any demands which they [**306** might have for amounts due from him over and above the money paid into court.

Answers and cross bills were filed by the several defendants making claims to both funds, and upon a hearing upon pleadings and proofs one half of the special fund of $14,140 was ordered to be paid to McPherson, executor of the will of John T. Cochrane, and the remaining half to the solicitors of James Gilfillan, John A. Rollings, and the estate of C. D. Maxwell. The general fund was ordered paid to Ellen Cochrane, widow of John T. Cochrane, John H. B. Latrobe, and Ward H. Lamon, in certain specified proportions. The claims asserted by certain other defendants, including a claim of McPherson, executor of Cochrane, to be paid out of the general fund for professional services rendered by Cochrane, was denied, and an appeal allowed in the

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decree. An appeal was also allowed to Gilfillan, Rollings, and Eastman, administratrix to the estate of C. D. Maxwell, from so much of the decree as awarded the general fund to Ellen Cochrane, John H. B. Latrobe, and Ward H. Lamon, and also from a decree previously rendered, sustaining a demurrer to the cross bill of Rollings, Gilfillan, and Maxwell, and dismissing the same. As to the last decree the appeal was dismissed.

Subsequently, as it appears from the certificate of the clerk of March 1, 1895, the money deposited in court was paid out to the several persons to whom it had been awarded by the above decree.

The facts underlying all these cases were substantially as follows:

1. That the Choctaw Nation, having various unsettled claims against the United States, arising out of treaty stipulations, the principal of which was a claim for the net proceeds of certain lands, by resolutions of its legislative council, adopted November 9, 1853, and November 1, 1854, appointed certain citizens of that nation, the principal one of whom was one Pitchlynn, to prosecute such claims, and, in the name of the Choctaw people, "to enter into any and all contracts which in their judgment are or may become necessary and proper, to bring to a final and satisfactory adjustment 307] and *settlement all claims and demands whatsoever, which the Choctaw Nation or any member thereof has against the government of the United States by treaty or otherwise."

2. Pursuant to this authority, on February 13, 1855, these delegates entered into a contract with John T. Cochrane, in which, after reciting the abandonment of a similar contract that had been made with Albert Pike, and the fact that Cochrane had already been for three years before acting as the agent of the Choctaw Nation in the prosecution of a claim for arrearages of annuities and school moneys, in which he had rendered valuable and most important services, Cochrane bound himself to continue to prosecute all unsettled claims and demands of the Choctaw Nation, and especially a claim arising under the treaty of Dancing Rabbit Creek of September 27, 1830, to the net proceeds of the lands ceded to the United States by that treaty, and to do his utmost to secure payment of said claims and demands, the Choctaws, upon their part, agreeing to pay him thirty per cent of every and all such sums of money, payable to them, as soon as the same was paid over by the United States.

3. Shortly thereafter Cochrane succeeded in inducing the authorities of the United States to enter into a treaty with the Choctaws, which was concluded June 22, 1855 (11 Stat. at L. 611) by which it was agreed that the claim of the Choctaws for the net proceeds of the lands in question should be submitted for adjudication to the Senate, which body was thus charged with and assumed the functions of an umpire, and on the 9th of March, 1859, made an award in favor of the Choctaws, according to certain principles, and referred the matter to the Secretary of the Interior to state an account showing the amount due to them according to such principles. That official made his report to the Senate on May 8, 1860, certifying that there was due to the Choctaw Nation, under the award of the Senate, the sum of $2,981,247.30, and in 1861 there was paid to the Choctaws, on account thereof, the sum of $250,000.

4. No progress was made in the further prosecution of their claim from 1861 to 1866, by reason of the alliance of *the Choctaws [308 with the southern confederacy during the war. After the close of the war, however, Cochrane procured a treaty to be entered into between the United States and the Choctaw Nation relieving them of their disabilities. 14 Stat. at L. 769.

5. In 1866, Cochrane was stricken with a mortal illness, and, with a view of securing to himself and family some remuneration for the services he had performed in behalf of the Choctaws, proposed to assign to Ward H. Lamon, or to some one in his behalf, all his interest in the contract of February 13, 1855; and verbal arrangements for the accomplishment of that result by the assignment of said contract to Jeremiah S. Black were made before the death of Cochrane. Before his death Cochrane made a will dividing his property equally between his wife Ellen and his sister Mary Magruder, and authorizing John D. McPherson, his executor, to sell, assign, or compromise his claims under his contract with the Choctaws as he should deem most for the interest of his estate. There was also an acknowledgment in this will that an equal interest in the Choctaw contract belonged to Luke Lea. After Cochrane's death, McPherson having qualified as his executor, a contract was entered into between him and Jeremiah S. Black, November 8, 1866, for the further prosecution of the Choctaw claims by Black, as the successor of Cochrane, and upon the terms of the contract made with Cochrane February 13, 1855, to which assignment the Choctaw delegates gave their assent.

6. The firm of Black, Lamon & Co., in whose behalf the assignment to Black was in fact made, at once entered upon and continued the work of prosecuting this claim until Judge Black withdrew from active practice, from which time the duty of prosecuting the claim devolved solely upon Lamon.

7. Nothing, however, was definitely accomplished before July 16, 1870, when, for reasons unnecessary to be here stated, the delegates of the Choctaw Nation entered into a new contract with James G. Blunt and Henry E. McKee to prosecute their claim, stipulating to pay them for their services and expenses thirty per cent of the sum already awarded and due to the Choctaw Nation, or of any sum that might be paid, *whenever the money or [309 bonds arising from said claim should come into the possession of the party or parties authorized by the Choctaw people to receive the same. This contract contained a further stipulation of Blunt and McKee "to pay to Mrs. John T. Cochrane of Washington, D. C., five per centum from the thirty per centum before referred to whenever they shall receive the same; and the said Blunt and McKee further agree to adjust the claims of all parties who have rendered services heretofore in the prosecution of said claim upon the principle of equity and justice, according to the value of the services so rendered," Blunt soon afterwards died,

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leaving McKee to carry out the contract alone.

8. In 1881, an act was passed by Congress (21 Stat. at L. 504) referring the question of the liability of the United States in respect to the Choctaw claims to the Court of Claims, and in March, 1886, a judgment was rendered in the Court of Claims in favor of the Choctaw Nation. 21 Ct. Cl. 59. From the judgment so rendered both parties appealed to this court, which also decided in favor of the Choctaws, and held that the award made by the Senate in 1859 determined the amount due in respect of the claim (119 U. S. 1 [30: 306]), and on June 29, 1888, an appropriation was made for the payment of the judgment of $2,858,798.62. 25 Stat. at L. 217, 239.

9. On February 25, 1888, an act of the legislative council of the Choctaw Nation, after reciting the recovery of the judgment, and that McKee and his associates were making proper efforts to secure from Congress an appropriation for the payment, enacted that the contract with McKee and another with one Luce should be recognized as valid, that the services required had been fully performed, and that to satisfy the obligations of the Choctaw Nation to McKee and Luce, who was jointly interested with him, there should be appropriated thirty per cent of the amount appriated by Congress for the payment of the judgment, twenty-five per cent of which should be paid to McKee, and it was made the duty of the treasurer of the nation to make such payment. The fourth section enacted that "the sum of $14,140 shown to be due to the late John T. Cochrane, deceased, by an act of [310] the *general council of November 1, 1861, is hereby appropriated out of any money received from the United States in payment of said judgment, and the payment of said amount shall be made to said Henry E. McKee," etc. The fifth section enacted "that the payments herein directed to be made shall, when made, either under this Act, or said other two acts hereinbefore referred to, be taken and accepted as full and complete payment and final discharge and satisfaction of all the contracts and obligations of the Choctaw Nation to any and all attorneys for services rendered to the nation in the prosecution of said claim against the United States."

10. On the filing of the bill of complaint July 7, 1888, by the surviving partners of Black, Lamon & Co., in the following case, a preliminary restraining order was issued enjoining the defendant McKee from demanding or receiving said money from the Treasury. But, in violation of this order, McKee, on July 9, collected and received from the Treasury the sum of $783,768.82, being the thirty per cent fund mentioned in the Cochrane and McKee contract as set aside for the compensation for services rendered in the prosecution of said claim. McKee, being subsequently ordered to pay into the registry of the court the sum of $186,500 in the same case, in addition to the sum of $161,197.68 paid into court in this case, refused to obey the order, and to avoid doing so absconded from the jurisdiction of the court, and has ever since kept himself concealed, to avoid process.

Messrs. **Geo. F. Appleby** and **Calderon Carlisle** for McPherson, Executor.

Mr. **S. S. Henkle** for Ellen Cochrane.

Messrs. **Enoch Totten** and *Reginald Fendall* for Latrobe, Executrix.

Mr. **A. B. Duvall** for Gilfillan *et al.*

Mr. **Willis B. Smith**, for Marbury, Administrator.

Messrs. **John J. Weed** and **Jefferson Chandler** for McKee.

Messrs. **James Coleman** and **Nathaniel Wilson** for Lamon and Black, on motion to dismiss.

Mr. Justice **Brown** delivered the opin- [311] ion of the court:

A motion to dismiss the appeal of McPherson, made by the appellees, demands a preliminary consideration. This motion is made upon the grounds, *first*, that the appellant is precluded from questioning the validity of the decree because, having been awarded a large sum of money out of the fund for distribution, he applied for and received the same, as did all the other beneficiaries to whom awards were made; and that the decree disposed of the entire fund and has been fully executed; *second*, that the decree was joint against the appellants and also against the other codefendants, whereas the appellants appeal separately and alone, their codefendants not joining, and without any proceeding in the nature of a summons and severance.

1. It did undoubtedly appear from the certificate of the clerk above mentioned that McPherson was paid $7,070 of the amount decreed to him out of the special fund. But it further appeared that he claimed to be paid from the general fund of $147,057.63, and that his claim in that particular was denied. While the acceptance of the whole or a part of a particular amount awarded to a defendant might perhaps operate to estop him from insisting upon an appeal, there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson; and the other applicable to the general fund in which McPherson had been denied any participation whatever. Clearly his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund. There is nothing inconsistent in his action *in accepting [312] the amount awarded to him from the special fund, and appealing from the refusal of the court to award him the general fund. As was said by this court in *Embry* v. *Palmer*, 107 U. S. 3, 8 [27: 346, 348]: "No waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be con-

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strued into an admission that the decree he seeks to reverse is not erroneous."

2. The objection that an appeal was not taken by the other defendants; that they did not join in the appeal, and that there was nothing in the nature of a summons and severance,—is equally untenable. The decree was several, both in form and substance, and the interest represented by each defendant was separate and distinct from that of the other. In such cases any party may appeal separately to protect his own interest. *Cox* v. *United States*, 31 U. S. 6 Pet. 172 [8:359]; *Todd* v. *Daniel*, 41 U. S. 16 Pet. 521 [10:1054]; *Hanrick* v. *Patrick*, 119 U. S. 156 [30:396]; *City Nat. Bank of Fort Worth* v. *Hunter*, 129 U. S. 557, 578 [32:752, 759].

3. As to the merits, we are only concerned in this case with the general fund of $147,057.63, which is five per cent upon the thirty per cent which the Choctaws agreed to pay to McKee for his services. This fund was awarded by the final decree to Ellen Cochrane, individually, and to Latrobe and Lamon, the fund being divided into $257\frac{17}{100}$ parts, of which Latrobe took 75, Lamon 85, and Ellen Cochrane the residue. The parts assigned to Latrobe and Lamon represent the decree obtained by them upon their separate bills against McKee in the two following cases. Both McPherson as executor of Cochrane, and Rollings and Gilfillan, assignees of Lea, appealed from the decree in the present case. The interests of these appellants are, in reality, identical. Cochrane, in his will, made in 1866, acknowledged an equal interest in the Choctaw contract 313] *to belong to Colonel Luke Lea, and on September 24, 1869, Lee assigned all his interest to Rollins and Gilfillan. No controversy exists between these parties; but if McPherson be awarded the fund, both are interested to defeat the claims of Latrobe and Lamon, which diminish by the amount of their decrees the sums which would otherwise go to the Cochrane estate. Both are also interested adversely to Ellen Cochrane, who claims the entire fund individually, while the appellants claim it as assets of Cochrane's estate to pass under his will, one half to Rollings and Gilfillan, assignees, and the other half to be divided equally between Ellen Cochrane, his wife, and Mary Magruder, his sister.

The controversy between them turns upon the construction of the contract of July 16, 1870, between McKee and the Choctaws, in which Blunt and McKee agreed "to pay to Mrs. John T. Cochrane of Washington city, D. C., five per centum from the thirty per centum before referred to whenever they shall receive the same." The view of the court below was that, if there were a trust in favor of parties who had rendered valuable services before the execution of the McKee contract of July 16, 1870, that trust attached to every dollar received by McKee, and that it was not in his power to disengage any particular dollar or any particular sum of money from the charge, and hence that the amount paid into court by McKee in this case was subject to the trust found by the court to exist in the other cases in favor of Latrobe and Lamon. As the court also awarded the residue to Ellen Cochrane, it follows that it must have treated this as a donation to Mrs. Cochrane, and not as a payment for services rendered by Cochrane, as, under the latter theory, it would have been ordered paid to McPherson, as executor, to become a part of the assets of his estate.

Two questions then arise upon this appeal: First, Was the payment in the McKee contract to be made to Mrs. Cochrane intended as a personal gift to her, or as a payment for Cochrane's services? Second, was such sum subject to a trust in favor of Latrobe and Lamon?

In disposing of the *first* question it is only necessary to *consider the contract be- [314 tween the Choctaws and McKee, in which the former agreed that for services rendered and money expended and to be expended in the prosecution of the claim, Blunt and McKee should receive thirty per cent of the amount awarded, or of any sum that may be paid by the United States; Blunt and McKee, on their part, agreeing to pay five per cent of this thirty per cent to Mrs. Cochrane, and also to adjust the claims of all parties who have rendered services heretofore in the prosecution of said claim, upon the principle of equity and justice, according to the value of the services so rendered. By section 4 of the act of the Choctaw council of February 25, 1888, the sum of $14,140 was the amount fixed as due the late John T. Cochrane, deceased, by an act of the general council of November 1, 1861, and that sum was appropriated out of any money to be received from the United States in payment of said judgment. Exactly for what this was intended as a payment does not clearly appear, but the fact that it was found to be due by an act passed in 1861 indicates very clearly that it could not have been for services subsequently rendered, although section 5 provides that the payments therein directed to be made should be accepted as full discharge and satisfaction of all the contracts and obligations of the Choctaw Nation to any and all attorneys for services rendered to the nation in the prosecution of said claim. This appropriation was evidently intended to discharge that obligation to him personally.

The argument for Mrs. Cochrane is based upon this plain agreement on McKee's part to pay her the five per cent, although, as no consideration moved from her either to McKee or to the Choctaws, it is, in reality, a donation. Upon the contrary, the appellants insist that the payment was intended as compensation for the services of Cochrane, which had been undoubtedly of great value to the Choctaws, and that the nation had no right to divert what must naturally have been intended as a payment for those services away from his estate, to which it properly belonged, and turn it into a donation to his widow. The oral testimony as to the intention of the parties, if competent at all, is conflicting and wholly unsatisfactory.

*As already observed, the Cochrane con- [315 tract provided for payment to him of thirty per cent of the amount collected, but it was a contract wholly contingent upon his success, and was never performed either by Cochrane personally, or by Black and Lamon, his assignees. Nothing was ever earned by them under this contract, and neither Cochrane's executor nor his assignee ever stood in position to sue upon

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it, or to claim anything by virtue of it. At the same time, both the Choctaws and McKee were ready to concede that Cochrane had rendered valuable services, which had doubtless contributed much to the ultimate success of the venture, and were therefore willing that compensation should be made in some form. Under the circumstances, there was nothing unreasonable in providing that this compensation should take the shape of a personal gift to Mrs. Cochrane, and thus relieve the estate from litigation with a horde of other claimants who might be expected to appear and claim to have rendered services to Cochrane, for which they were equitably entitled to share in the compensation. The oral testimony indicates that the insertion of Mrs. Cochrane's name instead of the executor of her husband's estate was an idea of Pitchlynn's, the chairman of the delegation, who thought that such a provision would prevent the necessity of the fund going through the probate court. In this connection McKee also states that the provision was put in at the instance of Pitchlynn, who stated that he considered the death of Cochrane ended his contract and his right to any further compensation for his services in the prosecution of the claim, but he was determined to make some provision which would not be subject to the control of Cochrane's executor or subject to his creditors, but that it should be paid directly to her, to be held and enjoyed by her in her own right; and hence that Pitchlynn insisted upon the provision in the contract in favor of Mrs. Cochrane, and the contract on the face of it expressed exactly what was intended by the contracting parties at the time. Had Cochrane or his assigns earned anything under this contract, and the promise had been to pay money earned for services fully performed, a question might have 316]arisen as to *the power of the Choctaws or of McKee to divert it from the estate in favor of the widow, but as the obligation, if any existed at all, was only a moral one, the parties had a right to discharge it in their own way.

This construction is consonant with the language of the act of the Choctaw council appropriating $14,140 in payment of the amount due to the estate of Cochrane; and providing that such payment should be a final discharge and satisfaction of their obligation to him personally. Upon the whole, we think the court construed this provision of the contract correctly.

As Mrs. Cochrane did not appeal from that part of the decree admitting Latrobe and Lamon to share with her, and as the appeal of the other parties turns primarily upon the validity of the allowance to Mrs. Cochrane, and not upon the fact that Lamon and Latrobe were admitted to share in such allowance, it is unnecessary to consider the second question. If the amount decreed to them were reduced, such reduction would redound to Mrs. Cochrane's benefit and not to the appellants.

While, as before observed, we think the court made a correct disposition of the case so far as this appeal is concerned, the reversal of the following case may make it necessary to readjust the amount due to Lamon and Black, and consequently our decree in this case must be for a reversal to await the disposition of the following case, and for further proceedings in conformity with this opinion.

HENRY E. McKEE, *Appt.*, [317
v.
ROBERT LAMON, Admr., etc., ET AL.

ROBERT LAMON, Admr., etc., ET AL., *Appts.*,
v.
HENRY E. McKEE.

(See S. C. Reporter's ed. 317-327.)

Necessary party—when trustee may be compelled to account—when trust arises—suit in equity against trustee.

1. In a suit against one to enforce a trust in moneys received by him for his services in collecting a claim for an Indian nation, that nation is not a necessary party.
2. Where a person collects a claim for a percentage of it under an agreement to pay others for their services rendered and moneys expended in the prosecution of the claim, he may be compelled to account to them, in a suit in equity for its proper distribution, although their names are not given in the agreement, but they are therein mentioned as a class.
3. Where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The receipt of the money is sufficient consideration for a promise for its final disposition.
4. Where one is employed by an Indian nation to collect a claim against the government under a contract for compensation for collection to be paid out of the moneys collected, and renders services towards its collection, but the contract is canceled before the collection is made, and another is employed to collect the same claim, and the latter agrees with the nation to pay to the former such sum as he is justly entitled to receive for such services out of the percentage the latter is to receive for such collection, the former can recover in equity for such services, from the latter, out of his percentage when received by him, although the former has no right of action against the nation for his compensation.

[Nos. 33, 34.]

Argued and Submitted March 13, 14, 1895. Decided October 21, 1895.

APPEAL from a decree of the Supreme Court of the District of Columbia in favor of Ward H. Lamon against Henry E. McKee for $85,000 as compensation for his services and for his disbursements and expenditures with interest thereon, to be paid out of a percentage received for the collection of a claim of the Choctaw Nation against the United States, and dismissing so much of the suit as related to the claim of Lamon and Black, or

NOTE.—*As to parties in error, who necessary*, see note to Owings v. Kincannon, 8: 727.

As to parties necessary in equity, want of; when a defense; when objection to be made, see notes to Morgan v. Morgan, 4: 242, and Marshall v. Beverley, 5: 97.

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either of them, as assignees of a certain contract, etc. *Reversed and case remanded for further proceedings.*

Statement by *Mr. Justice* **Brown:**

This was the original bill filed against McKee by Lamon and Black, surviving partners, and was based upon the assignment of the original Cochrane contract for a compensation of thirty per cent to Jeremiah S. Black, and the substitution of Black in the place of Cochrane, as the attorney, counsel, and agent of the Choctaw Nation for the prosecution of their claim. This contract was entered into between McPherson, as the executor of Cochrane, and Jeremiah S. Black, on the 8th of November, 1866, and was assented to by the delegates of the Choctaw Nation, whereby the right of Cochrane to receive the thirty per cent became vested in Black. This assignment seems really to have been made for the benefit of Lamon, who raised and paid $25,000 of the $75,000, **318**] which it* was contemplated should be paid to Cochrane in the verbal arrangements carried on between Lamon and Cochrane before his death. The bill, after setting forth the facts stated in the interpleader case, averred that, on the dissolution of the firm of Black, Lamon & Co. in 1872, Lamon succeeded to the interest of Black in the remainder of the thirty per cent after certain prior claims thereon should be paid.

The only averment of the performance of the Cochrane and Black contracts by the firm of Black, Lamon & Co., or either member of such firm, was that "they undertook the prosecution of said claim, and urged the same with great persistence before the committees of Congress, and did all in their power to bring about such legislation as the situation demanded, and they so continued so long as the firm of Black, Lamon & Co. existed. That, after some years, said Jeremiah S. Black, by reason of his failing strength and advanced life, was compelled to abandon the active work of his profession, and the said copartnership was, for that reason, dissolved, and the duty of prosecuting said claim devolved solely upon said Lamon."

The bill was subsequently amended in this particular by averring "that said services were rendered and said advances were made with the full knowledge and consent, and at the special instance and request of the Choctaw Nation, with the agreement and understanding that the said plaintiffs were to receive as compensation for said services such sum as the same were reasonably worth, to be paid out of the money claimed as aforesaid, when paid by the United States, and that said agreement and understanding were independent of the said Cochrane contract and of the rights claimed by the plaintiffs under and by virtue of the said Cochrane contract." A subsequent paragraph set up a lien upon the judgment rendered in favor of the Choctaws, and upon the amount due from the United States, and upon the thirty per cent fund set apart by the Choctaw Nation for the payment for services.

The amended bill further averred that while the question of the payment of the claim was pending before Congress, McKee procured the passage of two acts of the council of the Choctaw Nation, which acts were passed, as requested by *McKee, with the express understand- [**319** ing and agreement between McKee and the Choctaw Nation that he would "pay to these complainants and others such sum or sums of money as they were justly entitled to receive for the services rendered and money expended by them in the prosecution of said claim, with the further agreement that when said McKee should receive" the money set apart by said acts, as aforesaid, "that he, the said McKee, would hold the same in his possession in trust for the benefit of such persons, including these complainants, as might be entitled to some part thereof." The prayer was that McKee be enjoined from collecting the thirty per cent set apart for the payment of expenses; that a receiver be appointed to collect the same from the Treasury and pay it out to the plaintiffs and such other persons as had a just and equitable claim thereto.

Upon filing this bill, an order was entered enjoining the defendant from receiving this money from the Treasury. McKee, however, disregarded this order, no bond having been given as required by the rule of the court, and drew from the Treasury $783,768.82, which was twenty-five per cent of the whole judgment, five per cent of the thirty per cent having been paid to one Luce, who had taken Blunt's place in the contract. A rule was issued against McKee to show cause why he should not be punished for contempt in violating the restraining order of the court, but, it appearing that no bond had been filed, the motion was overruled and McKee was discharged. On the discharge of the rule, plaintiffs filed a petition based on the bill, answer, and affidavits, and prayed for the appointment of a receiver. After full argument, the court ordered that McKee should pay into court the sum of $136,500, to be held subject to the order of the court. McKee refused to obey this order, and absconded from the jurisdiction of the court. An appeal, however, was taken from the order, and the same was vacated and rescinded on December 3, 1889.

Subsequently, upon a hearing upon pleadings and proofs, a decree was rendered in favor of Ward H. Lamon against McKee as compensation for his services rendered and of his *disbursements and expenditures, for [**320** $35,000, with interest thereon at the rate of six per cent, and so much of the bill as related to claim of Lamon and Black, or either of them, as assignees of the so called Cochrane contract, and as surviving partners of Black and Lamon or Black, Lamon & Co., was dismissed.

From this decree the defendants, Ward H. Lamon and Chauncy F. Black, appealed to this court.

Messrs. **John J. Weed** and **Jefferson Chandler** for McKee.

Messrs. **Nathaniel Wilson** and **James Coleman** for Lamon, etc.

Mr. **Willis B. Smith** for Marbury, Administrator.

Mr. Justice **Brown** delivered the opinion of of the court:

In these cases, Nos. 33 and 34, we are concerned only with the decree in Lamon's favor for $35,000, and with that part of the decree dis-

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missing the claim of Lamon and Black. The bill was originally filed for the purpose of securing the payment to Lamon and Black of thirty per cent of the sum of $2,858,798.62 which the appellant was about to receive from the United States, under the authority received by him from the Choctaw Nation, and also for an injunction restraining him from receiving such sum of money, and for the appointment of a receiver, who should be authorized to collect this sum from the Treasury, whenever the same should become due and payable; and also for an accounting between the appellant and Lamon and Black in respect to the amount due them for services rendered and money expended in the prosecution of the claim. It appearing, however, that the contract of February 13, 1855, was never carried out, nor the money ever collected as required by the contract [321] between Cochrane and the *Choctaw Nation before Cochrane could become entitled to his thirty per cent, complainants amended their bill by averring that McKee procured an act of the Choctaw council of February 25, 1888, making provision for the payment of the amount due under his contract with them, by an express understanding and agreement that he would pay to the complainants and others such sum or sums of money as they were justly entitled to receive, for services rendered and money expended by them in the prosecution of their claim. In his answer, McKee denied the allegations of the bill so far as it related to services alleged to have been rendered in the prosecution of the said claim by the firm of Black, Lamon & Co., or either of them, previous or subsequent to July 16, 1870, but on the contrary averred that Black retired from and abandoned the case before such date; that by reason of such abandonment, the Choctaws, being without counsel, solicited himself and Blunt to take charge of the prosecution of such claim.

1. The first point made by the appellant, McKee, that the Supreme Court of the District of Columbia was without jurisdiction to entertain the suit, because upon the averments of the bill the suit was, in legal effect, one against the Choctaw Nation, to which the nation was a necessary party, is without foundation. The suit is neither directly nor indirectly against the Choctaw Nation; nor if made a party defendant would the complainants be entitled to any relief against the nation. No claim is made against it, nor is any attempt made to impair the effect of its legislation. By its first contract with Cochrane, made by its agents February 13, 1855, in pursuance and by virtue of resolutions of its legislative council of November 9, 1853, and November 10, 1854, it agreed to pay Cochrane for his services thirty per cent of all collections made by him in their behalf. By its second contract, it doubtless assumed that the first contract had been abandoned by Cochrane and his successors, Lamon and Black, and agreed to pay the same thirty per cent upon an amount which had already been fixed, with the further stipulation that Blunt and McKee should pay to Mrs. Cochrane five per cent upon such thirty per cent and should adjust the claims of all parties who had [322] theretofore *rendered service in the prosecution of such claim upon the principles of equity and justice, according to the value of the services so rendered.

The Choctaw Nation had really no interest in the thirty per cent. The stipulation was made by Blunt and McKee for the benefit of the parties interested in the percentage, and as soon as the money should be received by them, or either of them, they would hold it as trustees for the persons legally and equitably entitled to it. McKee, having obtained possession of the money, may be held accountable by a court of equity for its proper distribution. There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. *Taylor* v. *Benham*, 46 U. S. 5 How. 233, 274 [12: 130, 149]; *Kane* v. *Bloodgood*, 7 Johns. Ch 110, 11 Am. Dec. 417; *Baring* v. *Dabney*, 86 U. S. 19 Wall. 1 [22: 90]; *National Bank of Baltimore* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54 [26: 698]; *Keller* v. *Ashford*, 133 U. S. 610 [33: 667]; *Union Mut. L. Ins. Co.* v. *Hanford*, 143 U. S. 187 [36: 118]; *Ryan* v. *Dox*, 34 N. Y. 307, 90 Am. Dec. 696; Story, Eq. Jur. §§ 1041, 1255; Mechem, Agency, § 568. And in enforcing such trust, a court of equity may make such incidental orders as may be necessary for the proper protection and distribution of the fund.

It is true that, in this case, the names of the beneficiaries are not given in the instrument creating the trust, but they are designated by class as "all parties who have rendered service heretofore in the prosecution of said claim," and were to be rewarded "upon the principles of equity and justice, according to the value of the services so rendered." And if there be any conflict between individuals of such class, a court of equity is the proper tribunal for the adjustment of their respective claims. In such case, where the property is disposed of absolutely, the original assignor or party creating the trust need not be made a party to the bill. Story, Eq. Pl. § 153. This proposition renders it unnecessary to consider *whether the [323] Choctaw Nation is subject to be sued in the supreme court of the District of Columbia. The fact that the Act of Congress making the appropriation required the money to be paid "upon the requisition or requisitions" issued by "the proper authorities of the Choctaw Nation" did not oust the court of equity from controlling its subsequent disposition. The object of the bill is not to change the direction of Congress in respect to such payment, but to determine the further disposition of the money after it has reached the hands of the designated payee.

The objection that there was no consideration for the promise made by the appellant to adjust the claims of all parties, etc., is untenable since the original receipt of the money is a sufficient consideration for all promises, expressed or implied, with reference to its final disposition. *Walker* v. *Rostron*, 9 Mees. & W. 411; Mechem, Agency, § 568.

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2. The history of this controversy may be epitomized as follows: The Choctaws, believing that they had certain just claims against the government and particularly for the net proceeds of lands ceded to the United States by the treaty of Dancing Rabbit Creek of September 22, 1830, at first employed Albert Pike to prosecute such claims, and upon his abandoning the same annulled his contract, employed Cochrane and agreed to pay him thirty per cent of the amount collected by him. The contract with him was made February 13, 1855, and continued in force until it was superseded by the contract made with Black, November 8, 1866. Indeed, the contract of 1855 indicates that, for three years before that, Cochrane had been acting as the agent of the Choctaw Nation in the prosecution of certain other claims, in regard to which he had rendered most important and valuable services, etc. During these fourteen years he seems to have had charge of the Choctaw claims, and been engaged in their active prosecution. During this time the treaty of 1855, submitting the Choctaw claim for the net proceeds of the Senate, was concluded, and the award of the Senate of 1859 made, by which the Choctaws were allowed the proceeds from the sale of such lands as had been sold by the United States on the first of January preceding, 324] deducting *certain expenses therefrom, and referring the claim to the Secretary of the Interior to state the amount due them according to certain principles of settlement laid down by the Senate. During this time, also, the Act of Congress of 1861 was passed, which ratified and confirmed the Senate award and provided for a partial payment thereof. At the same time, Cochrane's express contract with the Choctaws was that his compensation of thirty per cent was only payable when the money was paid over by the United States to the Choctaw Nation or its legally authorized representatives—in other words, it was contingent upon success. Under this contract he seems to have been paid, for moneys collected before his death, the sum of $282,600, thirty per cent of the amount he had procured for the Choctaws.

On November 8, 1866, McPherson, the executor of Cochrane's estate, Cochrane in the meantime having died, acting under an authority contained in his will, assigned to Black all the interest of Cochrane in the thirty per cent compensation, and substituted him in the place of Cochrane, with the proviso that he should pay out of the money to be received by him to Cochrane's executor such sum as should be agreed upon between the parties, as well as all other demands justly due and payable out of such thirty per cent. In this connection Black seems to have been acting principally for his partner, Mr. Lamon. It appears that the firm of Black, Lamon & Co. were actively engaged in an effort to secure from Congress an appropriation to pay the Senate award during several sessions, Judge Black appearing before committees of Congress on behalf of the nation and their award, and the other parties preparing memoranda and briefs; that both Lamon and Black devoted much time in explaining the said award, and the claims upon which it was founded, to individual members of Congress. That, in 1870, Mr. Lamon, who had the principal charge of the case, advised the Choctaw delegates to discontinue further efforts to obtain from Congress the payment of the award by direct appropriation, and to apply for the passage of a bill referring the same to the court of claims for adjudication: that the delegates declined to accede to this proposition, and insisted *upon a further effort to secure the ap [325 propriation direct from Congress. That about this time they entered into the contract with McKee, and that, thereafter, Lamon, who does not seem to have been apprised of such contract, continued to urge upon Congress the justice of their claim and the duty of the United States to pay said award, until about 1878, when he prepared, at the request of Pitchlynn, the chief delegate, a bill authorizing the reference of such claim to the court of claims and a memorial to accompany the same.

About 1870, however, Black appears to have withdrawn from the case, except so far as was necessary for the protection of the interest of Thomas A. Scott, who had advanced some $75,000 to Cochrane's executor, whom Black felt in honor bound to protect. His reasons for so retiring are fully stated in a letter of March 27, 1883.

Whether, under Revised Statutes, section 3477, prohibiting the assignment of claims against the United States, as interpreted by this court in *Spofford* v. *Kirk*, 97 U. S. 484 [34: 1032], and subsequent cases, the original contract between Cochrane and the Choctaw nation, or the assignment thereof to Black by Cochrane's executor, McPherson, was of any force or validity or not, it is unnecessary to inquire. It is sufficient to say that the contract was entirely contingent upon the money being collected, and the compensation therein provided for was payable only from such money. As none was ever collected by Black or Lamon, they never obtained a legal right to compensation. But the question still arises whether, notwithstanding there was no legal claim, the Choctaws were not at liberty to recognize the fact that important services had been rendered, and that a moral obligation to pay for them existed on the part of those who should ultimately succeed in making the collection.

In this posture of affairs the contract of July 16, 1870, between the Choctaws and McKee, was entered into. There is very little, if any, testimony to justify the charge in the amended bill that this contract was fraudulently obtained for the purpose of cheating the complainants and other persons interested in the claim, and to obtain possession of the funds which McKee knew were due and justly payable out of the *proceeds. The truth seems to [326 be that the Choctaws were either discontented with the advice given by Lamon and Black to discontinue their efforts to secure a direct appropriation for the payment of the award, and apply for leave to go to the court of claims, or became satisfied that Black and Lamon were so much engrossed in other matters that they could not bestow the proper attention upon this; in short, that Black had practically abandoned the case, and that further assistance must be obtained. That there was no inten-

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tion on the part of either party to ignore what had already been done is evident from the concluding paragraph of their contract out of which the express trust is claimed to arise, that Blunt and McKee would adjust the claims of all parties who had theretofore rendered services in the prosecution of the claim upon the principles of equity and justice, according to the value of the services so rendered. That this clause must have referred to Cochrane and his assignees is evident from the fact that the stipulation was made expressly in favor of those who had "heretofore" rendered services. As such services had been rendered only by Cochrane and his assignees, and as Cochrane's individual claim was already provided for by the donation of five per cent to his wife, it is difficult to understand for what the subsequent reservation was made if not for Black and Lamon, who had succeeded him, and who had certainly rendered some valuable services in the prosecution.

The court below was of the opinion "that the Choctaws, in defining the trust, did not mean that people whose contracts they had annulled were to come within the trust," and hence that Black and Lamon, whose services were all rendered under the Cochrane contract, were not intended to be included. We do not think this necessarily follows. It is true that in 1874 the general council of the Choctaw Nation did pass an act annulling the contract with Cochrane, but this act is really of very little value, since the contract had already been practically abandoned as early as 1870, and was as dead as any act of the legislative council could make it. This act may have given it its *coup de grace*, but, for all practical purposes, it was null already. The object of the stipula-[327] tion in question was to *acknowledge that valuable services had "*heretofore*" been rendered, and, as Cochrane had already been provided for, it is but natural to suppose that his assignees were the ones intended to be recognized.

We are therefore of opinion that complainants, as surviving partners of the firm of Black, Lamon & Co., are entitled to recover the reasonable value of those services from the date of the assignment from McPherson to Black to the date of the McKee contract, which may be taken as denoting the time when the Black contract was abandoned. Whatever services Lamon rendered prior to that time, he rendered as a member of, and for the benefit of, the firm of Black, Lamon & Co., and that, too, is the theory of this bill, which is founded upon a partnership claim. If, subsequently to that time, or to the time when Lamon first learned of McKee's contract, Lamon rendered services which were of value to McKee, they would not fall within the express trust of the McKee contract, but perhaps might be subject to an implied trust in his favor. As to that, however, and as to the question whether the bill is properly framed to cover an individual liability, we express no opinion.

The decree of the court below is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

HENRY E. McKEE, *Appt.*, *v.* CHARLOTTE V. LATROBE, Exrx.

(See S. C. Reporter's ed. 327-331.)

Construction of a trust.

A trust expressed in a contract by an attorney to collect a claim for an Indian nation for thirty per cent of the amount collected, "to adjust the claims of all parties who have rendered service heretofore in the prosecution of such claim, upon the principle of equity and justice, according to the value of the services so rendered," is not merely a contract of indemnity with the nation to save it harmless from any claim for such services, but is enforceable in equity by such parties, in an action for the payment of the services out of the thirty per cent received by him for such collection.

[No. 35.]

Argued March 13, 14, 1895. Decided October 21, 1895.

APPEAL from a decree of the Supreme Court of the District of Columbia in a suit in equity brought by John H. B. Latrobe against Henry E. McKee, for the purpose of sharing in the sum recovered by McKee upon the trust contained in a contract between the Choctaw Nation and McKee in favor of persons who had rendered services theretofore in the prosecution of a certain claim in favor of said Nation against the United States. Said decree being against McKee for $75,000, with the further provision that if anything was paid to the complainant Latrobe, out of the fund deposited in court by McKee in the interpleader suit, such sum should be credited in favor of McKee on the decree. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a bill originally filed by John H. B. Latrobe, July 13, 1888, six days after the bill of Lamon and *Black was filed, and for [328] the same general purpose of sharing in the sum recovered by McKee, relying upon the trust contained in the contract of July 16, 1870, between the Choctaw Nation and McKee, in favor of persons who had rendered services theretofore in the prosecution of said claim.

His allegation of service is substantially that, after the close of the war of the rebellion, the Choctaw Nation employed him as their professional advisor in all matters, including the net proceeds claim, pertaining to their rights against the United States, for which the nation agreed to pay him a reasonable compensation. That he immediately entered upon the duties thus assumed, and prepared the treaty of 1866 between the Nation and the United States, reinstating the Indians in their rights and privileges. For this service, however, he seems to have been paid. That he procured and submitted large masses of evidence to the various committees of Congress having the matters in charge, and made numerous arguments before said committees, and before the executive officers of the United States, and stated accounts in behalf of the nation against the United

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States, and was engaged five or six years in the active prosecution of their claim. That these services continued until about the time McKee interposed in the business as the leading agent of the nation. That after that date his services were apparently not needed or desired by the other attorneys and he did but little, but is informed and believes that McKee, and those working with him prosecuting the case which he had previously prepared, and, with the use of the results of his professional skill and industry, secured the payment of the claim. That, if the McKee contract were held to be valid, then McKee was bound in equity and justice to pay the complainant a fair and just compensation for the services theretofore rendered, for which McKee should be charged as trustee. That it was agreed, in 1866, between himself and the Choctaws, that his services should be rendered in conjunction with Cochrane, and that he subsequently agreed with Cochrane that his compensation should be paid out of the percentage reserved to Cochrane by his contract, and that he is reasonably entitled **329**]to receive $75,000, which had been *agreed upon between himself and McPherson, Cochrane's executor, as his proper compensation.

In his answer, McKee denied the general employment of the complainant by the Choctaw Nation, and averred that, if he were ever employed at all, it was only to assist and advise with the authorities of said Nation in regard to the negotiation of the treaty of April 28, 1866, and denied that under such treaty the claim for net proceeds was secured, or that it had been prosecuted to a successful conclusion through the provisions of such treaty.

Upon a hearing upon pleadings and proofs, the case resulted in a decree for $75,000 against McKee, with the further provision that if anything were paid to the complainant, Latrobe, out of the fund deposited in the court by McKee in the interpleader suit, such sum should be credited in favor of McKee on the decree. Upon the following day, a decree was entered in the interpleader suit, to which Latrobe was a party defendant, awarding him his distributive share of the entire amount, $75,000, out of the general fund of $147,057.63 in controversy in that case. McKee appealed from the decree in this case.

Messrs. **John J. Weed** and **Jefferson Chandler** for appellant.

Messrs. **Enoch Totten** and *Reginald Fendall* for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

This is another one of the claims made under the trust expressed in the McKee contract "to adjust the claims of all parties who have rendered services heretofore in the prosecution of said claim, upon the principle of equity and justice, according to the value of the services so rendered." McKee's argument in this connection is that this was a personal agreement and obligation of himself and Blunt with the Choctaw Nation; was not for the benefit of Latrobe; vested in no one any interest in the money which might become payable under that contract; and was not an assignment or dedi- **330**]cation of *any part of the money which they might receive from the Choctaw Nation, in consideration of the performance by them of their contract—in other words, that it was a contract of indemnity, by which McKee undertook to save the Choctaw Nation harmless from any claim that should be made for services that had been theretofore rendered by other agents and attorneys. We do not so read it. A trust so plainly declared would be of no avail, if the class of persons who are described therein could not take advantage of it. It was not needed to indemnify the Choctaws, since no possible action could lie against them after the contract had been abandoned by Black. It was evidently intended to satisfy any moral obligation for services which had been performed, but not completed, and to throw the burden of adjusting and paying them upon McKee.

His theory, too, is inconsistent with his repeated statements to leading members of the Choctaw council, whose affidavits, received in the place of depositions, show that he declared to the leading authorities of the nation that he considered himself obligated under his contract to pay all outstanding obligations to persons for the services rendered in the prosecution of the claim prior to his own contract. In addition to that, and in corroboration of his own statements, he exhibited a letter written by his own attorney, and by his direction, to Leflore, in which he stated that "so far as I know, or have ever heard, every lawyer who has ever rendered service, or pretends to have rendered service, in regard to the net proceeds claim expects to get his pay out of the thirty per cent, and to get it through McKee. For myself, I expect to be paid by Mr. McKee out of his thirty per cent. I have no claim against the Choctaw Nation if Mr. McKee's thirty per cent is paid, even if he should not pay me, but of this I have not the slightest doubt. McKee's contract requires him to stand between the Choctaws and their attorneys who have rendered service. He would be liable to suit in the courts, here and elsewhere, wherever he could be found, if he should neglect or fail to carry out his agreement with the Choctaws to settle and adjust the claims of other attorneys, who have rendered *service, upon princi- [**331** ples of equity and justice. The Choctaws would not be liable to any such suit anywhere." Here follows a list of parties who had rendered service in the prosecution of the claim, among which is the name of John H. B. Latrobe, with the statement that "he looks to Mr. McPherson, executor of Mr. Cochrane, for his fee. Whatever sum Mr. Latrobe or Mr. Cochrane gets, comes out of McKee's thirty per cent." McKee's prompt repudiation of this promise, and his vigorous defense to all these claims, argues either a serious impairment of memory with reference to the transaction, or a deliberately dishonest purpose.

The services of Mr. Latrobe in this connection seem to have had their origin in a visit made by the Choctaw delegation on their way to Washington, at Latrobe's residence in Baltimore. It seems that they expressed to him the fear that all their treaties with the government had been abrogated by the war that had just ended; that he expressed some doubt upon the point, said he would look into the matter, and a short time afterwards called upon the

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delegation and told them that he had made up his mind that their treaties had not been abrogated by the war; that the right had been given to the President to abrogate them by proclamation, and that he had not done so; that the occasion had passed, and that the treaties were still in force. The value of his services were subsequently agreed upon by McPherson, executor of Cochrane's estate, and fixed at $75,000. This was the value put upon them by the court below, and we see no occasion to disturb it.

The decree of the court below is therefore affirmed.

332]ROBERT McCORMICK, *Plff. in Err.*,
v.
J. D. HAYES.

(See S. C. Reporter's ed. 332-343.)

Parol evidence, when not admissible.

Parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and state officers having authority in the premises, that certain lands were in fact, at the date of the Swamp Land Act of 1850, swamp and overflowed lands.

[No. 87.]

Argued March 27, 28, 1895. Decided October 21, 1895.

IN ERROR to the Supreme Court of Iowa to review a judgment of that court which affirmed a judgment of the District Court of Linn County in that state declaring that J. D. Hayes, the plaintiff in the suit, was owner of certain lands, in an action brought by said plaintiff against Robert McCormick. *Reversed.*

The facts are stated in the opinion.

Mr. **Charles A. Clark** for plaintiff in error.

Mr. **D. E. Voris** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up a judgment of the supreme court of Iowa, which affirmed a judgment of the district court of Linn county in that state, declaring the defendant in error, who was the plaintiff in the suit, to be the owner of the southwest quarter of the northwest quarter of section nineteen, township eighty-five, range eight, west of the fifth principal meridian.

It is assigned as error that the judgment of the state court deprived the defendant of rights secured to him under the laws of the United States.

The plaintiff Hayes claimed title under the Swamp Land Act of Congress of September 28, 1850 (9 Stat. at L. 519, chap. 84); the defendant, under an Act of Congress, approved May 15, 1856 (and the acts amendatory thereof), granting lands to the state of Iowa in aid of the construction of certain railroads. 11 Stat. at L. 9, chap. 28.

The question of title cannot be fully understood without examining various enactments, Federal and state, under which the parties respectively claim the lands in dispute, as well as some of the decisions of this court. We are the more disposed to enter upon this examination because of the statement by counsel in argument that many cases in the *supreme[333 court of the state depend, in whole or in part, on the determination of the questions involved in this suit.

By the Swamp Land Act of 1850 Congress granted to Arkansas, to enable it to construct the necessary levees and drains for reclaiming the swamp and overflowed lands within that state, the whole of such lands made "unfit thereby for cultivation." § 1. The Act made it the duty of the Secretary of the Interior to make out, as soon as practicable after its passage, an accurate list and plats of those lands, and transmit it to the governor of the state, and, at the request of the latter, to cause a patent to be issued to the state therefor. "On that patent," the Act declared, "the fee simple to said lands shall vest in the said state of Arkansas, subject to the disposal of the legislature thereof." § 2. The required list and plats, it was provided, should include all legal subdivisions, the greater part of which were wet and unfit for cultivation, and exclude each subdivision, the greater part of which was not of that character. § 3. The provisions of the Act were extended to and their benefits conferred upon each state in which swamp and overflowed lands were situated. § 4.

The legislature of Iowa authorized the commissioner of the state land office to provide the proofs necessary to secure those lands to the state. Iowa Laws 1851, chap. 69, p. 169.

By a subsequent statute of the state, approved January 18, 1853, all the swamp and overflowed lands granted to Iowa were granted to the counties respectively in which they were situated, for the purpose of constructing the necessary levees and drains for reclaiming the same. If it appeared that any of such lands had been sold by the United States after the passage of the Act of 1850, the counties in which they lay were authorized to convey to the purchasers, the county court taking from the purchaser an assignment of all his rights in the premises, with authority to receive from the United States the purchase money. Where a county surveyor had made no examination and report of swamp lands within his county, in compliance with instructions from the governor, the county court was directed to appoint a competent person with authority to examine such lands, and make reports and plats to the *county court, which should transmit lists[334 of the lands in each of the counties, "in order to procure the proper recognition of the same, on the part of the United States, which lists, after an acknowledgment of the same by the general government," were to be recorded. Iowa Laws 1852, chap. 12, p. 29, §§ 1-3.

A subsequent act, approved January 25, 1855, authorized the governor to draw all moneys due or that might become due to the state, arising from any disposition of its swamp lands by the government of the United States,

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

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to provide for the selection of the swamp lands of the state, and to secure the title to the same, and also for the selection, in the name of the state, of other lands in lieu of such as had been or might thereafter be entered with warrants; the selections made by organized counties to be reported by the governor to the authorities at Washington. Iowa Laws 1854-55, chap. 138, p. 261.

Such was the legislation—so far as it need be noticed—at the time Congress, by an Act approved May 15, 1856, granted to Iowa, to aid in the construction of certain lines of railroad in that state, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads, with liberty to the state to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the rights of pre-emption had attached at the time the lines or routes of the respective roads were definitely fixed; the land so located to be in no case farther than fifteen miles from the lines of the roads. But the Act expressly exempted from its operation, and reserved to the United States, any and all lands theretofore reserved by any Act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, except so far as it was found necessary to locate the routes of the railroads through such reserved lands, in which case the right [335] of *way only was granted, subject to the approval of the President of the United States. 11 Stat. at L. 9, chap. 28.

The next enactment in point of time was the Act of Congress, approved March 2, 1857 (11 Stat. at L. 251, chap. 117), providing that the selection of swamp and overflowed lands granted to the several states by the Swamp Land Act and by the Act of March 2, 1849, giving aid to the state of Louisiana in draining the swamp lands within its limits, and theretofore reported to the Commissioner of the General Land Office, so far as such lands remained vacant and unappropriated, and were not interfered with by an actual settlement under any existing law of the United States, "be and the same are hereby confirmed, and shall be approved and patented to the said several states, in conformity with the provisions of the Act aforesaid, as soon as may be practicable after the passage of this law."

The trust conferred upon Iowa by the Act of Congress of May 15, 1856, was accepted by the state by an Act approved March 26, 1860. And by the latter Act so much of the lands, interests, rights, powers, and privileges as were granted by Congress in aid of the construction of a railroad from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line running as near as practicable to the 42d parallel across the state to the Missouri river, were granted and conferred upon the Cedar Rapids & Missouri River Railroad Company, an Iowa corporation. Iowa Laws 1860, chap. 37, p. 40.

By an Act of Congress, approved March 12, 1860, it was provided that the selection to be made from lands then already surveyed in each of the states, under the authority of the Swamp Land Act of 1850, and of the Act approved March 2, 1849, to aid Louisiana in draining the swamp lands therein, "shall be made within two years from the adjournment of the legislature of each state at its next session after the date of this Act; and as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the *state that the surveys have been se- [336] lected and confirmed." 12 Stat. at L. 3, chap. 5.

At the trial in the district court the plaintiff introduced witnesses having more or less knowledge of the land in dispute. Their evidence, it is claimed, showed that at and ever since the passage of the Act of 1850 this land was, within the meaning of that Act, swamp and overflowed land.

The parties stipulated that the land in controversy was seventeen miles in a direct line from the Cedar Rapids & Missouri River Railroad (now the Chicago & Northwestern Railroad), as constructed, built, and operated; that the railway was built, constructed, and was being operated on the present line of the latter road, for a distance of about 100 miles west of Cedar Rapids, Iowa, on and prior to the 2d day of June, 1864; and that the assessed value of the land in controversy for each and every year since 1866 to the present time, as returned by the assessor, as shown by his assessment books, is $95.

The *northwest* quarter of the northwest quarter of section 19, township 85, range 8, was selected as swamp and overflowed land.

The land here in dispute is the *southwest* quarter of the northwest quarter of the *same section*, township, and range, and is covered by a quitclaim deed to Hayes, acknowledged September 4, 1888, from the supervisors of Linn county, state of Iowa, the consideration recited being one dollar.

The present suit was commenced within a few days after the making of that deed.

The defendant's witnesses stated facts tending to show that the land in controversy was not and never was swamp or overflowed land.

He introduced in evidence a list of lands, aggregating 1,809 acres, certified as having been granted by Congress to Iowa for the Iowa Air Line Railroad, afterwards the Cedar Rapids & Missouri River Railroad. This list designated lands within the six mile limit *and included the land in controversy*, was signed by the Commissioner of the General Land *Office, [337] December 23, 1858, and approved by the Secretary of the Interior, December 27, 1858.

The defendant read in evidence a list of lands in Linn county, aggregating 668 acres, certified and approved in 1881 *to the state* by the Secretary of the Interior, under the Act of May 15, 1856, *as having enured to the Cedar Rapids & Missouri River Railroad Company. This list included the land in suit*, was in the form required by the Iowa statutes, and was signed by the governor and register of the state land office.

He also read in evidence a deed dated March, 1870, from the Cedar Rapids & Missouri River

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Railroad Company to the Iowa Railroad Land Company, and also a deed to him from the Iowa Railroad Land Company, dated October 30, 1885,—both deeds covering the land in dispute.

It appears that the parties made the following stipulation, which was read in evidence by the defendant, to wit: "In order to avoid the introduction of evidence upon the subject hereinafter mentioned, it is stipulated and agreed by and between the parties: That the county of Linn, prior to 1875, made selections of swamp lands as shown by the records of the register of the state land office, which selections so made embrace certain tracts in section 19, township 85, range 8, in Linn county, and among them the *north*west quarter of N. W. quarter and the south*east* quarter of the N. W. quarter of said above-named section. The said selections so made, or a copy thereof, are on file in the secretary of state's office in the state of Iowa, and that the tract in controversy [the *south*west quarter of the northwest quarter of the same section] *was not included in any such selections*, and that, so far as shown by any record of the state or county, the tract in controversy has never been patented to the state nor by the state to the county."

It was also proved by the defendant that the Cedar Rapids & Missouri River Railroad Company and the Iowa Land Company and himself had annually paid the state, county, and other taxes assessed and levied on said land from 1866 to 1888, both inclusive.

338] *Each party objected to the evidence introduced by the other on the ground of incompetency.

This was the case on which the district court gave judgment establishing and quieting the plaintiff's title.

Undoubtedly, the certification to the state by the Department of the Interior, of the lands in controversy, under the railroad Act of May 15, 1856, as having enured to the Cedar Rapids & Missouri River Railroad Company, was unauthorized by law, if the lands at the date of the Swamp Land Act of 1850 were swamp and overflowed lands, whereby they were unfit for cultivation; for lands of that character were expressly reserved from the operation of the railroad grant of 1856. If they were not granted to the state for the benefit of the railroad company, because previously granted to the state as swamp and overflowed lands, they could not be legally certified or transferred to the state to be applied in aid of the construction of the railroad.

This is made clear by the decision in *Burlington & M. R. R. Co.* v. *Fremont County*, 76 U. S. 9 Wall. 89, 94, 95 [19:563, 564].

That was a suit in equity to quiet the title to a tract of land in Iowa, both parties claiming under grants by Congress—the plaintiff, the county of Fremont, under what is known as the Swamp Land Act of 1850; the railroad company, under the above Act of Congress of May 15, 1856, granting lands to Iowa to aid in the construction of railroads. After referring to that part of the Act reserving from its operation any and all lands theretofore reserved to the United States by any Act of Congress, or in any manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, the court, among other things, said: "These reservations clearly embrace the previous *grant of the swamp and overflowed [339 lands for the purpose of enabling the state to redeem them and fit them for cultivation by levees and drains. At the time of the passage of this Act (May 15, 1856) a moiety of the lands in controversy had been selected and reported to the land department; and the authorities of the state, under instructions from that department, were engaged in the selection of the remainder. The lands already selected and returned had been withdrawn from sale, and were not in the market at the time of the passage of the Act; and as soon as the remaining lists were returned, which was January 21, 1857, they were also withdrawn from the market. In the language of the railroad Act, the whole of the lands in controversy were 'otherwise appropriated,' and were 'reserved' for the purpose of aiding the states in their objects of internal improvements." Many decisions of this court are to the same effect.

The controlling question, therefore, in this case, so far as the plaintiff is concerned,—and he must recover upon the strength of his own title, even if that of the defendant be defective,—is whether, under the circumstances disclosed by the record, the particular lands in controversy, in the absence of any selection and certification of them by the United States to the state under the Swamp Land Act can be shown by parol testimony to have been, in fact, at the date of that Act, swamp and overflowed lands. Congress having made it the duty of the Secretary of the Interior to make out accurate lists and plats of the lands embraced by the Swamp Land Act, and transmit the same to the governor of the state, and, at the request of the latter, to cause a patent to be issued to the state therefor, and having provided that "on that patent the fee simple to said lands shall vest in said state subject to the disposal of the legislature thereof," did the title vest in the state, by virtue alone and immediately upon the passage of the Act, without any selection by or under the direction of the Department of the Interior, so that the state's grantees could maintain an action to recover the possession of them?

At the term of the court at which *Burlington & M. R. R. Co.* v. *Fremont County*, 76 [340 U. S. 9 Wall. 89 [19:563], was determined, the case of *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19:599], was decided. The latter case was ejectment by a railroad company to recover certain lands in Missouri. It deduced title from an Act of Congress, approved June 10, 1852, granting public lands to that state to aid in the construction of certain railroads. The state accepted the grant, and by statute vested in the railroad company the lands so granted, without any description of their boundaries. The defendant, Smith, asserting title under the Swamp Land Act, introduced parol evidence tending to show that, at the date of that Act, the lands in dispute were, in fact, wet and unfit for cultivation, and therefore were to be deemed swamp and overflowed lands within the meaning of the Act of Congress. It was admitted that the title had vested in the railroad company, unless the land was of the class that was reserved by

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the above Act of 1852, which, in that respect, was similar to the Act of 1856 granting lands to Iowa to aid in the construction of railroads. The court held this evidence to be competent.

Mr. Justice Clifford did not concur in the judgment of the court, being of opinion that, as special power was conferred upon the Secretary of the Interior to make out an accurate list and plats of the lands, it was quite clear that a jury was no more competent to ascertain and determine whether a particular subdivision should be included or excluded from the list and plats required to be made under that section, than they would be to make the list and plats during the trial of a case involving the question of title; and that courts and juries were not empowered to make the required list and plats, nor determine what particular lands shall be included in the list and plats before they were prepared by the officer designated by law to perform that duty; otherwise, he said, the states could select for themselves, and if their title was questioned by the United States or by individuals they could claim of right that the matter shall be determined by jury.

The next case is that of *French* v. *Fyan*, 93 U. S. 169-172 [23:812, 813]. That was also ejectment, and the question was, whether, as 341] *against a patent for the lands there in controversy, issued by the United States to Missouri under the Swamp Land Act of 1850, it was competent to show by parol testimony that the lands so patented were not, in fact, swamp and overflowed lands within the meaning of the Act. In that case the plaintiff by purchase in 1872, became vested with such title as had passed in 1854 to the Missouri Pacific Railroad Company under the Act granting lands to aid that corporation in the construction of its road. The defendant based his claim on a patent issued by the United States in 1857 under the Swamp Land Act of 1850. It thus appeared on the face of the papers—treating the grant by the Swamp Land Act as one *in præsenti*, and any patent issued under it, no matter when issued, as relating to the date of the grant—that the better title was with the defendant, because the grant under which the railroad company claimed was not made until after the passage of the Swamp Land Act. In this view, the question arose whether, in an action at law, in which these evidences of title came in conflict, parol testimony could be admitted that the land was never, in fact, swamp and overflowed, and, in that way, collaterally impeach the patent issued to the state under the Act of 1850.

In considering that question, the court, in *French* v. *Fyan*, reaffirmed the general doctrine, to which there are some recognized exceptions not important to be here stated, that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, was conclusive upon all others. Speaking by *Mr. Justice* Miller, who delivered the opinion in the previous case of *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599], the court, in *French* v. *Fyan*, said: "We see nothing in the case before us to take it out of the operation of that rule; and we are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before *it. It would be substituting the jury, [342 or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

In the argument of *French* v. *Fyan* great reliance was placed by the counsel on *Hannibal & St. J. R. Co.* v. *Smith*, above cited, in which, as we have seen, parol evidence was held to be competent to prove that a particular piece of land was swamp and overflowed land within the meaning of the Act of Congress. Upon this point the court, in *French* v. *Fyan*, said: "But a careful examination will show that it was done with hesitation, and with some dissent in the court. The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made *no selection or lists whatever*, and *would issue no patents*, although many years had elapsed since the passage of the Act. The court said: 'The matter to be shown is one of observation and examination; whether arising before the Secretary, whose duty it was primarily to decide it, or before the court whose duty it became, because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.' There were no means, as this court has decided, to compel him to act; and if the party claiming under the state in that case could not be permitted to prove that the land which the state had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the state might be defeated by this neglect or refusal of the Secretary to perform his duty. *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 [19: 62]; *Cox* v. *United States*, 76 U. S. 9 Wall. 298 [19: 579]; *Litchfield* v. *Richards*, 76 U. S. 9 Wall. 575 [19: 681]. There is in this no conflict with what we decide in the present case, but, on the contrary, the strongest implication that if, in that case, the secretary *had made any decision*, the evidence would have been excluded." 93 U. S. 178 [23: 814].

The same general question arose, under somewhat different circumstances, in *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 69 [29: 346], which *was an action to recover possession of [343 a tract of land in California; the plaintiff deraigning title through a conveyance by one to whom the United States had issued a patent in 1875; the defendant contending that the lands in controversy, although covered by the above patent, were, in fact, lands that passed to the state under the Swamp Land Act of 1850. The question was whether the defendant, who did not connect himself in any way with the title, and was a mere intruder, without color of title, could be admitted to show by parol evidence that the lands were in fact swamp and overflowed. The court said: "In that case (*French* v. *Fyan*, 93 U. S. 169 [23:812]), parol evidence to show that the land covered by a patent to

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Missouri under the act was not swamp and overflowed land, was held to be inadmissible. On the same principle, parol testimony to show that the land covered by a patent of the United States to a settler under the pre-emption laws was such swamp and overflowed land must be held to be inadmissible to defeat the patent. It is the duty of the land department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. As was said in the case cited of the patent to the state, it may be said in this case of the patent to the pre-emptioner, it would be a departure from sound principle and contrary to well-considered judgments of this court to permit, in such action, the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony."

It is supposed by counsel that these principles were modified in *Wright* v. *Roseberry*, 121 U. S. 488, 511, 512, 518 [30: 1039, 1046, 1048]. But such is not the fact. In that case the plaintiff sued to recover possession of a tract of land in California. He asserted title under that Act, claiming by conveyance from parties who had purchased from the state; the defendants, under patents of the United States issued under the pre-emption laws to them or to parties from whom they derived their interest. The particular point to which the court directed its attention was whether an action could be maintained upon the title to swamp **344**]*and overflowed lands *in California* until they had been certified as such pursuant to the fourth section of the Act of Congress of July 23, 1866, entitled "An Act to Quiet Land Titles in California." In determining that question it became necessary to examine the course of legislation and of judicial decision under the Swamp Land Act of 1850. Referring to the Act of July 23, 1866 (14 Stat. at L. 218, chap. 219), the court said that "Congress changed the provisions of law for the identification of swamp and overflowed lands *in that state. It no longer left their identification to the Secretary of the Interior*, but provided for such identification by the joint action of the state and Federal authorities." That Act, the court said, tended to remove the uncertainty and confusion which prevailed in relation to land titles in that state, "principally by recognizing the action of the state in disposing of the lands granted to her, in cases where such disposition was made to parties in good faith, and did not interfere with previously acquired interests, and by providing a mode for identifying the swamp and overflowed lands in the future without the action of the Secretary of the Interior." It appeared in proof that the lands there in controversy had been segregated as swamp and overflowed lands by the authorities of the state of California; that their designation as such lands on a plat of the township made by the surveyor general of the United States was approved by that officer, and forwarded to the General Land Office, pursuant to the Act of 1886; and that such plat was approved by the Commissioner, as shown by its official use of it. "The Act of Congress" the court said, "intended that the segregation maps prepared by authority of the state, and filed in the state surveyor general's office, if found, upon examination by the United States surveyor general, to be made in accordance with the public surveys of the general government, should be taken as evidence that the lands designated thereon as swamp and overflowed were such in fact, except where this would interfere with previously acquired interests." So far from modifying the rule announced in *French* v. *Fyan*, the court recognized the authority of that case, and distinguished it from the one then under consideration.

*In *Heath* v. *Wallace*, 138 U. S. 573, [**345** 585 [34:1063, 1068], the court held that the decision of the land department on the question whether lands were swamp and overflowed, within the meaning of the Act of 1850, was the decision of a fact which, in the absence of fraud or imposition, was conclusive upon the courts.

The latest case in this court upon the general question before us is *Chandler* v. *Calumet & H. Min. Co.* 149 U. S. 79, 88, 89, 92 [37: 657, 661, 662]. The action was ejectment, each party holding a conveyance from the state of Michigan; that to the plaintiff, Chandler, having been made many years subsequent to the one made to the defendant. The plaintiff claimed that the premises in controversy were a part of the swamp and overflowed lands granted to the state by the Act of September 28, 1850, and were patented to him by the state on the 3d day of November, 1887, whereby he acquired a title to the same superior to that attempted to be passed to the defendant by the prior patent based on an Act of Congress of August 26, 1852, granting public lands to Michigan to aid in the construction of a ship canal around the Falls of St. Mary. There was proof showing that the state and the Interior Department made a selection of lands under the Swamp Land Act, and that the lands there in controversy were not embraced in such selection, nor in the patent to the state for them. The defendant contended that this action of the state and of the Interior Department was a determination that the particular land in dispute was not covered by the Act of 1850, and it having been selected and certified to the state under the Act of 1852 was a determination that it was included in the canal grant; and that this determination could not be collaterally attacked in an action at law. Referring to *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599], *Mr. Justice* Jackson, speaking for the court, after observing that the converse of the situation existing in that case was presented in the case then before it, said: "But aside from this, the rule as to oral evidence, recognized in that case, was afterwards explained, and limited, in its operation, to cases in which there had been nonaction or refusal to act on the part of the Secretary of the Interior in selecting lands granted, as appears in the subsequent cases of *French v. *Fyan*, 93 [**346** U. S. 169, 173 [23: 812, 814], and *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 69 [29: 346], where parol evidence was offered to show that patented lands were not of the character described."

After examining *French* v. *Fyan* and *Ehrhardt* v. *Hogaboom*, above cited, and stating that nothing said or involved in *Wright* v.

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Roseberry, 121 U. S. 488 [30: 1039], was in conflict with the rulings in those cases, the court proceeded: "Under the principle announced in that case, and under the foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the Secretary of the Interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which pass to the state by the swamp land grant, and that the selection by the state of the demanded premises under the canal grant of 1852, with the approval of the Secretary of the Interior, and the certification of the department to the state that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. The exclusion of the land in dispute from the swamp lands selected and patented to the state, and its inclusion in the selection of the state as land coming within the grant of 1852, with the approval of such selection by the Interior Department and the certification thereof to the state, operated to pass the title thereto as completely as could have been done by formal patent (*Frasher* v. *O'Connor*, 115 U. S. 102 [29: 311]), and, being followed by the state's conveyance to the canal company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony in an action at law. Under the facts of this case we are of opinion that the plaintiff in error could not properly establish by oral evidence that the land in dispute was, in fact, swamp land, for the purpose of contradicting and invalidating the department's certification thereof to the state and the latter's patent to the canal company."

To this review of the former decisions of this court but little need be added. The case before us is not like that of *Hannibal & St. J. R. Co.* v. *Smith*, in which, as subsequently ex-[347] plained *in *French* v. *Fyan*, it was shown that there was an absolute neglect of duty on the part of the Interior Department, in that it neither made nor would make any selection or lists whatever, and therefore there was no action by that department that could be relied on as a determination of the question whether the particular lands then in dispute were or were not embraced by the Swamp Land Act. That case was exceptional in its circumstances, and seemed to justify the decision rendered, in order to prevent a total failure of justice, arising from the unexplained neglect of the land department to perform the duty imposed by the Act of 1850. What was said in *French* v. *Fyan* shows that this court not only so regarded the previous case, but it was, in effect, said that the ruling in *Hannibal & St. J. R. Co.* v. *Smith* was not to be extended to any case in which the land department had taken action or made a decision or determination under the Swamp Land Act.

In the case now before us, the selection by Linn county, grantee of the state, prior to 1875, of swamp and overflowed lands in the very section of which the lands in dispute formed a part, without including the latter in such selection, together with the acquiescence in that selection by the Interior Department, and the selection by or under the direction of the Secretary of the Interior, and their certification to the state, first in 1858, and again in 1881, of the lands in dispute, as lands enuring, under the Act of Congress of May 15, 1856, to the Cedar Rapids & Missouri River Railroad Company, and, therefore, not lands embraced by the Act of 1850, constituted a determination, based on "observation and examination," that the lands here in dispute were not swamp and overflowed, and therefore had not been reserved or appropriated, prior to the date of the railroad land grant Act, but passed, as the Secretary of the Interior certified, to the state, for the purpose named in the railroad Act. Twice the land department certified these lands to the state as enuring to it under the railroad land grant Act, and it does not appear that the state has ever questioned the correctness of that certification or applied to the Secretary of the Interior for re-examination *as to the [348] character of the lands. Nor did the county of Linn, so far as the record shows, ever contend that these lands belonged to it, under the Act of 1850, as the grantee of the state, until its board of supervisors, for the consideration of $50 (their deed, however, reciting one dollar as the consideration), sold them to the plaintiff, taking his promissory note for the price. This was in 1888, a few days before this suit was brought, and more than thirty years after the Secretary of the Interior first certified them to the state as railroad grant lands.

We are of opinion that this case comes within the ruling of previous cases, particularly *Chandler* v. *Calumet & H. Min. Co.* 149 U. S. 79 [37: 657], and *French* v. *Fyan*, 93 U. S. 169 [23: 812].

Upon the authority of former adjudications, as well as upon principle, it must be held that parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and state officers, having authority in the premises, that these lands were in fact, at the date of the Act of 1850, swamp and overflowed grounds which should have been embraced by Linn county in its selection of land of that character, and withheld from the state as lands granted expressly in aid of railroad construction within its limits.

The plaintiff was not entitled to the relief asked, and, as the case was tried by the court, judgment should have been rendered for the defendant.

As the court below did not proceed upon the grounds we have stated to be proper, and as its judgment deprived the defendant of rights secured by the laws and exercised under the authority of the United States, that judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Reversed.

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349] SIOUX CITY & ST. PAUL RAILROAD COMPANY, *Appt.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 349-372.)

Grant in aid of railroad—number of acres—fractional part of constructed road—state as trustee—conflicting place limits—official measurement—lien of mortgage.

1. Where a railroad company has received as much of the public lands as it was entitled to, under the grant of 1864 to Iowa, the other lands named in the grant, not earned by the railroad company, are undisposed of and revert to the United States.
2. By the grant of 1864 to Iowa, of land in aid of railroads, the United States did not undertake that the granted sections should contain any given number of acres: and a railroad company is only entitled to the quantity of land actually covered by the grant.
3. A railroad company could not, under the land grant of 1864 to Iowa, get lands for a fractional part of constructed road, less than ten consecutive miles, until the completion of its road.
4. Under the land grant of 1864 to Iowa in aid of railroads, until the state disposed of the lands, the title was in it, as trustee, and not in the railroad company.
5. When lands are granted by acts of Congress of the same date, or by the same Act, to aid in the construction of two railroads that must necessarily intersect or which are required to intersect, each grantee is entitled to an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of the location of the respective lines.
6. For the purpose of ascertaining the quantity of public lands which a railroad company earned on account of the construction of its road under a land grant from Congress, the latest official measurement of the area of the granted limits, not charged to have been fraudulently made, may be accepted as the best, if not conclusive, evidence.
7. Trustees under a mortgage made by a railroad company and holders of bonds secured by such mortgage are bound to know the extent of the authority of the Secretary of the Interior to issue patents to the state, under the grant of 1864 by Congress to Iowa, of lands in aid of railroads, and such of said lands as remained with the state after transferring to the company such of said lands as were patented to the state for the use of the company are not covered by such mortgage.

[No. 20.]

Argued April 16, 17, 1895. Decided October 21, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Iowa in a suit brought by the United States against the Sioux City & St. Paul Railroad Company, in favor of the United States, and quieting its title in certain lands as against the said company and others. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George B. Young** and *J. H. Swan* for appellant.

Mr. **J. M. Dickinson,** Assistant Attorney General, for appellee.

Mr. William Lawrence for settlers on the lands in controversy.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought by the United States against the Sioux City & St. Paul Railroad Company, pursuant to the Act of Congress of March 3, 1887, providing for the adjustment of land grants in aid of the construction of railroads, and for the forfeiture of unearned lands theretofore granted. 24 Stat. at L. 556, chap. 376.

Upon its appearing that, from any cause, lands had been erroneously certified or patented to or for the use and benefit of any company to aid in the construction of a railroad, it became the duty of the Secretary of the Interior to demand the relinquishment or reconveyance of such lands, whether within granted or indemnity limits. If the company failed for ninety *days to comply with that demand, it[350 was made the duty of the Attorney General to institute proceedings for the cancelation of the patents, certifications, or other evidence of title issued for such lands, and for the restoration of the title to the United States. § 2.

The decree from which the present appeal was taken quiets the title of the United States as against the Sioux City & St. Paul Railroad Company and Elias F. Drake and Amherst H. Wilder, trustees in mortgages given by that company, to certain tracts of land in Dickinson county, Iowa, alleged to contain 800 acres, and to other tracts in O'Brien county, in the same state, alleged to contain 21,179.85 acres; in all, 21,979.85 acres. *United States v. Sioux City & St. P. R. Co.* 43 Fed. Rep. 617.

The railroad company claims title under an Act of Congress, approved May 12, 1864, chap. 84, granting lands to Iowa in aid of the construction of railroads in that state, and also under statutes of Iowa passed in execution of the objects of that Act. 13 Stat at L. 72.

The United States claims that the company has received a larger quantity of lands than it was entitled to receive under the Act of 1864, and therefore can have no claim to the particular lands here in controversy.

The relation of the parties to these lands and the facts upon which the question of title depends are shown by the following summary of the evidence:

By the above Act of May 12, 1864, Congress granted lands to the state of Iowa to aid in the construction of two railroads in that state; one from Sioux City to the south line of Minnesota, at such point as the state of Iowa might select between the Big Sioux river and the west fork of the Des Moines river; the other for the use and benefit of the McGregor Western Railroad Company, an Iowa corporation, to aid in the construction of a railroad extending from South McGregor, Iowa, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude,

NOTE.—*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to error in surveys and descriptions in patents for lands: how construed, see note to Watts v. Lindsey, 5: 423.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

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until it intersected, in the county of O'Brien, the proposed road from Sioux City to the Minnesota state line. 13 Stat. at L. 72, chap. 84.

351] *The grant was of every alternate section, designated by odd numbers. But if it appeared, at the date of definite location, that the United States had sold any granted section or part thereof, or that any pre-emption or homestead right had attached thereto, or that the same had been reserved by the United States for any purpose whatever, the Secretary of the Interior was to select, or cause to be selected, for the purposes stated in the Act, from the public lands nearest to the tiers of sections specified, so much, in alternate sections or parts of sections, designated by odd numbers, as was equal to the lands lost to the state in either of the modes just stated. The lands thus selected were to be held by the state for the above uses and purposes, and were not, in any case, to be located more than twenty miles from the lines of the road to be constructed. All lands previously reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any work of internal improvement, or other purpose, were expressly reserved and excepted from the operation of the act, except so far as it was found necessary to locate the routes of the roads through such reserved lands. § 1.

The lands granted were "subject to the disposal of the legislature of Iowa for the purposes aforesaid, and no other;" and the railroad was to be and remain a public highway for the use of the government of the United States, free of toll or other charge upon the transportation of the property or troops of the United States, as well as for the transportation of the mail at such price as Congress should fix. §§ 3, 6.

The fourth section of the Act was the subject of much discussion by counsel. It provided "that the lands hereby granted shall be disposed of by said state, for the purposes aforesaid only, and *in manner* following, namely: *When* the governor of said state shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner as a first class railroad, *then* the Secretary of the Interior shall issue to the state patents for one hundred sections of land for the benefit of the road having 352] completed the *ten consecutive miles as aforesaid. *When* the governor of said state shall certify that another section of ten consecutive miles shall have been completed as aforesaid, *then* the Secretary of the Interior shall issue patents to said state in like manner, for a like number; and *when* certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of land shall be patented as aforesaid, *until* said roads or either of them *are completed*, *when* the whole of the lands hereby granted shall be datented to the state for the uses aforesaid and none other: . . *Provided further*, That, if the said roads are not completed within ten years from their several acceptance of this grant, the lands hereby granted and not patented shall revert to the state of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms, as the state shall determine: *And provided further*, That said lands shall not, in any manner, be disposed of or encumbered, except as the same are patented under the provisions of this Act; and should the state fail to complete such roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States." 13 Stat. at L. 78, chap. 84, § 4.

The lands embraced by the Act were to be withdrawn from market as soon as the governor of the state filed, or caused to be filed, with the Secretary of the Interior, maps designating the routes of the respective roads. § 5.

The last section of the Act granted to the state of Minnesota four additional alternate sections of land per mile—to be selected under the conditions, restrictions, and limitations contained in a former Act of Congress, approved March 3, 1857 (11 Stat. at L. 195, chap. 99)—for the purpose of aiding the construction of a railroad in that state, extending from St. Paul and St. Anthony, by way of Minneapolis, to a convenient point of junction west of the Mississippi, in the southern boundary of the state, and in the direction of the mouth of the Big Sioux river. § 7.

By an Act approved April 3, 1866, Iowa accepted the lands, powers, and privileges conferred upon it by the Act of May 12, 1864, *and so much of the lands, interests, [353 rights, powers, and privileges as were or could be granted and conferred in pursuance of the Act of Congress, for the purpose of aiding the construction of the railroad from Sioux City to the Minnesota line, were disposed of, granted, and conferred upon the Sioux City & St. Paul Railroad Company, an Iowa corporation, to be hereafter called, for the sake of brevity, the Sioux City company. That Act authorized the company to select and designate the point upon the south line of Minnesota to which its road should be built. Iowa Laws 1866, chap. 134, p. 143, §§ 1, 2, 7.

By a subsequent statute of Iowa, approved April 20, 1866, it was provided that the lands, powers, duties, and trusts conferred by the Act of Congress of "July 12, 1864," were accepted by the state upon the terms, conditions, and restrictions therein contained, and that "whenever any lands shall be patented to the state of Iowa in accordance with the provisions of said Act of Congress said land shall be held by the state in trust for the benefit of the railroad company entitled to the same by virtue of said Act of Congress, and to be deeded to said railroad company as shall be ordered by the legislature of the state of Iowa." Iowa Laws 1866, chap. 144, p. 189. The word "July" in that Act, inserted by mistake, was stricken out by an Act passed March 24, 1868, and "May" substituted, and the acceptance intended to be made by the Act of April 20, 1866, was ratified and confirmed. Iowa Laws 1868, chap. 42, p. 49.

On the 17th of July, 1867, the Sioux City company filed in the General Land Office a map showing the location of its route from

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Sioux City, Iowa, northwardly to the south line of Minnesota, a distance of 83.52 miles. This map was accepted by the Interior Department, and, August 26, 1867, the odd numbered sections within the ten and twenty mile limits of the located line were withdrawn from the market.

The company—commencing, not at Sioux City, as was apparently contemplated by Congress and indicated by the map of definite location, but at the Minnesota line—began the construction of its road in 1872, and completed [354] it *southwardly in the direction of Sioux City, but only as far as Le Mars, in Plymouth county, a distance of 56.13 miles. No road was ever constructed by that company between Le Mars & Sioux City, a distance of about 25 miles, although it did construct, in 1872, within the corporate limits of Sioux City, about two miles of track, and erected there machine shops, depots, and round houses of the value of $125,000, of which $30,000 were the proceeds of a special tax levied and collected by that city under a statute of the state.

In conformity with the Act of 1864 the governor of Iowa certified, July 26, 1872, to the completion in a good, substantial, and workmanlike manner, as a first-class railroad, of two sections of ten consecutive miles each, or twenty miles; August 10, 1872, of one section or ten miles; February 4, 1873, two other sections or twenty miles; in all, fifty miles or five sections of ten consecutive miles each.

The Secretary of the Interior, as we have seen, was authorized by the fourth section of the Act of 1864 to issue patents for one hundred sections of land, as each section of ten consecutive miles was certified by the governor of the state to have been properly completed. Nevertheless, he issued to the state, in the name of the United States for the use and benefit of the Sioux City company, patents for 191,464.04 acres, October 16, 1872; 205,874.76 acres, June 17, 1873; 10,911.41 acres, January 25, 1875; and 160 acres, June 4, 1877—in all, 407,910.21 acres. As one tract of 40 acres was patented twice, the real amount patented to the state was 407,870.21 acres.

If each odd-numbered section for ten sections in width on each side of the road, within the terminal limits of the fifty miles of road certified as completed, had contained the full complement of 640 acres, the utmost quantity which the Secretary of the Interior was authorized to patent to the state on account of that fifty miles of road would have been 320,000 acres.

Of the 407,870.21 acres of land patented to the state, 322,412.81 acres were conveyed by the state to this company, the state retaining within its control the title to the balance, namely, 85,457.40 acres.

[355] *The legislature of Iowa, by an act of March 13, 1874, directed the governor to certify to the Sioux City company, in accordance with the provisions of the act of April 20, 1866, any and all lands then held in trust for its benefit. That act, however, only required the conveyance of such of the trust lands, held by the state, as the company was entitled to by virtue of the Act of Congress. For this reason, it is suggested, the governor did not convey the 85,457.40 acres that remained after conveying to the company the 322,412.81 acres of the 407,870.21 acres.

It was stipulated by the parties that the state has never conveyed to the Sioux City company the lands in Dickinson and O'Brien counties which are here in dispute and claimed by the United States.

In 1878 the Chicago, Milwaukee & St. Paul Railway Company, to be hereafter referred to as the Milwaukee company, having succeeded to the rights of the McGregor Western Railroad Company, the other corporation named in the Act of 1864, completed the construction of the McGregor railroad to a point of intersection with the line of the Sioux city road at Sheldon, a town in Iowa between Le Mars and the Minnesota line. And in 1879 the Milwaukee company instituted a suit in the Circuit Court of the United States for the District of Iowa against the Sioux City company and others for a decree determining the respective rights of itself and the Sioux City company in the lands at and near the point of intersection, where the grants for the road from Sioux City to the Minnesota line and the grant to the McGregor company necessarily came in conflict. That case came to this court upon the appeal of the Sioux City company, and it was here adjudged: 1. That the odd sections within the ten-mile limits of the Sioux City road, and not within the ten-mile limits although within the twenty-mile limits of the Milwaukee road, belonged exclusively to the Sioux City company. 2. That like sections within the ten-mile limits of the Milwaukee road, and not within the ten-mile limits although within the twenty-mile limits of the Sioux City road, belonged exclusively to the Milwaukee company. 3. That the lands *within the [356] ten-mile limits of both roads belonged to the companies in equal undivided moieties. 4. That the lands within the twenty mile or indemnity limits of both roads, and not within the ten mile or absolute grant limits of either road, the title to none of which could accrue until selection was made for one road or the other, should, in view of the situation in which the title had been placed by the action of Federal and state officers, be equally divided between the companies. *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U.S. 406 [29: 928].

The principles of this decision were carried into a decree of partition in the circuit court. From that decree it appears that of the 322,418.81 acres conveyed by the state, under the Act of May 12, 1864, to the Sioux City company, there remained to that corporation 280,725.29 acres, after deducting the lands set apart to the Milwaukee company.

It is necessary now to refer to certain facts in relation to the line of road which the Sioux City company located, but never constructed, between Sioux City and Le Mars.

By an Act of Congress, approved May 15, 1856,—more than eight years before the grant in aid of the construction of the road from Sioux City to the Minnesota line—a grant of lands was made to the state of Iowa to aid in the construction of a railroad from Dubuque to a point on the Missouri river at or near Sioux City. 11 Stat. at L. 9, chap. 28. This grant was accepted by an act of the Iowa leg-

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islature approved July 14, 1856, and the lands were granted and conferred upon the Dubuque & Pacific Railroad Company, which located its line or route and filed its map of definite location with the Secretary of the Interior. Iowa Laws 1866, special session, chap. 1, p. 1. And, in 1870 that road was completed from Le Mars southwardly to Sioux City by the Iowa Falls & Sioux City Railroad Company, the successor of the Dubuque & Pacific Railroad Company.

In the year 1879 the Sioux City company conveyed to the St. Paul & Sioux City Railroad Company, a Minnesota corporation, its roadbed, rolling stock, depots, depot grounds, and other property and franchises in connection 357] with its railroad; *and the latter company in 1881 sold and conveyed the same property and franchises to the Chicago, St. Paul, Minneapolis, & Omaha Railroad Company, which still owns and operates the road constructed by the Sioux City company north of Le Mars. The last-named company has remaining no other property or assets, except such land as may enure to it under the grant of Congress of May 12. 1864, out of the lands patented to the state but not conveyed to that corporation, all of which are pledged, so far as that could be legally done, to secure the debts specified in the mortgages in which Drake and Wilder were trustees. One of those mortgages was executed August 26, 1871; the other, February 5, 1884. The original debts secured by the mortgages aggregated $2,800,000, all of which has been paid off by sales of lands, except $660 000.

The preamble of an act of the legislature of Iowa, approved March 16, 1882, referred to the Act of May 12, 1864, providing that if the road from Sioux City to the Minnesota line was not completed within ten years from the acceptance of the grant the lands granted and not patented should revert to the state for the purpose of securing the completion of the road, and also to the statute of Iowa of April 3, 1866; and after reciting the failure of the Sioux City company to complete, or cause to be completed, any road on the line adopted therefor from Sioux City to Le Mars or any road in lieu thereof, it was declared "that all lands and all rights to lands, granted or intended to be granted to the Sioux City & St. Paul Railroad Company by said acts of Congress and of the general assembly of the state of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the state of Iowa, and that the same be and are absolutely vested in said state as if the same had never been granted to said railroad company." Iowa Laws 1882, chap. 107, p. 102.

On the 27th day of March, 1884, the state passed another act, by the first section of which it relinquished and conveyed to the United States all lands and rights to lands resumed and intended to be resumed by the above act of 358] March 16, 1882, § 1. *By the second section of that act the governor was directed to certify to the Secretary of the Interior all lands not theretofore patented to the state to aid in the construction of the Sioux City road, the lands so certified to be deemed those above relinquished and conveyed to the United States by the first section, "provided, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien." Iowa Laws 1884, chap. 71, p. 78.

Pursuant to the latter act, the governor, on the 12th day of January, 1887, relinquished and conveyed to the United States 26,017.33 acres of the 85,457.40 acres of land which, as already stated, has been patented to the state for the benefit of the Sioux City company, but which were never certified to that company. Those lands are in Plymouth and Woodbury counties, and do not embrace the lands in dispute.

The Sioux City road was so constructed as to form a continuous line with the railroad of the St. Paul & Sioux City Railroad Company, a Minnesota corporation, to aid in the construction of which from St. Paul and St. Anthony to the southern boundary of that state Congress made the grant of March 3, 1857. The latter is the road referred to in the seventh section of the Act of May 12, 1864. Upon the construction by the Sioux City company of the road from the Minnesota line to Le Mars, that corporation obtained by lease the right to run and operate its cars over the road of the Iowa Falls & Sioux City railroad extending from Le Mars to Sioux City (and now operated by the Illinois Central Railroad Company), from which time the Iowa and Minnesota corporations and their grantees have continued to run and operate their roads as one continuous line from St. Paul to Sioux City.

Part of the lands in controversy here were entered upon by different persons between 1882 and 1885, claiming under the homestead and pre-emption laws of the United States, and making formal applications to enter such lands. Their applications were rejected, but they appealed from those decisions, continuing to improve and cultivate the lands under their claims, and, in some instances, making valuable improvements *And before the bringing 359 of this suit the Sioux City company had commenced actions in ejectment in one of the state courts against the parties in possession.

In 1887 application was made to the Secretary of the Interior on behalf of certain persons in O'Brien county, who had settled on the lands in controversy, as well as on the lands referred to in the above partition decree, requesting suit to be brought by the United States to assert its title to said lands. After argument before the Secretary by counsel severally representing the settlers as well as the Sioux City and Milwaukee companies, that officer—Secretary Lamar—rendered an elaborate opinion, in which the whole subject was reviewed. 6 U. S. Land Dec. 50, 62.

1. The lands now in dispute are part of the 85,457.40 acres patented by the United States to Iowa for the use and benefit of the Sioux City company, but never conveyed by the state to that company.

If the company has received as much of the public lands as it was entitled to have on account of constructed road, may not the lands in dispute—the time limited by Congress for the completion of the entire road having passed—be regarded as "undisposed of" within the meaning of section four of the Act of 1864,

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and may they not, therefore, be claimed by the government as belonging to the United States? According to that section, if the two 360] roads named *in it were not completed within ten years from the several acceptances of the grant, the lands granted and not patented were to revert to the state "for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms, as the state shall determine." And the second proviso was to the effect that said lands should not, in any manner, be disposed of or encumbered, except as the same were patented under the provisions of the Act; "and should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States."

If the terms of an Act of Congress granting public lands "admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them." *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 740 [23: 634, 637]. Acts of this character must receive such construction "as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance." *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618, 625 [28: 1109, 1111]. "Nothing is better settled," this court has said, "than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59 [36: 340, 344].

Giving effect to these rules of statutory interpretation, we cannot suppose that Congress intended that the railroad company should have the benefit of more lands than it earned. As the lands granted could only be devoted to the construction of the Sioux City road from Sioux City to the Minnesota line, and as the state, holding the legal title in trust, has not disposed of and does not intend to dispose of them for the purpose of completing that part of the road located between Sioux City and Le Mars, we perceive no sound reason why, within the meaning of the Act of 1864, these 361]lands may not*be regarded as"undisposed of," and equitably the property of the United States, if it be true that the railroad company has received as much of the public lands as it was entitled to have on account of constructed road certified by the governor of the state. This was the interpretation placed by the state upon the Act of Congress; for, by the act of the Iowa legislature of March 16, 1882, the state, because of the failure of the Sioux City company to construct any road between Sioux City and Le Mars, resumed the title to all lands that had not been "earned" by the railroad company; and by the subsequent statute of March 27, 1884, it relinquished and conveyed to the United States all lands and rights of land resumed and intended to be resumed by a previous act.

It is apparent, therefore, that the fundamental question in the case is whether the Sioux City company, having failed to complete the entire road from Sioux City to the Minnesota line, has received as many acres of the public lands as it could rightfully claim under the Act of 1864? If this question be answered in the affirmative, the company cannot complain of the final decree as one to the prejudice of its substantial rights. Before considering this question, it is necessary to examine certain propositions relating to the quantity of lands to which the Sioux City company was entitled for constructed road.

2. On behalf of the company, it is contended that in ascertaining the extent of the grant we must assume that each odd-numbered section in the place limits contained its full complement of six hundred and forty acres, and that if any section contained, in fact, less than that quantity, the United States was under a legal obligation to make good the difference. Clearly, the Act of 1864 does not admit of this construction. The record shows that many sections in the granted limits, as surveyed and marked, contained less than 640 acres. The grant was of the odd-numbered sections for ten sections in width on each side of the road, whether they contained six hundred and forty acres, or more or less than that quantity. The United States did not undertake that the granted sections should contain any given number of acres. *If it appeared, at the time[362 the line of the road was located, that the United States had sold or reserved any particular section, the selection from the public lands nearest to the tiers of the granted sections to supply that loss was limited by the Act to the quantity of lands actually in the section so sold or reserved. The court below well said that there was no guaranty by the United States that the quantity of land covered by the grant should equal any fixed number of acres either for the construction of the entire road or any portion thereof, and that the exceptions named in the act clearly show that the company undertaking the construction of the line of the proposed railway was to get only the quantity of land that was ultimately found to be, in fact, covered by the grant.

3. The company also contends that it was entitled to lands for the whole number of miles of road actually constructed by it; that is, for the fifty miles certified by the governor to have been completed, and also for the fraction of six miles and a quarter immediately north of Le Mars, which was never certified to the Secretary of the Interior. We cannot assent to this construction of the Act of Congress. Congress evidently had in view the construction of an entire road from Sioux City to the Minnesota state line. And to that end, the first section of the Act of 1864 grants to the state every alternate section of land designated by odd numbers for ten sections in width on each side of the road. But that section must be taken in connection with the fourth section prescribing the mode in which the grant shall be administered. By the latter section, it is provided that the state shall not dispose of the lands granted, except for the purposes indicated by Congress and *in the manner* prescribed; further, that "said lands shall not in any manner be disposed of or encumbered, ex-

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cept as the same are patented under the provisions of this Act." Now, the manner prescribed for disposing of the lands granted was that patents should be issued to the state for one hundred sections of land for each section of ten consecutive miles, when the governor certified to the completion of such section in 363]good, substantial, and *workmanlike manner as a first-class railroad. This was evidently the interpretation given by the state to the Act of Congress, for the governor never certified to the construction of any section of road less than ten consecutive miles in length.

It does not follow from this interpretation of the act that the company could never get lands for a fractional part of constructed road, less than ten consecutive miles. Provision was made for such cases by the clause directing patents to be issued to the state, as each section of ten consecutive miles was constructed, and was properly certified by the governor, "*until* said roads, or either of them, are *completed, when* the *whole* of the lands hereby granted shall be patented to the state for the uses aforesaid and none other." In other words, for a completed road, the state should have the full quantity of lands granted and found in odd-numbered sections, with the right to select other lands to supply any losses in either of the modes specified in the Act of Congress. But the time never came when the state could rightfully demand patents for the whole of the lands granted. The road was never completed, and therefore patents could not be legally issued, except for one hundred sections of land for each section of ten consecutive miles of road, certified by the governor of the state to have been constructed in the mode required by Congress. The result of this view is that the Secretary of the Interior was without authority to issue patents, except for the five sections of ten consecutive miles each, that is, for fifty miles of constructed road certified by the governor of the state. The state could not, without completing the road, or causing it to be completed, demand patents on account of the construction of less than a section of ten consecutive miles. This was the view taken by Secretary Lamar, who said that "a careful consideration of the granting act convinces me that there is no authority of law for patenting any lands on account of the six and a quarter miles of road [immediately north of Le Mars], and that no lands have been earned by the construction thereof." 6 U. S. Land Dec. 51.

4. Another contention is, that upon the issuing of the patents of 1872 and 1873 to the 364]state for the use and benefit *of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraints or alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee* v. *Oregon & C. R. Co.* 139 U. S. 663, 674, 676, 677 [35: 305, 306, 308]; *Van Wyck* v. *Knevals*, 106 U. S. 360 [27: 201]; *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 496 [33: 687]; *Deseret Land Co.* v. *Tarpey*, 142 U. S 241 [35: 999]; *St. Paul & P. R. Co.* v. *Northern Pac. R. Co.* 139 U. S. 1, 6 [35: 77, 79]. But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the Act of Congress required that the patents for lands earned should be issued, not to the state for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the state for the benefit of the company. So that, until the state disposed of the lands, the title was in it, as trustee, and not in the railroad company. *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 59 [22: 554]; *Lake Superior Ship Canal. R. & I. Co.* v. *Cunningham*, 155 U. S. 372 [39: 189]. See also *McGregor & M. R. Co.* v. *Brown*, 39 Iowa, 655; *Sioux City & St. P. R. Co.* v. *Osceola County*, 43 Iowa, 321. In the case last named the Sioux City company was relieved from the payment of taxes upon some of the lands patented to the state for its benefit, upon the ground that the legal title was in the state, and the lands, for that reason, were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the state had conveyed them directly, to that company.

5. The company also contends that any calculation of the quantity of lands that the railroad company was entitled to receive, on account of constructed road, duly certified, must be on the basis that it was entitled to lands, in lieu of those awarded to the Milwaukee company in the common place limits of the two intersecting roads. In this interpretation of the statute we cannot concur.

The rule is well settled that when lands are granted by acts of Congress of the same date, or by the same Act, to aid in *the construction [365 of two railroads that must necessarily intersect, or which are required to intersect, each grantee —the map of definite location having been filed and accepted—takes, as of the date of the grant, an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of the location of the respective lines. *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406, 408 [29: 928, 929]; *St. Paul & C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 720, 727 [28: 872, 874]; *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491, 501 [24: 1095, 1098]; *Cedar Rapids & M. R. R. Co.* v. *Herring*, 110 U. S. 27 [28: 56]; *Grinnell* v. *Chicago, R. I. & P. R. Co.* 103 U. S. 739 [26: 456]. In *Donahue* v. *Lake Superior Ship Canal, R. & I. Co.* 155 U. S. 387 [39: 194], this court said: "The rule is that where two lines of road are aided by land grants made by the same Act, and the lines of those roads cross or intersect, the lands within the 'place' limits of both, at the crossing or intersection, do not pass to either company in preference to the other, no matter which line may be first located or road built, but pass in equal undivided moieties to each."

The grants for the Sioux City and Milwaukee roads were by the same Act. Of the granted sections in place limits common to both roads, each company, having filed its map of definite location, took, as of the date of the grant, an equal undivided moiety—no more. The equal undivided moiety granted for one road was not granted, nor could it be used, for the other road. Congress knew, when it passed the Act of 1864, that there would be an overlapping of place limits at the required point of intersection

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of the two roads. And the Sioux City company when it accepted the benefit of the grant, knew that such must be the case. As the Act did not provide for a selection of lands for either road, on account of the undivided moiety of place lands granted for the other, we may not assume that the right to such selection was intended to be reserved. Lands lost to the Sioux City company in one of the modes named in the Act of Congress, and for which other lands could be selected, were lands granted for that company, not lands granted to another company for a different road. The lands which the Sioux City company claims to have [366] so lost—*namely, the undivided moiety granted and subsequently awarded to the Milwaukee company out of the common place limits—were never granted for the Sioux City road, but were granted for the McGregor or Milwaukee company.

This question was examined in 1887 with great care by Secretary Lamar. The claim was made before him by the Sioux City and the Milwaukee companies that each was entitled to indemnity for the lands which it claimed to have lost by reason of the grant for the other company of an equal undivided moiety within the conflicting place limits. The Secretary said: "I am unable to conclude that such was the intention of Congress in making the grant. To say that it was would be to say in effect that, in so far as the ten-mile limits of the two grants overlap, the purpose of the granting Act was to make what would amount to a double grant. Each company got a moiety of the lands in odd-numbered sections within the common granted limits. Now, should there be allowed to each company indemnity for the moiety lost by grant to the other, a quantity of land equivalent to all the odd and even numbered sections in said common granted limits would be passed under the granting Act. This, I think, could not be justified by any proper construction of the Act, nor can I conceive it to have been intended by Congress. The grant was of a moiety for each road within the common granted limits of both roads. This accords with the view expressed by the Supreme Court in the case of *St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 720 [28: 872]. Either this is true, or Congress by the same Act twice granted the same lands. To say that it did, or intended to do, this, would be to say that it acted unreasonably, or without a proper understanding of what it was doing. Now, since indemnity is allowed only for lands granted and lost from the grant, and since in the common ten-mile limits of these two roads only a moiety was granted, it follows that neither company has any legal claim for indemnity on account of the moiety granted to the other." 6 U. S. Land Dec. 54, 62.

6. In the light of these principles we come to the practical question presented for determin- [367] ation, namely, whether the *Sioux City company, having failed to complete the road for the benefit of which the grant was made, has received as much of the public lands as it was entitled to receive under the Act of 1864. This is entirely a matter of figures.

As heretofore shown, the state patented or certified to the railroad company 322,412.81 acres out of the 407,870.21 acres patented by the United States. We have seen that of the 322,412.81 acres so transferred to the company, 41,687.52 acres were taken from the Sioux City company and given to the Milwaukee company by the decree of the circuit court, pursuant to the mandate of this court in *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406 [29:928]. This, as has been stated, left the Sioux City company with title to 280,725.29 acres, which it has disposed of or sold, and about which no question is made in this case by the United States.

Was the company entitled to a larger quantity of lands on account of the fifty miles of road certified by the governor of Iowa to have been properly constructed?

We have said that the Sioux City company was only entitled to the sections as surveyed and as they appeared on the public records, whether they contained more or less than 640 acres each. Upon examination of the certified list of lands, *based on the diagram originally furnished by the railroad company to the Secretary of the Interior* and transmitted by the General Land Office to the local land office on the 26th of August, 1867, it is found that the actual area of the odd-numbered sections within the place limits of the Sioux City road, *excluding* odd-numbered sections within the conflicting place limits of the two roads, contained only 247,476.85 acres; and the actual area within the conflicting place limits of the two roads, *according to the same diagram*, was 70,705.29 acres. Of the latter quantity, one half, or 35,352.64 acres, belonged to the Milwaukee company as its equal undivided moiety of the lands in the common place limits. Apparently, therefore, if this diagram be taken as a basis of calculation, the railroad company could have earned, on account of the fifty miles of constructed road, only 247,476.85 acres outside of the conflicting *place limits [368] and 35,352.64 acres within such limits; in all, 282,829.49 acres, or 2,104.21 acres more than the 280,725.29 acres actually received by it, and about which no question is here made by the government.

But there are exhibits in the case made part of the agreed statement of facts that lead us to a different result. In 1887 the Commissioner of the Land Office, having before him the question of how much of the public lands the Sioux City company was entitled to receive, caused an accurate measurement to be made of the area of the odd-numbered sections and parts of sections lying within the grant made by the Act of May 12, 1864, for the construction of the Sioux City road. The record shows, if that measurement be regarded, that within the common place limits of the two roads there were only 69,825.99 acres, of which the Sioux City Company was entitled to one half, or 34,912.99 acres, and that outside of the conflicting limits, and within the place limits of the Sioux City road, there were only 243,807.41 acres. So that, on the basis of the measurement of 1887, the company could have earned for the fifty miles of certified road only 278,720.40 acres, that is, less, by 2,004.89 acres, than it has actually received and holds or has sold.

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The result is that if the diagram furnished by the railroad company in 1867 be followed, the Sioux City company is entitled to 2,104.22 acres in addition to what it has received; whereas, if the measurement of 1887, made under the direction of the Land Office, be accepted, that company has received 2,004.89 acres more than should, in any case, have been awarded to it.

We are of opinion that the measurement of 1887 should be taken as the basis for determining the area of the odd numbered sections within place limits. In the agreed statement of facts reference is made to a list, certified from the General Land Office, of the odd numbered sections and parts of sections lying within the conflicting place limits of the Sioux City and Milwaukee roads, and it is agreed that that list is correct, according to the limits laid down on the map of 1887, "and correctly shows the area of each of said tracts." In the agreed 369]*statement of facts reference is also made to another list, certified from the General Land Office, and it is stated to be a correct list of the odd numbered sections and parts of sections within the place limits of the Sioux City road outside of the conflicting limits "and the areas thereof," as defined and certified on the map of 1887.

These lists were objected to by the railroad company as immaterial and irrelevant. But we do not perceive any good reason why they are not competent as evidence,—as much so as the diagram of 1867 and the lists based upon it. Surely it was competent for the land office, when determining whether the Sioux City company was entitled to additional lands, to ascertain, by careful remeasurement, the exact area of the odd-numbered sections covered by the grant of 1864, and thus determine whether the map furnished by the railroad company in 1867 was, in all respects, accurate. By examining the maps of 1867 and 1887 it was easy to perceive in what particulars they differed; and, by proof, to show which was correct. But the defendant took no proof to discredit the map of 1887, and rests this part of the case upon the general proposition that, after the lapse of so many years, the court should base its decree on the map of 1867, which was accepted by the government and was not questioned until the measurement of 1887 was made by the General Land Office. This view is, of course, entitled to great weight, and might be accepted, if the determination of this question of evidence and the acceptance of the measurement of 1887 would affect the rights of third parties to specific lands. The matter to be ascertained is the number of acres in each one of certain sections, the exterior boundaries of which are not in dispute. Now, it would seem that, as between the United States and the railroad company, and for the purpose of ascertaining the quantity in acres of public lands which the company earned, or could have earned, on account of the construction of the 50 miles of road, the latest official measurement of the area of the granted limits, not charged to have been fraudulently made, may be accepted as the best, if not conclusive, evidence.

It is said that a contrary view was announced 370] in *United *States* v. *Hancock*, 133 U. S. 193, 196 [33: 601, 603]. That was a suit to set aside a patent based upon a decree confirming a claim to certain lands within specified boundaries. The court, following previous decisions, held that "when a *decree* gives the boundaries of the tract to which the claim is confirmed, with precision, and *has become final by stipulation of the United States, and the withdrawal of their appeal therefrom*, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." That was a case in which the rights of third parties were involved, and it is scarcely necessary to say that nothing we have said is in conflict with the principle settled in it.

Our conclusion, then, is that the Sioux City company, having failed to complete the entire road, for the construction of which Congress made the grant in question, was not entitled to the whole of the lands granted, but, at most, only to one hundred odd-numbered sections—as those sections were surveyed, whatever their quantity—for each section of ten consecutive miles constructed *and certified by the governor of the state;* and that, according to the measurement of 1887, which is accepted as the basis of calculation, the railroad company had, prior to the institution of this suit, received more lands, on account of the fifty miles of constructed road, certified by the governor, than it was entitled to receive. Under this view, it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands containing a like number of acres that were, in fact, transferred to it, and which cannot now be recovered by the United States by reason of their having been disposed of by the company. If the company has received as much, in quantity, as should have been awarded to it, a court of equity will not recognize its claim to more in whatever shape the claim is presented.

It is proper to say, in this connection, that the United States, in its bill, alleges that the excess of lands received by the company was 1,228.13 acres. We have found the excess to be 2,004.89 acres. The bill also states that the lands in Dickinson and O'Brien counties, here in dispute aggregate 29,979.85 *acres, and so the de-[371 cree below assumes. The amount appears to be 21,692.18 acres, and it was so stated by Secretary Lamar. 6 U. S. Land Dec. 63. But these differences are immaterial on the present appeal, for we adjudge that, although the lands in dispute were patented to the state for the use and benefit of the Sioux City company, the latter is not entitled to any of them, whatever may be the aggregate quantity of acres. It is not claimed by the company that any of these lands constitute a part of those actually certified to it by the state.

7. The last contention of the appellants is that the claim of the United States ought not to prevail against the trustees in the mortgages executed by the railroad company, and which constitute the only security for bona fide holders of bonds secured by those mortgages. The first of these mortgages was executed August 1, 1871, before any lands were patented to the state, and before the railroad company had commenced the construction of its road; the second, on the 25th day of February, 1884, long

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after the Iowa legislature—which had authority, under the Act of 1864, to dispose of lands not earned—had declared the resumption by the state of the title to all lands patented to the state under the Act of Congress, and not earned, and more than fifteen years after the railroad company accepted the act of the state that conferred upon it the benefits of the grant.

In reference to this claim by the trustees in those mortgages,—assuming that they properly represent, in this matter, the holders of bonds, —it is sufficient to say that the Secretary of the Interior was without authority to issue any patents to the state for the use and benefit of the railroad company, except for the fifty miles of road certified by the governor to have been constructed in the manner required by the Act of Congress. The trustees and all holders of bonds secured by the mortgages were bound to know the extent of the Secretary's authority under the Act of Congress. The utmost that the trustees could claim is that the mortgages covered one hundred sections for each ten consecutive miles of road certified by the governor of the state to have been properly constructed. Lands to that extent have been received by the 372]*company. The 85,457.40 acres, of which the lands in dispute were part, and which remained with the state after transferring to the company 322,412.81 acres of the 407,870.21 acres patented to the state for the use of the company, were not, and could not legally have been, covered by the mortgages.

Upon the grounds stated in this opinion, we adjudge that the decree below did not prejudice any right of the appellants, or of either of them, and it is therefore affirmed.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, *Appt.*,

v.

UNITED STATES, SIOUX CITY & ST. PAUL RAILROAD COMPANY, ELIAS F. DRAKE, and AMHERST H. WILDER.

(See S. C. Reporter's ed. 372-377.)

Estoppel by judgment.

A decree in a suit between two railroad companies that certain lands within the conflicting place limits of the two roads were granted by Congress in aid of the construction of the road of one of such companies, and not in aid of the construction of the road of the other company, estops the latter, in a subsequent suit by it against the United States, brought after the United States had legally reacquired title to the lands against the former company, by reason of its failure to construct its road, from making any claim to such lands.

[No. 47.]

Argued April 16, 17, 1895. Decided October 21, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Iowa in favor of the United States and dismissing the cross bill of the Chicago, Milwaukee, & St. Paul Railway Company, and establishing the title of the United States as against the Milwaukee Company to certain lands. *Affirmed.*

The facts are stated in the opinion.

Mr. **W. H. Norris** for appellant.

Messrs. **J. M. Dickinson**, Assistant Attorney General, for the United States.

Mr. **George B. Young** for Sioux City & St. Paul Railroad Company.

Mr. William Lawrence for the homestead and pre-emption claimants.

Mr. Justice **Harlan** delivered the [373 opinion of the court:

After the circuit court had announced its conclusions in the case of *Sioux City & St. P. R. Co.* v. *United States*, just decided, the Milwaukee company obtained leave to intervene as a defendant, and by cross bill assert its right to the lands in Dickinson and O'Brien counties, originally patented to the state of Iowa for the use of the Sioux City & St. Paul Railroad Company, and *within the conflicting place limits of the two roads*, but which the state held and never conveyed to that company, and which the court below found to be the property of the United States as against the Sioux City company and the trustees in the mortgages executed by it.

Such a cross bill was filed before the entry in the court below of a final decree on the original bill, and the cause was left undetermined as to the claims asserted by the Milwaukee company in its cross bill.

Benjamin Olson, Peter Anderson, and others, parties defendant in the original suit, intervened, with leave of the court, as defendants, and, by a cross bill against the Milwaukee company and the Sioux City company, asserted rights to portions of the lands in controversy—having settled, they alleged, on such lands, under the laws of the United States, between the years 1881 and 1887, and made valuable improvements thereon.

The United States answered the cross bill of the Milwaukee company, and also filed an amended bill, in which it prayed that, by final decree, its title to the lands awarded to it by the original decree as against the Sioux City company, be established and quieted as against the Milwaukee company.

The court below rendered a decree in favor of the United States on this amended bill, and dismissed the cross bill of the Milwaukee company.

The cross bill of Olson and others was dismissed without prejudice. This was done because the pleadings presented no issue as between the settlers and the United States; the cross bill of the settlers being against the railroad companies only.

*We are of opinion that the appellant [374 has no reason, in law, to complain of the decree of the circuit court.

Although the Act of May 12, 1864, would, if its title alone were consulted, furnish some slight ground for the contention that the object of the grant therein was to aid in the construction of "a railroad," its provisions plainly show that Congress had in view two railroads:

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

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one extending from Sioux City to the Minnesota line; the other from South McGregor, by a named route, to a point of intersection, in the county of O'Brien, with the Sioux City road.

The grant was of every alternate section, designated by odd numbers, for ten sections in width, "on each side of said roads," and, therefore, for the benefit of the roads separately. As decided in the other case, no part of the lands granted in aid of the construction of one road could be applied in aid of the other road. The Act is to be interpreted as if Congress by one Act made a grant to the state in aid of the construction of the Sioux City road on the route designated, and, by another and separate Act, passed at the same time, made a grant to the state in aid of the construction of the other road from South McGregor to a point of intersection with the Sioux City road.

It appeared in the original case, and appears in the present case made by the cross bill of the Milwaukee road,—and Congress, in requiring an intersection of the two roads, must have anticipated such a condition of things,—that because of the conflict between the two grants, it was impossible to set apart for each road every alternate odd-numbered section for ten sections in width on each side of every part of its located line. Consequently, in the suit brought against the Sioux City company by the Milwaukee company as the last successor to the McGregor Western Railroad Company, by a final decree filed pursuant to the directions given by this court in *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406 [29: 928], the lands within the conflicting lines were, prior to the institution of the present suit, partitioned between the two companies.

The claim of the Milwaukee company now is, 375] that it is *entitled, under the Act of May 12, 1864, to the lands involved in the present controversy, although by the decree in *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.*, and which is conclusive between those companies, they have been withheld from it upon the specific ground that they were never granted by Congress to aid in the construction of the McGregor or Milwaukee road, but were granted in aid of the construction of the Sioux City road and for no other purpose. If, as matter of law and fact, these lands were never granted for the benefit of the Milwaukee road, but were granted in aid of the construction of the Sioux City road, and for no other purpose, they could never—consistently with the Act of Congress—have been used by the state for the benefit of the Milwaukee road. *Sioux City & St. P. R. Co.* v. *United States, ante*, 177.

It is therefore of no concern to the Milwaukee company, as the successor in right of the McGregor company, what was done with them by the state, nor whether the United States legally reacquired title to them as against the Sioux City company. It is in no position to question the decree on the original bill establishing the title of the United States as against the Sioux City company, and it is estopped by the decree in the suit which it brought to make any claim whatever to these lands. If, as has been conclusively adjudged, the Milwaukee company was without title or claim as against the Sioux City company, no rights could subsequently accrue to it by reason of the decree declaring that these lands reverted to the United States by reason of the failure of the Sioux City company and of the state to construct the road over the entire route from Sioux City to the Minnesota line. As these lands were set apart exclusively for the construction of the Sioux City road, no failure to construct that road by the state or by the corporation charged with the duty of building it, could, in any case, without the assent of Congress, justify their being applied in aid of the construction of another and distinct road.

The defendant rests its claim in part upon the act of the Iowa legislature of February 27, 1878, chap. 21. By that act *the state resumed [376 all lands and rights theretofore granted to the McGregor & Sioux City Railway Company, the immediate successor of the McGregor Western Railroad Company, and conferred upon the Chicago, Milwaukee, & St. Paul Railway Company (which succeeded, in right, the McGregor & Sioux City Railway Company) "all lands and rights of lands, whether in severalty, jointly, or in common, and including all lands or rights to lands or any interest therein or claims thereto, whether certified or not, embraced within the overlapping or conflicting limits of the two grants or roads made and described by the Act of Congress hereinafter designated [the Act of May 12, 1864], granted to the state of Iowa to aid in the construction of a railroad" from South McGregor to intersect with the road from Sioux City to the Minnesota line. It is contended that when it became certain that the Sioux City company had, by failure to construct its road within the time specified by the Act of Congress, lost *its* right to the lands, the state, to which they had been patented specifically for the use and benefit of the Sioux City road, could pass to the Chicago, Milwaukee, & St. Paul Company the title to any lands within the overlapping limits, that had not been, and could not nor would not be, applied to the Sioux City road.

This position cannot be sustained upon any theory that would be consistent with the Act of Congress. As we have already said in *Sioux City & St. P. R. Co.* v. *United States, ante*, 177, the grant of an equal undivided moiety of lands in the overlapping limits of two roads was a grant for the benefit of each road, of the particular moiety of lands dedicated by the Act of Congress to its construction. Neither road could get the benefit of the moiety of lands granted for the building of the other road, by reason of the failure of the company constructing the latter road to earn *its* moiety of the lands. This results from the explicit declaration by Congress of the purposes for which the lands were to be used, and by express words, excluding all others. The provision that the lands "hereby granted shall be disposed of by said state for the purposes aforesaid only," precludes the idea that the state *could, [377 without a breach of trust, apply lands for the benefit of one road that had been granted to aid the construction of another road.

Besides, it is manifest from the face of the act of the Iowa legislature of 1878 that there was no purpose to give the Milwaukee or McGregor road the benefit of any lands not granted

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to aid in its construction. For the language of that act was that "when said railroad [the McGregor road] shall have been built and constructed to the point of connection with the Sioux City & St. Paul Railroad, then and thereupon the governor of this state shall patent and transfer to said Chicago, Milwaukee, & St. Paul Railway Company all the remaining lands belonging to or embraced in said grant *appertaining to their line of railroad*, including all or any part or moiety of the lands in said overlapping limits which, by the terms of said Act of Congress, *appertain to their line of road*." § 3.

It having been finally adjudged as between the Sioux City company and the Milwaukee company that these lands did not appertain to the latter road, there is no foundation for a suit by the Milwaukee company to compel the United States to surrender any title it may have or claim, however such title may have been acquired.

Decree affirmed.

SIOUX CITY & ST. PAUL RAILROAD COMPANY, *Plff. in Errr.*, *v.* LEWIS COUNTRYMAN ET AL.

(See S. C. Reporter's ed. 377-380.)

Title of railroad company to lands.

A railroad company has no interest in so much of lands granted to the state in trust for it by Act of Congress as were conveyed back to the United States by the state, after the company had received the full complement of lands it was entitled to, under the grant for road constructed by it.

[No. 80.]

Argued April 16, 17, 1895. Decided October 21, 1895.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that court affirming the judgment of the District Court of Woodbury County, Iowa, in favor of defendant, in certain consolidated actions of ejectment brought by the Sioux City & St. Paul Railroad Company against Lewis Countryman *et al.*, for the recovery of lands. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George B. Young** and *J. H. Swan* for plaintiff in error.

Mr. **M. B. Davis** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The history of the lands, of which those here in dispute form a part, is fully stated in the opinion just delivered in *Sioux City & St. P. R. Co.* v. *United States*, *ante*, 177.

By reference to the opinion it will be seen that the only certificates given by the governor for the benefit of the Sioux City company were certificates showing the construction by it of fifty miles, or five sections of ten consecutive miles each; that, in 1872 and 1873, the Secretary of the Interior caused to be issued patents to the state for 407,870.21 acres, of which 322,412.81 acres were certified by the state to the company, the state retaining within its control 85,457.40 acres; that of the 322,412.81 acres, 41,687.52 acres were awarded to the Milwaukee company, as successor in right of the McGregor Western Railroad Company, leaving with the Sioux City 280,725.29 acres that it has disposed of, and about which no question is here made; that out of the 85,457.40 acres, 37,747.89 acres were awarded to the Milwaukee company; and that of the 85,457.40 acres, 21,692.38 acres were those in dispute in *Sioux City & St. P. R. Co.* v. *United States*, and 26,017.33 acres were formally relinquished and conveyed by the governor of Iowa, pursuant to the act of the Iowa legislature of March 27, 1884. Iowa Laws 1884, chap. 71, p. 78; Iowa Laws 1882, chap. 107, p. 102.

After this conveyance by the governor of Iowa, the question as to the disposition of these 26,017.33 acres came up for consideration in the Department of the Interior. Upon the hearing of this question, Secretary Lamar said: "The certification by the governor under this act was not made without an effort on the part of the railroad company to prevent it. He was enjoined by the company, but the injunction was dissolved, and the certification followed. [379] The company is still opposing reassertion of title by the United States, and is now here, by its president and by counsel, claiming in effect that the grant for the benefit of the company was one of quantity and not lands in place, and that therefore the company has earned the lands in question, notwithstanding they are outside of the fifty-mile terminal limits." The conclusion of the Secretary is thus stated: "I must conclude, after a careful examination of the matter as presented, that neither the state of Iowa nor the Sioux City & St. Paul Railroad Company ever had any title under the granting Act of 1864 to the lands in question beyond the prima facie legal title which would appear from the face of the patents, which, so far as these lands are concerned, were improperly and illegally issued. This title, such as it was, had gone no further than the state, for it had not patented or certified the lands in question to the company. The state having relinquished and reconveyed to the United States such title as it had, I have no hesitation in concurring in your recommendation that the lands so certified and conveyed be restored to entry under the settlement laws of the United States. You will therefore treat them as public lands and they will be thrown open to settlement and entry, as are other public lands of the United States." 6 U. S. Land Dec. 47, 53.

By an order of the Interior Department made August 4, 1887, these 26,017.33 acres were restored to entry under the pre-emption, homestead, and timber culture laws of the United States. Entries were made September 12, 1887, as follows: By defendants in error, Lewis Countryman and Adam Phillips, respectively, under the homestead laws; and by defendants

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NOTE.—*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 194.

As to errors in surveys and descriptions in patents for lands; how construed, see note to Watts v. Lindsey, 5: 428.

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in error, Washington Royer and Basil D. Battin, respectively, under the pre-emption laws.

The railroad company brought separate actions of ejectment in the district court of Woodbury county, Iowa, against these persons, in which it asserted title to the lands so entered by the respective defendants. By stipulation of the parties the four cases were heard and determined together. Judgment in each case was rendered for the defendant, and upon 380]*error to the supreme court of Iowa each judgment was affirmed.

For the reasons stated in the opinion in *Sioux City & St. P. R. Co.* v. *United States*, just decided, it must be held that the railroad company did not have, at the time those actions were instituted, any interest whatever in the 26,017.38 acres, or any of them, certified back to the United States by the governor of Iowa pursuant to a statute of that state. It had previously received its full complement of public lands under the Act of May 12, 1864, on account of road certified by the governor of the state as having been constructed in accordance with the requirements of that Act.

The judgment in each case is affirmed.

WILLIAM A. SWEET ET AL., *Plffs. in Err.*, *v.* CHRISTIAN RECHEL.

(See S. C. Reporter's ed. 380-408.)

Constitutionality of statute—Constitution of Massachusetts as to the right of eminent domain—compensation to owner of lands taken—Massachusetts statute of 1867.

1. In determining whether a statute is unconstitutional, every reasonable presumption must be indulged in favor of its validity.
2. The constitution of Massachusetts does not require compensation to be made or tendered to the owner before the rights of the public in property appropriated for public uses become complete; it is sufficient if the statute authorizing such appropriation makes adequate and certain provision for such compensation.
3. Adequate provision for such compensation is made when the statute authorizing a municipal corporation to take private property for public uses directs the regular ascertainment, without improper delay and in a legal mode, of the damages sustained by the owner, and gives him the right to the judgment therefor, which can be collected by judicial process.
4. It was competent for the legislature of Massachusetts, in the exercise of the police power and of its power to appropriate private property for public uses, to authorize, by the statute of 1867, the city of Boston to take the fee of the lands described in that statute, prior to making compensation, and the provision therein made for compensating the owner was adequate and certain.

[No. 18.]

Argued Dec. 14, 1894. Decided Oct. 21, 1895.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of defendant, Christian Rechel, in an action brought by William A. Sweet *et al.*, to recover certain real estate situated in the city of Boston. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Thomas A. Jenckes** and *James E. Leach*, for plaintiffs in error:

It is a prime requisite that compensation shall be made for the appropriation of lands for public purposes.

Cooley, Const. Lim 699; Dill. Mun. Corp. (3d ed.) 612; *People* v. *McRoberts*, 62 Ill. 38, 43, 44; *Stacey* v. *Vermont C. R. Co.* 27 Vt. 44, 46; *Baltimore & S. R. Co.* v. *Nesbit*, 51 U. S. 10 How. 395 (13: 469); *Water Works Co.* v. *Burkhart*, 41 Ind. 364; *Coster* v. *New Jersey R. & Transp. Co.* 23 N. J. L. 227; *De Varaigne* v.

NOTE—*As to constitutionality of ex post facto laws*, see notes to Calder v. Bull, 1: 648; and Sturges v. Crowninshield, 4: 529.

As to construction of statute according to purpose for which it was passed, see note to United States v. Saunders, 22: 736.

As to constitutionality of laws or of repeal or modification of statute, see note to Fletcher v. Peck, 3: 162.

As to payment for private property taken for public use; 5th Amendment to Constitution applies only to Federal government, and not to states, see note to Withers v. Buckley, 15: 816.

Eminent domain; who may exercise; for what purpose; what may be taken; property devoted to public use; right acquired; what constitutes a taking; right to compensation; damages to easements; noise, smoke, bridges, and approaches.

The right of eminent domain is an essential element in the essence of sovereignty and is recognized in the American Constitution only by the limitation provided by the 5th Amendment. Merriam v. United States, 29 Ct. Cl. 250.

The New York condemnation law (N. Y. Code Civ. Proc. chap. 23, tit. 1) has for its purpose only the regulation of procedure for condemnation of property, where the person instituting it has authority under some independent statute to acquire the title to land for public use, and does not itself authorize the condemnation of land. *Re* Thomson, 36 Hun, 405.

The power conferred upon the board of trustees of a town to open and lay out a new street necessarily implies and includes the power to institute condemnation proceedings to carry such power into effect. Chicago & N. W. R. Co. v. Cicero, 154 Ill. 656.

The legislature has power to authorize foreign railroad corporations, as well as those organized under the laws of the state, to acquire additional lands by condemnation. New York, N. H. & H. R. Co. v. Welsh, 143 N. Y. 411.

The United States has no right to condemn the site of a battlefield for the purpose of preserving the lines of battle and marking the position of the various commands of the armies, as its right is limited to some power delegated to the general government and necessary or adapted to its execution. United States v. A Certain Tract of Land, 67 Fed. Rep. 869.

The right of eminent domain may be invoked where the public interest will be promoted, although private interests may also gain largely. Barr v. New Brunswick, 67 Fed. Rep. 402.

Riparian rights of the lower owners of land upon the bank of a stream are property such as cannot be taken by the state for even a public use, except in aid of navigation, and cannot be taken at all or impaired for private use. Patten Paper Co. v.

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Fox, 2 Blatchf. 95; *Wheeler* v. *Rochester & S. R. Co.* 12 Barb. 227; *Baker* v. *Johnson*, 2 Hill, 342; *Heyward* v. *New York*, 7 N. Y. 314; *Bloodgood* v. *Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 318; *Brooklyn Park Comrs.* v. *Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70.

Compensation must be simultaneous with the taking.

Walther v. *Warner*, 25 Mo. 277, 286; *San Francisco* v. *Scott*, 4 Cal. 114.

It is not sufficient that the law points out the mode by which the damage may be ascertained and provides the party with a remedy to enforce his rights.

Fox v. *Western P. R. Co.* 31 Cal. 538, 555; *Henry* v. *Dubuque & P. R. Co.* 10 Iowa, 540; *Ferris* v. *Bramble*, 5 Ohio St. 109; *Bonaparte* v. *Camden & A. R. Co.* Baldw. 205; *Nichols* v. *Somerville & K. R. R. Co.* 43 Me. 359; *Kennedy* v. *Indianapolis*, 108 U. S. 599 (26: 550); *Cushman* v. *Smith*, 34 Me. 247.

When lands are taken by the state under the internal improvement laws, and just compensation made to the owners, the title in fee is transferred from the owner to the state.

Water Works Co. v. *Burkhart*, 41 Ind. 364; *Nelson* v. *Fleming*, 56 Ind. 310.

It has never yet been held that the title passed out of the owner until just compensation had actually been made. In fact the decisions appear to have been uniformly to the effect that it did not.

Kennedy v. *Indianapolis*, 11 Biss. 13; *Avery* v. *Fox*, 1 Abb. (U. S.) 246; *Doe, Carr*, v. *Georgia R. & Bkg. Co.* 1 Ga. 524; *Young* v. *McKenzie*, 3 Ga. 31; *Blodgett* v. *Utica & B. R. R. Co.* 64 Barb. 580; *Brock* v. *Hishen*, 40 Wis. 681; *Davis* v. *San Lorenzo R. Co.* 47 Cal. 517; *Brady* v. *Bronson*, 45 Cal. 640; *San Mateo Water Works* v. *Sharpstein*, 50 Cal. 284; *McAulay* v. *Western Vermont R. Co.* 33 Vt. 311, 78 Am. Dec. 627; *Gray* v. *St. Paul & P. R. Co. First Div.* 13 Minn. 315, 322; *Hursh* v. *St. Paul & P. R. Co. First Div.* 17 Minn. 439; *Warren* v. *St. Paul & P. R. Co. First Div.* 18 Minn. 384, 396; *Hall* v. *People*, 57 Ill. 307, 316; *People* v. *Williams*, 51 Ill. 63; *Shute* v. *Chicago & M. R. Co.* 26 Ill. 436; *Daniels* v. *Chicago & N. W. R. Co.* 35 Iowa, 129, 134, 136, 14 Am. Rep. 490; *Atchison, T. & S. F. R. Co.* v. *Weaver*, 10 Kan. 344; *Smith* v. *Chicago, A. & St. L. R. Co.* 67 Ill. 191; *Ford* v. *Chicago & N. W. R. Co.* 14 Wis. 610; *Graham* v. *Columbus & I. C. R. Co.* 27 Ind. 260, 89 Am. Dec. 498.

Kaukauna Water Power Co. 90 Wis. 370, 28 L. R. A. 443.

No portion of the public street can lawfully be appropriated to the exclusive and permanent use of a private corporation, under the guise of an exercise of power to alter or change the grade. Willamette Iron Works v. Oregon R. & Nav. Co. 26 Or. 224, 29 L. R. A. 88.

A city authorized by statute to conduct water thereto from a designated lake through a pipe not exceeding a specified diameter, for the purpose of supplying the city with water, has no right to condemn the right to lay any other pipe than the one specified in the statute. Syracuse v. Benedict, 86 Hun, 343.

Land taken as a site for the erection of a courthouse is taken for public use. Jockheck v. Shawnee County Comrs. 53 Kan. 780.

A railroad company may condemn a strip of land to provide for its prospective necessities, within the limits of 100 feet in width, under the New Jersey general railroad law. State v. National Docks & N. J. J. C. R. Co. 57 N. J. L. 86.

A railroad company which in filling up its roadbed has deposited earth upon adjoining land may condemn such land under the Ohio statute authorizing it to appropriate so much as may be deemed necessary for its road. Ohio S. R. Co. v. Hinkle, 1 Ohio Dec. 662.

A railroad company may appropriate land for the new route of a public road which it has changed in strengthening and improving its own road. Peiffer v. Harrisburg, P. Mt. J. & L. R. Co. 12 Lanc. L. Rev. 265.

Homestead property is subject to the right of eminent domain, and may be taken for public purposes. Jockbeck v. Shawnee County Comrs. 53 Kan. 780.

A portion of the yard of a railroad company cannot be condemned for the extension of a street, where it will require removal or interference with the use of a turntable, water tank, engine house, and coal dock, as well as side tracks. Cincinnati, W. & M. R. Co. v. Anderson (Ind.) 10 Am. R. & Corp. Rep. 17.

A village cannot by eminent domain obtain an easement upon lands of an individual for emptying its sewage thereon, untreated, without any provision for its disposition. Colby v. La Grange, 65 Fed. Rep. 554.

A statute purporting to give persons desiring to float timber down a specified stream the right to construct a chute in connection with any dam across it, and reconstruct booms previously or subsequently constructed, and providing for compensation to the owners of such booms, will not authorize the condemnation of an easement to float logs and timber down the stream and make all necessary improvements by removing obstructions therein, and of a strip of land on its shore for a distance of 10 feet back from high-water mark. *Re* Thomson, 86 Hun, 405.

Land in a public street may be condemned as against the private owner of the fee, under the New Jersey general railroad law. State v. National Docks & N. J. J. C. R. Co. 57 N. J. L. 86.

A railroad yard, as well as the track or right of way of a railroad, is subject to the statutory power to extend a street across "any railroad track, right of way, or land of any railroad company." Illinois C. R. Co. v. Chicago, 156 Ill. 98, 112.

Property owned by a street railway company, not used as a right of way or necessary for use in connection with its right of way, may be condemned by another company for the purposes of a right of way. Chicago W. D. R. Co. v. Metropolitan W. S. Elevator R. Co. 152 Ill. 519.

The railroad of one company may be intersected by that of another as permitted by N. Y. Laws 1892, chap. 676, § 4, subd. 5, although it has been already appropriated to public use. Hornellsville Electric R. Co. v. New York, L. E. & W. R. Co. 83 Hun, 407.

Condemnation by a city of the works and franchise of a water company may be authorized by statute on the ground that it is for a public use of a higher and wider scope. *Re* Brooklyn, 143 N. Y. 596, 26 L. R. A. 270.

A resolution by the canal board, that the waters of a designated lake and outlet are "hereby appropriated" to the public for a feeder to the canal, does not appropriate the waters of such lake as against lower riparian owners uninjured thereby, where the plan adopted by them was simply to appropriate the waters as against other owners of water rights immediately below the dam. Waller v. State, 144 N. Y. 579.

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If possession of the property had been actually taken without compensation to the owner, then the owner becomes entitled to recover possession by an action of ejectment.

Gardiner v. *Tisdale*, 2 Wis. 153; *Weisbrod* v. *Chicago & N. W. R. Co.* 21 Wis. 603; *Wager* v. *Troy Union R. Co.* 25 N. Y. 526; *Lozier* v. *New York C. R. Co.* 42 Barb. 466; *Nichols* v. *Lewis*, 15 Conn. 137; *McClinton* v. *Pittsburg, Ft. W. & C. R. Co.* 66 Pa. 404; *Chicago, B. & Q. R. Co.* v. *Knox College*, 34 Ill. 195.

The fact that opportunity was provided in the act for compelling compensation is not sufficient, and there is no obligation imposed on the owner to resort to a legal tribunal to enforce payment.

Orr v. *Quimby*, 54 N. H. 590, 642; *Piscataqua Bridge Proprs.* v. *New Hampshire Bridge*, 7 N. H. 35, 70; *Shepardson* v. *Milwaukee & B. R. Co.* 6 Wis. 618; *Lee* v. *Northwestern U. R. Co.* 33 Wis. 222.

The compensation to fulfil the requirements of the constitution must be in money. "No just compensation can be made except in money."

Vanhorne v. *Dorrance*, 2 U. S. 2 Dall. 312, 314 (1: 395, 396); *Carson* v. *Coleman*, 11 N. J. Eq. 106, 108.

Without compensation, and that, too, in money actually paid to the owners by the city of Boston, the latter did not become vested with the title in fee to this land, and conversely the owners did not become devested of their title in fee.

Jones v. *Wills Valley R. Co.* 30 Ga. 43; *State* v. *Ravine Road Sewer Comrs.* 39 N. J. L. 665; *Central Ohio R. Co.* v. *Holler*, 7 Ohio St. 220, 225; *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557).

The act in question was not passed under the general police power of the legislature.

Com. v. *Alger*, 7 Cush. 53.

In no case in Massachusetts has the police power been enlarged to include the taking of private property, except in case of forfeiture for crime.

Dingley v. *Boston*, 100 Mass. 556; *Com.* v. *Tewksbury*, 11 Met. 55; *Fisher* v. *McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Blair* v. *Forehand*, 100 Mass. 139, 1 Am. Rep. 94, 97 Am. Dec. 82; *Watertown* v. *Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Rideout* v. *Knox*, 148 Mass. 368, 2 L. R. A. 81.

The right of a water company in lands flowed by it under the exercise of eminent domain is something more than a mere easement, and includes the right of exclusive occupation, with all attendant riparian rights. Wright v. Woodcock, 86 Me. 113, 25 L. R. A. 499.

Condemnation proceedings for a right of way for a railroad, which are regular and legal and in which the award is deposited as required by statute, vest a complete easement in the company as against a mortgagee, although the latter receives no portion of the award. Wichita & W. R. Co. v. Thayer, 54 Kan. 259.

A railroad company which has taken land for a right of way may define the limits so as to exclude whatever is unnecessary to the construction and operation of its line, either at the time the appropriation is made or within a reasonable time thereafter. Jones v. Erie & W. V. R. Co. 169 Pa. 323.

An order confirming an appraisement in condemnation proceedings does not require the public authorities to take the land asked to be condemned, but is merely conclusive of the value. District of Columbia v. Prospect Hill Cemetery, 23 Wash. L. Rep. 162.

The use of a public toll bridge for an electric railway on payment of adequate tolls is not a taking of or injury to the property in the exercise of the power of eminent domain. Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co. 165 Pa. 37, 26 L. R. A. 323.

There is no taking of property of a railroad company by reason of the hindrance and burden imposed by the crossing of its tracks by a street railway which, in exercising its franchise in enjoyment of the public easement, is laying its tracks along the street. Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co. (Ind.) 26 L. R. A. 337.

Mere consequential injury to riparian rights by a public improvement, without any actual invasion of the premises of the riparian owner, does not constitute a taking of property within the constitutional provisions as to compensation. Gibson v. United States, 29 Ct. Cl. 18.

A municipal corporation cannot, in the exercise of its right to restore the grade of a public street, commit an actual trespass and destroy property without compensation. West Covington v. Schultz, 16 Ky. L. Rep. 333.

A land owner, a part of whose land is taken, is entitled to compensation for the injury done to the remaining land by the taking. District of Columbia v. Prospect Hill Cemetery, 23 Wash. L. Rep. 162.

A railroad company is liable to a purchaser of lands adjoining its right of way for a substantial and material change, after the purchase, in the construction of its road from that originally contemplated, whereby an increased amount of water is set back on the land. Chicago & A. R. Co. v. Henneberry, 153 Ill. 354.

The occupant or owner of a log house existing upon a street at the time it was dedicated to the public is not entitled to compensation for its removal for the purpose of securing unobstructed use of the street. Brown v. Edmonton, 23 Can. S. C. 308.

The extension of streets across the right of way of a railroad company deprives it in part of its property rights in respect to the portions of land within the lines of the streets, so as to entitle the company to just compensation for the damage sustained thereby. Illinois C. R. Co. v. Chicago, 156 Ill. 112.

One who conveys a right of way to a railroad company by a deed providing that the grantee as part consideration shall make and maintain an under crossing is not entitled to recover damages caused by the construction of a depot and a branch railroad with switches near it, by which its use is rendered more difficult. Perry v. Lehigh Valley R. Co. 9 Misc. 515.

A street railway company, by appropriating the joint use of the tracks of another company, under the Ohio statutes, obtains a property right which cannot be interfered with for public use by another company, without legal proceedings to appropriate, and compensation made therefor. Toledo Electric Street R. Co. v. Toledo & M. V. R. Co. 1 Ohio Dec. 33.

A quitclaim deed to a strip of ground taken from one lot for railway purposes will not constitute a release of damages to an adjoining lot by subsequently extending the railway embankment. Atchison, T. & S. F. R. Co. v. Pratt, 53 Ill. App. 263.

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Messrs. **Samuel J. Elder** and *Charles T. Gallagher*, for defendant in error:

The provision of the constitution of Massachusetts, that whenever the public exigency requires that the property of an individual be appropriated to public uses he shall receive reasonable compensation, has been often construed by the Massachusetts supreme court, which has held that it is sufficient compliance therewith if provision be made for ascertaining the damage.

Haverhill Bridge Proprs. v. *Essex County Comrs.* 103 Mass. 120, 4 Am. Rep. 518; *Talbott* v. *Hudson*, 16 Gray, 417, 431; *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 397; *Dodge* v. *Essex County Comrs.* 3 Met. 380.

Where the description filed accurately identifies the land the name of the owner is immaterial.

Woodbury v. *Marblehead Water Co.* 145 Mass. 512; *Grand Junction R. & D. Co.* v. *Middlesex County Comrs.* 14 Gray, 553.

The statute of 1867, chap. 309, has been passed upon, and substantially the whole question has already been decided by the Massachusetts supreme court in *Dingley* v. *Boston*, 100 Mass. 544.

This decision conclusively establishes that under this act the city took a title in fee simple, free from any possibility of reverter left in the original owner of the land.

This statute was again before the court in *Cobb* v. *Boston*, 109 Mass. 438, and the decision in *Dingley* v. *Boston* was reaffirmed.

The city might alien land held by it in fee simple.

Dill. Mun. Corp. (3d ed.) § 575; *Beach* v. *Haynes*, 12 Vt. 15.

The question, what the consideration of the sale was, is immaterial in this action.

Bachelder v. *Wakefield*, 8 Cush. 247; *Com.* v. *Wilder*, 127 Mass. 6; *Chase* v. *Sutton Mfg. Co.* 4 Cush. 171.

Even if the city might not legally part with its title, yet the defendant's possession under claim of legal title is sufficient defense either in an action of ejectment or writ of entry.

Preston v. *Bowmar*, 19 U. S. 6 Wheat. 580 (5: 336); *Ricard* v. *Williams*, 20 U. S. 7 Wheat. 59 (5: 398); Adams, Ejectment, 275.

The question here involved is the title to real property as affected by state statute, and the Federal court must apply state law as the state courts would do.

Erie R. Co. v. *Pennsylvania*, 88 U. S. 21 Wall. 492, 497 (22: 595, 598); *Williams* v. *Kirt-*

Land abutting upon a highway cannot be taken as the base of a proposed fill in changing the grade, without compensation to the owner. Leonard v. Cassidy, 1 Ohio Dec. 517.

A land owner is entitled to damages from the construction of a railroad embankment in a street and the necessary construction of an approach to the street obstructing the entrance to the land, although the approach is constructed in compliance with a statutory duty of the railroad company. Atchison, T. & S. F. R. Co. v. Pratt, 53 Ill. App. 263.

An abutting owner not owning the fee of the street is not entitled to compensation before the street is used by a street railway company. Matousek v. West & S. Town Street R. Co. 27 Chicago Leg. News, 223.

Enlargement of its facilities by an existing street railway by constructing additional side tracks or turnouts to meet an increased public demand does not entitle an abutting owner to compensation, unless he is deprived of light, air, or access. Oviatt v. Akron Street R. Co. 3 Ohio Dec. 252.

Evidence of the noise made by defendant's trains in passing plaintiff's premises, and of its probable effect upon his property, is admissible in an action for damages for the construction and operation of a railroad in the street in front of plaintiff's premises. Chicago, P. & St. L. R. Co. v. Leah, 152 Ill. 249.

An allowance for noise caused by an elevated railroad in the streets in front of premises should not be made in condemnation proceedings, although the owner's title extends to the centre of the street. Seaside & B. Bridge Elev. R. Co. v. South Reformed Dutch Church, 83 Hun, 143.

The owner of property who has only an easement in the street in front of which an elevated railroad is constructed is not entitled to damages for noise made by the operation of the road. Krumwelde v. Manhattan R. Co. 9 Misc. 552.

Building in a city an approach to a bridge over railroad tracks, leaving access to abutting owners, is not an additional servitude. Home Bldg. & C. Co. v. Roanoke (Va.) 27 L. R. A. 551.

The power of the United States government to take private property for public use upon making just compensation cannot be exercised in the absence of legislative authorization. United States v. A Certain Tract of Land, 34 W. N. C. 550.

Whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the state in which the lands lie. Luxton v. North River Bridge Co. 153 U. S. 525 (38: 808).

A city incorporated in one state cannot exercise the power of eminent domain in another state. Saunders v. Bluefield Waterworks & I. Co. 58 Fed. Rep. 133.

Private property cannot be taken except for public purposes: and the determination of what are such purposes is for the courts. Williams v. Eighteenth Judicial Dist. Ct. Judge, 45 La. Ann. 1295.

Lands may be condemned for the purpose of enlarging a public cemetery, where the public in general have the right to obtain interment; and it is thereby devoted to public use. Farneman v. Mt. Pleasant Cemetery Asso. 135 Ind. 344.

The general power conferred by a statute upon a municipality or corporation to acquire lands by the right of eminent domain does not extend to lands already dedicated by authority of law to a public use, unless expressly conferred or necessarily implied. *Re* Utica, 73 Hun, 256.

The title to lands occupied by the tracks of a railroad company cannot, without special authority from the legislature, be acquired for the purposes of public parks. *Re* Buffalo, 72 Hun, 422.

One railroad company may condemn the right of way of another railroad company for a crossing to connect with a third road, under Ill. Rev. Stat. chap. 114, § 19. Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co. 149 Ill. 272.

Power conferred by statute upon a city to establish and construct wharves, docks, and piers does not authorize the condemnation by the city of an existing wharf. Madison v. Daley, 58 Fed. Rep. 751.

The inhibition of the United States Constitution against the taking of private property for public use without due compensation applies only to acts of the general government. Smith v. Rivens, 56 Fed. Rep. 352.

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land, 80 U. S. 13 Wall. 306 (20: 683); *Barrett* v. *Holmes*, 102 U. S. 655 (26: 292); *Carroll County Suprs.* v. *United States*, 85 U.S. 18 Wall. 71 (21: 771); *Beauregard* v. *New Orleans*, 59 U. S. 18 How. 497 (15: 469).

The claim of the plaintiff that no Massachusetts case holds that a title will pass before compensation has been paid is erroneous.

Brock v. *Old Colony R. Co.* 146 Mass. 194; *Cupp* v. *Seneca County Comrs.* 19 Ohio St. 173; *George's Creek Coal & I. Co.* v. *New Central Coal Co.* 40 Md. 438.

The receipt of compensation by the owner of land is wholly immaterial where, as in this case, the land is taken to abate a nuisance under the police power of the commonwealth.

Bancroft v. *Cambridge*, 126 Mass. 438.

Mr. Justice **Harlan** delivered the opinion of the court:

The real estate—the title to which is involved in the present writ of entry—formerly belonged to Peleg Tallman, Sen., of Maine, who died on the 12th day of March, 1840, having made a will which was duly admitted to record in that state, and a copy whereof was admitted to probate May 10, 1841, in Suffolk county, Massachusetts, where the premises in controversy are situated.

The parcel of land in dispute, with other real estate, was devised to Henry Tallman, to hold for life, and at his decease to descend to his son, Peleg Tallman, Jun. The devisee in remainder was born April 18, 1836, and died April 15, 1868, leaving two children, Frank G. Tallman and Peleg H. Tallman; also a widow, who subsequently intermarried with William A. Sweet, one of the plaintiffs in error.

The plaintiffs in error, who were the plaintiffs below and are citizens of New York, claim title under the will of Peleg Tallman, Sen.

The defendant, a citizen of Massachusetts, claims title under proceedings instituted by the guardian of the devisee in remainder in the probate court of Suffolk county, Massachusetts, by the order of which court, and in full compliance therewith, as is contended, the interest of Peleg Tallman, Jun., in certain real estate, including the lot in dispute, was sold in 1844—Henry Tallman, the owner of the life estate, becoming the purchaser. In the same year the latter conveyed, with warranty, to Robert Knott who purchased in good faith at the price of $2,900. In 1869, Knott conveyed by warranty deed to the defendant Rechel, for the sum of $4,800 in cash or its equivalent. Rechel bought in good faith, for full value, without actual notice of any alleged defect in the title, and erected buildings and made improvements on the premises in dispute at a cost of $8,575.

The defendant also claims that the title to the 382] lot in controversy *was taken by the city of Boston in 1867—the title being, at that time, apparently, in Knott—under a statute of Massachusetts, approved June 1, 1867, entitled "An Act to Enable the City of Boston to Abate a Nuisance Existing Therein, and for the Preservation of the Public Health in Said City." Mass. Stat. 1867, chap. 308.

By reason of its grade being lower, and because it was incapable of being properly drained, the condition of the territory, of which the lot in controversy was a part, was such during the period between the years 1860 and 1870 as to endanger the public health. Various plans having been suggested for the raising of the grade and for the proper drainage of that territory, the legislature passed the act of June 1, 1867.

By that act it was provided that the city of Boston "may purchase or otherwise take the lands or any of them in said city, with the buildings and other fixtures thereon," situated within a certain defined district which included the lands here in dispute; that the "city shall, within sixty days from the time they shall take any of said lands, file in the office of the registry of deeds for the county of Suffolk a description of the land so taken as certain as is required in a common conveyance of lands," with "a statement that the same are taken pursuant to the provisions of this act, which said description and statement shall be signed by the mayor of said city;" that "the title to all land so taken shall vest in the city of Boston, and if any party whose land is taken shall agree with the said city upon the damage done to him by the said taking, the same shall be paid to him by the said city forthwith." It was made "the duty of the city of Boston forthwith to raise the grade of said territory so taken or purchased, laying out and filling up the same with good materials, with reference to a complete drainage thereof, so as to abate the present nuisance and to preserve the health of the city." § 1. Any person having an interest in the land taken was at liberty, within one year after the same was taken, as well in his own behalf as in behalf of all other persons having estates therein, to file a bill in equity in the supreme judicial court, in the county of Suffolk, setting forth the taking of *the complainant's land, the condition of [383 the same in respect to its capacity for drainage, and whether the complainant claimed any and what damages against the city or the Boston Water Power Company, or other corporation or person, "by reason of any and what wrongful act or omission by their causing a diminution in the value of his land at the time of said taking, and praying an assessment of damages against such parties"—notice of such bill being given to the parties named therein as defendants, according to the course of courts of equity, and also public notice thereof, to all persons in whose behalf such bill was filed, to appear and become parties thereto, if they thought fit to do so. It was made the duty of the court to prescribe how such public notice should be given, and what length of time should be allowed for appearing and becoming a party to the suit. Any one interested who failed to appear and become a party within the time prescribed by the court was forever barred from recovering any damages on account of such taking. Each person appearing and becoming a party, having filed a written description of the land in which he claimed an estate, together with a plan thereof, so as clearly to distinguish the same from all other lands, was required to declare what estate he claimed therein. If he claimed that the value of said lands at the time of the taking was lessened by

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any unlawful act or omission of the city of Boston, or of the Boston Water Power Company, or of any other corporation or person, "so that the value of the land, in its condition when taken, would not be a just compensation for all the estate and rights of the party in and in reference to the same," he was also to state "what such injury is, and how and by whom the same had been or is caused, and what right or title of the party is violated, and what amount of damages in gross is claimed by him, as compensation therefor, from each of the parties defendant." Mass. Stat. 1867, chap. 308

Other sections of the act provided for the appointment of commissioners to hear the parties, after due notice, to assess the value of the land taken, and to make report to the court of their doings. Any party aggrieved by the report might except thereto and have his excep-
384] tion heard as in a suit in *equity, or might apply for the framing of proper issues, to be tried by a jury.

The seventh section provides: "When it shall be finally determined what amount of damages any party is entitled to recover against the city of Boston, or the Boston Water Power Company, or any other party defendant, a separate decree shall be entered accordingly and execution therefor shall be issued, without regard to the pendency of the claims of any other party or parties, or of other claims of such complainant."

The city council approved and spread upon its records an instrument reciting the act of 1867, and stating that, pursuant to its provisions, the city "has taken, and by these presents does take," a certain parcel of land "belonging to Robert Knott,"—in whose name, as we have seen, the title then stood of record,—"to have and to hold the same to the said city of Boston, its successors and assigns, to its and their sole use and behoof forever, agreeably to the provisions of the said act." This instrument was approved by the mayor, who certified that "the lands described in said instrument were and are taken pursuant to the provisions of the said act." Within sixty days of the taking of the land, to wit, on May 22, 1868, that instrument was filed in the Suffolk registry of deeds, and was fully recorded.

It was admitted at the trial that the city followed the provisions of the statute, and that the premises were held by the defendant under Knott and the city; also, that the city forthwith performed the duty imposed on it by the statute at an immense outlay; that "the grade of the land was raised and the buildings thereon, the territory was laid out and filled, a complete and effective system of drainage was provided, the nuisance abated, and the value of the land was greatly enhanced. The lot in suit was filled in to a depth of several feet, the buildings were raised and underpinned, and the value increased."

Subsequently a settlement was had with the assignee of Knott, in relation to the taking of the land, and—Knott having executed a release
385]—the city conveyed, by deed of *March 14, 1870, to the defendant Rechel, the deed reciting that the property had been previously taken by the city under the above act of 1867.

It was also admitted that no compensation was ever paid to the plaintiffs by reason or on account of any proceedings by the city under the act of June, 1867. And it was agreed that "in 1869 a bill in equity was brought under the statute, reported in 109 Mass. 438, the case being *Cobb* v. *Boston*, on behalf of Cobb and all others entitled to have damages assessed for this taking; that this case was pending in the Supreme Court until the April term, 1882; that it was ordered by the court in this case that the time from December 23, 1869, to first Tuesday of April, 1870, be allowed to parties to bill; that notice was published in papers on said order, and that such persons as came in had their damages assessed under said bill."

The grounds upon which the plaintiffs impeach the validity of the sale of 1844 are: That the notice required to be given of the proceedings in the Suffolk probate court was not shown to have been published as often as required, and therefore such jurisdiction of the ward was not acquired as authorized an order for the sale of his property; that the notice of the sale did not specify both the time and place of sale; that the guardian could only sell for money in hand, and was without authority to sell and convey and immediately take, as was done, a mortgage back for the purchase money; that no return of the proceeds of sale was ever made by the guardian; and that an affidavit setting forth the time and place of the sale was not filed by the guardian within the time prescribed by the statute.

But, obviously, the question to be first considered is whether an absolute title passed to the city of Boston. If the title passed in virtue of what was done under the act of 1867, it will become unnecessary to determine whether the sale made by the guardian of Peleg Tallman, Jun., in 1844, was invalid upon any of the grounds assigned by the plaintiffs. For, if that sale was, in itself, ineffectual to devest the title of the devisee in remainder, and if, at the time, the city proceeded under the statute of 1867, the title was not, in law, in Knott or in the defendant Rechel, but in the children and widow of the devisee in remainder upon his death in 1863, the title nevetrheless passed to the city, if the provisions of that *statute[392
were followed, and unless, as plaintiffs contend, the statute was unconstitutional and void.

The constitution of Massachusetts recognizes the right of each individual to be protected in his life, liberty, and property, according to standing laws; declares his obligation to contribute his share to the expense of such protection; and provides that "no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." And "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. pt. 1, art. 10. The legislative department of the commonwealth has, however, full power "from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they

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shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof." Pt. 2, chap. 1, art. 4.

The authority for the enactment of the statute of 1867 is found in these constitutional provisions. The territory of which the lot in controversy formed a part was in such condition, for many years, as to require, or at least to justify, legislative interference under the power to ordain and establish wholesome and reasonable regulations conducive to the good and welfare of the people, and not inconsistent with the fundamental law of the commonwealth. And no restrictions are imposed by the Massachusetts constitution upon the mode in which this power may be exerted, except that it is expressly required that the orders, regulations, and statutes prescribed by the legislature must not be repugnant to the constitution, and it was necessarily implied that the exercise of the power must have some real, substantial relation to the general good and welfare. But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be in-[393]dulged in *favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed. *Talbot* v. *Hudson*, 16 Gray, 417, 422; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 128 [3: 162, 175]; *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700, 718 [25: 496, 501].

We must therefore assume that the act of 1867 had for its real object the protection of the public health, and not the mere acquisition of the property in question for purposes of sale and profit, after it had increased in value by reason of the grade being raised. It is not alleged in the pleadings, nor was there any evidence tending to show that the cost of raising the grade would have been so slight, compared with the real value of the property, that a due regard to the constitution demanded that the owner should have been given opportunity to raise the grade at his own expense, and retain the property in its improved condition. On the contrary, it appears that the public health justified prompt action and the use of such means as could be effectively supplied only by municipal authority acting under legislative sanction.

In *Dingley* v. *Boston*, 100 Mass. 544, 554-560, this act of 1867 was assailed upon various grounds. It was there adjudged that the statute authorized the property described in it to be taken by the city for public purposes; that its language imported a title in fee simple. The point was pressed that the legislature had assumed the power to declare the existence of a public nuisance on the land of the plaintiff, and that this was an exercise of judicial power because it charged him with an offense and decided the question without giving him an opportunity to be heard, and then proceeded to deprive him of his land. But this point was overruled, the court holding that the statute did not regard him as an offender in any sense, because it gave him a right to compensation, not only for all damage occasioned by the taking of his land, but for its deterioration in value before the taking; that it regarded *him as an innocent person whose land[394] was taken on the ground of public necessity in order to protect the health of the city; and that, upon the facts stated, it was apparent that no indictment would lie against him, notwithstanding the nuisance, for it had been created by the acts of others which were beyond his control, and it was not in his power to remove it.

After observing that the work specified in the act was regarded by the legislature as a great public enterprise to accomplish a highly important object, one that needed to be prosecuted by legislative authority, and which could not have been dealt with by a judicial tribunal under any known forms of proceeding, the court proceeded: "Where the sanitary condition of a large city requires an interference with the real estate of a great number of persons, making expensive and essential changes in the condition and character of the land, a case is presented within that clause of the constitution which confers authority upon the legislature to make 'all manner of wholesome and reasonable laws, so as the same be not repugnant or contrary to this constitution.' Pt. 2, chap. 1, § 1, art. 4. In *Hingham & Q. Bridge & Turnp Co.* v. *Norfolk County*, 6 Allen, 353, Bigelow, *Ch. J.*, says one of the main purposes of this clause was to vest in the legislature's superintending and controlling authority, under and by virtue of which it might enact all laws not repugnant to the constitution of a police and municipal nature, and necessary to the due regulation of the internal affairs of the commonwealth."

In the same case it was objected that as the act authorized the city to first take the land and thereby transfer to itself the fee without the consent of the owners, and as the only object of the legislature was to abate a nuisance, the act should only have granted power to occupy the land until its object was effected by raising the grade, which being done, the land should have been restored to the owners, applying the benefit received therefrom in offset to the damages. That objection was fully met. Conceding it to be true that the raising of the grade did not require an occupation of the *land for a great length of [395] time, and that when the work was completed, the nuisance was abated, and the land in a condition to be occupied by private persons, the court said: "But its condition will be greatly changed; almost as much as raising flats into upland. The former surface will be deeply buried under the earth that will have been brought upon it, and the changed condition is to be perpetual. If the old property is restored, the new property which has been annexed to it must go with it. This would be very unjust to the city, which has been compelled to incur the great expense of destroying the nuisance, unless the owner were required to make a reasonable compensation, which might be far beyond the amount of the damages to which he would be entitled. It would be

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difficult to adjust the matter; and in many cases it might operate harshly upon the owner to compel him to take and pay for the improvements. On the whole, therefore, the plan of compelling the city to take the land in fee simple, and the owner to part with his whole title for a just compensation, would seem to be the most simple and equitable that could be adopted, unless there is some objection on the ground that a fee simple is more sacred than an estate for life or years, or than an easement of greater or less duration. We can see no ground for regarding one of these titles as more sacred than another, or for regarding land as more sacred than personal property." Again: "Whether land be taken under the clause authorizing the making of wholesome and reasonable laws, or by virtue of the clause authorizing the appropriation of private property to public uses, it must, in either case, be left to the legislature to decide what quantity of estate ought to be taken in order to accomplish its purpose, and do the most complete justice to all parties. . . . The constitution provides for the protection of all private property, and it provides that when the public exigencies require that the property of any individual shall be appropriated to public uses he shall receive a reasonable compensation therefor. But it leaves the legislature, without any restriction, express or implied, to decide in each case, as it arises, what constitutes such exigency; and if land is to be taken, what estate in it shall pass."

396]*But the validity of the act of 1867 is questioned on the ground—not sugested in *Dingley* v. *Boston*, 100 Mass. 544—that it did not provide for compensation to be made to the owners of the property in advance of its actual appropriation by the commonwealth.

Upon this point the defendant insists that the statute was enacted under the authority to ordain and establish laws and regulations reasonably adapted to secure the good and welfare of the people, and that statutes, having such objects in view, which deprived individuals of the control and use of their property, need not make provision at all for compensation to such individuals.

In support of this position reference is made to *Bancroft* v. *Cambridge*, 126 Mass. 438, 441. That case arose under a statute empowering the city of Cambridge to require the owners of certain lands to fill them to a prescribed grade in order to abate a nuisance. If the owners failed to do so, then the city was authorized to raise the grade, the expense thereby incurred to become a lien on the land filled. If any one gave due notice of his dissatisfaction with the assessment of the expense of raising the grade, the city was thereupon required to "take" the land, and, within a named time, file in the registry of deeds a description of it, together with a statement that it was taken under the statute. If the parties did not agree as to the amount of damage done by the taking, then the question of damage was to be determined by a jury, proper allowance being made for the improvement by reason of the grade of the land being raised.

The court said that the compensation to which the owner was entitled was the value of the land at the time of the taking, making due allowance for the improvement; that this excluded loss or inconvenience caused to the owner by proceedings prior to the taking; that the purpose of the statute was to give to each owner the right to elect whether he would pay the expenses of filling his land and retain his estate, or surrender his estate to the city for a fair compensation; and that the act gave no right either to the owner who surrendered, or to the owner who did not surrender, to recover for previous *loss or inconvenience. "Nor,"[397 the court said, "is the statute made unconstitutional by this construction. It is entitled an act to provide for the prevention and abatement of nuisances and the preservation of the public health. It was not passed to delegate the right of eminent domain, but under the police power of the commonwealth. Laws passed in the legitimate exercise of this power are not obnoxious to constitutional provisions merely because they do not provide compensation to the individual who is inconvenienced by them. He is presumed to be rewarded by the common benefits secured. Instances of its exercise are found in all quarantine and health regulations, and in all laws for the abatement of existing and the prevention of threatened nuisances. . . . The legislature is ordinarily the proper judge of the necessity for the exercise of the power, and there is nothing in this case which shows that this act was not required for the preservation of health and protection against a nuisance."

That case does not sustain the view advanced in behalf of the present defendant. The statement, in the opinion of the court, that laws passed in the legitimate exercise of the police power are not to be held objectionable, on constitutional grounds, *merely* because they do not provide for compensation to the individual inconvenienced by them, had reference only to so much of the statute then under examination as directed, in the interest of the public health, the abatement of the nuisance created by the condition of the property in question. The abatement of a nuisance—nothing more being required or done—is not of itself, and within the meaning of the constitution, an appropriation of property to public uses. The court did not say that private property, the condition of which was such as to endanger the public health, could be legally taken by the commonwealth *and appropriated* to *public use* without reasonable compensation to the owner. On the contrary, the statute there under examination contemplated that if the owner did not himself abate the nuisance in the mode prescribed, then the *property*, the condition of which was the cause of the nuisance, was to be *taken* by the city, the owner to receive such damages as a jury awarded, *allowance being made [398 for the improvement that resulted from the raising of the grade at the expense of the city. That case, it is manifest, proceeded upon the ground that the provisions of the constitution above quoted are to be construed together, so that if private property be actually taken and appropriated for public uses, although taken or appropriated in virtue of a statute having as its main or primary object the conservation of the public health, reasonable compensation must be made to the owner. This necessarily follows from the restriction imposed by the con-

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stitution to the effect that statutes passed in the exercise of the police power of the commonwealth must not be repugnant or contrary to the constitution, one of the provisions of which is that the owner of private property *appropriated* to *public uses* shall receive a reasonable compensation therefor. And it was so appropriated when the city took the fee, and thereby acquired a right to sell the property after it was improved, and put the proceeds into its treasury. *Brooklyn Park Comrs.* v. *Armstrong*, 45 N. Y. 234, 244, 6 Am. Rep. 70.

Undoubtedly, the state, without taking the title to itself, may, in some appropriate mode and without compensation to the owner, forbid the use of specified private property, where such use would be injurious to the public health. For, as said by Chief Justice Shaw in *Com.* v. *Alger*, 7 Cush. 53, 84, "it is a settled principle, growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." This, the court said, was not the power of emi-[399] nent domain, but rather *the police power, "the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute makes provision for reasonable compensation to the owner.

The difference between an act passed with exclusive reference to the police power of the state, without any purpose to take and apply property to public uses, and a statute like the one here involved, which, for the general good, ordains and establishes regulations declaring the existence of a nuisance created by the condition of particular property, and, *in addition*, and as the best mode of accomplishing the end in view, authorizes the same property to be appropriated by the public, is illustrated by *Com.* v. *Tewksbury*, 11 Met. 55, 59. That case related to a statute of Massachusetts, which, for the protection of the harbor of Boston, forbade, under penalties, the removal of any stones, gravel, or mud from any of the beaches in the town of Chelsea. The court, observing that all property was acquired and held under *the tacit* condition that it should not be so used as to injure the equal rights of others or to destroy or greatly impair the public rights and interests of the community, said that "a law prohibiting an owner from removing the soil composing a natural embankment to a valuable, navigable stream, port, or harbor is not such a taking, such an interference with the right and title of the owner, as to give him a constitutional right to compensation, and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property, which the legislature have authority to make."

*The principle is also illustrated by the [400] case of *Turner* v. *Nye*, 154 Mass. 579, 581, 14 L. R. A. 487. That case involved the validity of a statute authorizing the flowage of certain lands or flats, upon prescribed terms and conditions, for the purpose of creating and raising a pond for the cultivation of useful fishes. Referring to the constitutional provision giving power to enact all manner of wholesome and reasonable laws for the general good (Mass. Const. pt. 2, chap. 1, art. 4), the court, in that case, said: "The provision above quoted does not authorize the legislature to take property from one person and give it to another, nor to take property for public uses without compensation, nor wantonly to interfere with private rights. These are always to be carefully guarded and protected. But, of necessity, cases will arise where there will or may be a conflict of interests in the use and disposition of property, and questions may and will come up affecting the public welfare in regard to the use which shall or shall not be permitted of certain property." *Salem* v. *Eastern R. Co.* 98 Mass 431, 437, 96 Am. Dec. 650.

But must compensation be actually made or tendered in advance of such taking or appropriation? Is it not sufficient, in order to meet the requirements of the constitution, if adequate provision be made for compensation?

The constitutions of some of the states expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the constitution of Massachusetts nor the Constitution of the United States contains any such provision. The former only requires that the owner "shall receive a reasonable compensation;" the latter, that private property shall not be taken for public use "without just compensation." Reasonable compensation and just compensation mean the same thing.

In *Haverhill Bridge Props.* v. *Essex County Comrs.* 103 Mass. 120, 124, 4 Am. Rep. 518, the court said: "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. *Payment need not precede the seizure; [401] but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay."

A leading case upon this point is *Connecticut River R. Co.* v. *Franklin County Comrs.* 127 Mass. 50, 52, 56, 34 Am. Rep. 338. That case arose under a statute of Massachusetts authorizing the manager of a railroad owned by the commonwealth to take land for a passenger

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station to be used by that and other railroads, and providing no other mode of compensation to the owner than that the land should be paid for out of the earnings of the railroad. The statute was held to be void.

The court said: "It has long been settled by the decisions of this court, that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent,"—citing among other cases *Boston & L. R. Corp.* v. *Salem & L. R. Co.* 2 Gray, 1, 87. Again: "Statutes taking private property for a public highway, and providing for the ascertaining of the damages and for payment thereof out of the treasury of the county, town, or city, have often been held to be constitutional. But, in the cases in which it has been so held, the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, and might be enforced by writ of execution or warrant of distress, or by mandamus to compel the levy of a general tax. The rule has not been extended to cases in which only a special fund was charged with the payment of the damages, and the municipality had no power to levy a general tax to pay them. . . . When," the court said, "private property is taken directly by the commonwealth for the public use, it is not necessary or usual that the commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient if the statute which authorizes the taking of the property should provide for assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the 402] treasury of the *commonwealth, and authorize the governor to draw his warrant therefor."

Much stress was placed by counsel in that case upon the admitted fact that the earnings of the railroad owned by the commonwealth would probably be sufficient to meet and extinguish all claims for damages for lands taken. But that, the court well said, fell short of the constitutional requirement that the owner of property shall have prompt and certain compensation, without being subjected to undue risk or unreasonable delay

In the later case of *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394, 396, the language of the court was that "a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void."

In view of these authorities, it is clear that as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public in the property taken or applied become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.

Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation. In *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 658 [34: 295, 302], it was suggested that the Act of Congress there involved violated the Constitution of the United States in that it did not provide for compensation to be made to the plaintiff before the defendant entered upon lands taken for the purpose of constructing *its road over them. This objec-[403 tion was not sustained. The court said: "The Constitution declares that private property shall not be taken for public use without just compensation. It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty. In the present case, the requirements of the Constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award to abide its judgment; and that being done the company may enter upon the property sought to be condemned, and proceed with the construction of its road. We are of the opinion that this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled. . . . The plaintiff asks, What will be its condition as to compensation, if, upon the trial *de novo* of the question of damages, the amount assessed in its favor should exceed the sum which may be paid into court by the defendant? This question would be more embarrassing than it is if, by the terms of the Act of Congress, the title to the property appropriated passed from the owner to the defendant, when the latter—having made the required deposit in court—is authorized to enter upon the land pending the appeal, and to proceed in the construction of its road. But clearly [under that Act of Congress] the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution [and under that Act], the property, although entered upon pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner."

*In *Kennedy* v. *Indianapolis*, 103 U. S. [404 599, 603 [26:550, 552], cited by the plaintiffs, the controlling question was whether the owner of certain lands, taken under an Indiana statute

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for a public object, had been devested of his *title*. And that question depended upon the construction of the clause of the state constitution, providing "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor." Ind. Const. 1816, art. 1, § 7. It should be here stated that the Indiana statute (Ind. Rev. Stat. 1838, chap. 55, p. 337) contained no clause expressly declaring at what stage of the proceedings the owner's title should be devested. Necessarily, therefore, it was held that, under the Indiana constitution, the owner was not devested of title until he was compensated. After referring to adjudged cases in that and other states, this court, speaking by *Chief Justice* Waite, said: "Not to multiply cases further, it seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but the title does not pass from the owner without his consent until just compensation has been made to him."

But that case by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which, under the constitution, he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation. The Massachusetts statute of 1867, unlike the Indiana [405] statute, *expressly declares that from the moment the property was taken in accordance with its provisions, the title should be vested in the city of Boston; that the city should thereupon proceed forthwith with the work of raising the grade; and that the owner should have the right, for the prompt enforcement of which adequate provision was made, to obtain reasonable compensation for his property.

Numerous authorities have been cited which, it is supposed, are in conflict with the views we have expressed. But a careful examination will show that the cases cited are distinguishable from those to which we have referred.

In *Baltimore & S. R. Co.* v. *Nesbit*, 51 U. S. 10 How. 395, 398, 399 [13: 469-471], it was said that it was the payment or tender of the value assessed by the inquisition that gave title to a railroad company that had taken private property for its road, and, consequently, without such payment or tender, no title could pass. But it was so declared because, by the very terms of the statute, the company was entitled to the estate and interest of the owner in the land condemned *when* it paid or tendered the value so ascertained.

In *Bloodgood* v. *Mohawk & H. R. Co.* 18 Wend. 9, 17, 18, 31 Am. Dec. 312,—which was a case of private property taken for a railroad company,—Chancellor Walworth said that the payment of the damages awarded, or the deposit of the amount as prescribed, was in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and take permanent possession of the land for the use of the corporation. But that was said with reference to a statute providing that upon the payment of the damages awarded, with the costs of the appraisement, or upon the deposit of the amount in a bank in a named city to the credit of the owner, of which notice should be given, the railroad company should "be deemed to be seised and possessed of the fee simple of all such land or real estate as shall have been appraised." That the chancellor did not hold to the doctrine that payment or tender of payment must in every case precede the devestiture of the owner's title is clear from the preceding parts of his opinion. He said: "It certainly was *not the intention of the framers of the [406] constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, *or an appropriate remedy must be provided, and upon an adequate fund;* whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so. . . . The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid."

So, in *People* v. *Hayden*, 6 Hill, 359, 361, *Chief Justice* Nelson said: "Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the state itself, that, at least, certain and ample provision must be first made by law (except in cases of public emergency), so that the owner can coerce payment, through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay." See also *Brinckerhoff* v. *Wemple*, 1 Wend. 470-472; *Rogers* v. *Bradshaw*, 20 Johns. 735, 741; *Baker* v. *Johnson*, 2 Hill, 342, 347.

In *Stacy* v. *Vermont Cent. R. Co.* 27 Vt. 39, 44, the court said that the railroad company derived no title to the condemned land nor any easement growing out of it, and acquired no right to enter upon it or exercise ownership over the same, until it paid the damages awarded to the owner, or deposited the money as prescribed by the statute. The reason given for this was that the statute expressly provided that that should be done before any right in the land accrued to the company.

The case now before us differs from all, or nearly all, of *those cited by the plaintiffs [407] in this, that in the latter the statute under which the property was taken, either expressly or by

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necessary implication, made the payment or tender of the compensation awarded to the owner of the property appropriated to public use, a condition precedent to the acquisition of title by the party at whose instance the property was taken; whereas, in the present case, the statute vests the title in the city of Boston from, at least, the time it filed in the office of the registry of deeds a description of the lands taken by it, describing them with as much certainty as is required in a common conveyance of lands, and stating that the same were taken pursuant to the provisions of the statute. As soon as they were so taken, the city—invested from that time with the title—had the right forthwith to raise the grade, and could not throw the property back upon the former owner, or compel him to pay the cost of raising the grade; and the owner became, from the moment the property was taken, absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city which could be effectively enforced.

We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate.

It results that as the title to the lands here in question passed to the city of Boston when such lands were actually taken in the mode prescribed in the statute of 1867, the persons who were then the owners, whoever they were, had thereafter no interest in them, but were only entitled to reasonable compensation.

If the proceedings in the probate court of Suffolk county were so defective that the title of the ward was not legally devested by the sale in 1845,—upon which question it has become unnecessary, in the present case, to ex-[408] press any *opinion,—nevertheless, the title passed, under the act of 1867, to the city of Boston, when, following the provisions of that statute, it took these lands. In this view, no action can be maintained by the plaintiffs to recover the land under the title of the owner, as that title existed prior to the acquisition of the property by the city.

The judgment is affirmed.

CHARLES L. BORGMEYER, Administrator of the Estate of ALEXANDER CHATAING, Deceased, *Plff. in Err.*,

v.

WILLIAM IDLER and JOHN W. HAZELTINE, Administrators *de bonis non* of the Estate of JACOB IDLER, Deceased.

(See S. C. Reporter's ed. 408-415.)

Jurisdiction of this court.

Where the jurisdiction of the United States circuit court rests solely, at the commencement of the suit, upon the ground of diverse citizenship, the judgment of the circuit court of appeals is final, although other questions are subsequently raised; and if the case is brought to this court from the circuit court of appeals, the writ of error must be dismissed.

[No. 582.]

Submitted October 15, 1895. Decided October 28, 1895.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court reversing the judgment of the Circuit Court in favor of the plaintiff in an action brought by Charles L. Borgmeyer, administrator of Alexander Chataing, against William Idler and John W. Hazeltine, administrators of Jacob Idler, to recover the amount of two promises in writing made by Jacob Idler to pay to said Chataing a certain commission for services and for money advanced to him. *On motion to dismiss or affirm. Writ of error dismissed.*

See same case below, 65 Fed. Rep. 910.

Statement by *Mr. Chief Justice* **Fuller:**

Borgmeyer, administrator of the estate of Alexander Chataing, deceased, under letters granted September 14, 1892, brought an action September 15, 1892, against William Idler and John W. Hazeltine, administrators *de bonis non* of the estate of Jacob Idler, deceased, in the Circuit Court of the United States for the Eastern District of Pennsylvania, averring that he was a citizen of the state of New Jersey and that the defendants were citizens of the state of Pennsylvania.

Plaintiff's statement of claim or declaration, filed September *22, alleged the recovery [409] by Jacob Idler, after prolonged litigation, of a judgment against the republic of Venezuela in September, 1832, and that, throughout the litigation, Chataing was Idler's attorney and counsel, and that he had advanced Idler the sum of 4,400 pesos. The statement then continued thus: "Thereupon, after obtaining said judgment, the said Jacob Idler executed in favor of said Chataing, in consideration of his then past services and advances, two promises, in writing, expressed in the Spanish language, a copy of each of which, bearing date at Caracas, together with a translation of each, is hereby appended, marked respectively B and A. By the first of these, dated September 25, 1832, the said Jacob Idler promised to pay to the said Chataing ten per cent (10 %) of the amount of said judgment at such time and in such manner as Venezuela should make payment upon the latter; by the second, dated January 9, 1833, he further promised to repay to the said Chataing, out of the first money which should be paid by Venezuela upon said judgment, the said four thousand, four hundred (4,400) pesos. After very great and unlooked for delays upon the part of Venezuela in satisfying the said judgment, it was made the basis

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NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6:571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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of awards against the republic in favor of the said Jacob Idler and the defendants, by certain mixed commissions, authorized thereto by the United States and that republic in the years 1868 and 1890; and under said awards, since September 3, 1890, and up to the present date, Venezuela has paid to, and to the order of, the said Jacob Idler, or the defendants, by instalments as awarded, a portion of the said judgment, deducting from which portion certain legitimate expenses by the latter incurred in obtaining said awards, there has as yet come to the hands of said Jacob Idler or the defendants, in all, ninety-three thousand, nine hundred and eighty-six dollars and sixty-five cents ($93,986.65) for principal and interest;" and plaintiff claimed to recover a commission of ten per cent under the paper of September 25, 1832, and a balance due on the advance of 4,400 pesos.

Defendants filed an affidavit of defense, setting up as to the ten per cent commission, that [410] the judgment was annulled in *1839 by the highest court of Venezuela and no payment had ever been made thereon; that Chataing died August 30, 1836, and Idler employed other agents to endeavor to obtain payment of the claim, and that after Idler's death, May 26, 1856, William Idler continued these efforts and employed other agents and counsel; that an award was made in favor of Idler and his associates in 1868 by a mixed commission created under a treaty of 1866, and that in 1871 there was paid by the department of state of the United States, under this award, $17,696.98, and in 1876 the further sum of $20,225.12; that by a treaty of June 4, 1889, all the awards were reopened and a mixed commission appointed under that treaty which heard and determined, in the city of Washington in 1890, the validity of the claim of Idler and his associates *de novo;* that no claim was made before this commission for or on account of any interest in this award by Chataing or his estate; that the commission reopened the award made under the treaty of 1866 and heard and decided as to the validity of the claim, reduced the award, and made a division between all whom the court decided had interests therein; that from 1833 to 1891 no claim or demand of any nature was made by Chataing in his lifetime, or after his death, against Idler in his lifetime, or his associates; nor was any claim or demand of any nature or kind against the estate of Idler, or against his associates, made by the estate of Chataing or any person for his estate or heirs, for or on account of the claims in this suit until 1891, a period of fifty-eight years; and defendants set up the bar of the statute of limitations, payment, etc.

At the trial the circuit court directed a verdict for plaintiff, reserving all the questions of law, and subsequently entered judgment in favor of plaintiff on the verdict. Defendants took the case on error to the Circuit Court of Appeals for the Third Circuit, which reversed the judgment of the circuit court and entered judgment for the defendants, notwithstanding the verdict, on the points of law reserved at the trial. The court of appeals held as to the claim for commission that the record disclosed the fact that Idler's judgment in Venezuela had been annulled by the courts of that country, and that *nothing had been paid by [411] Venezuela on the footing of that judgment, and the court observed:

"Idler's judgment having thus been swept away, the consideration for his promise to pay to Chataing a commission thereon wholly failed. The event upon which the commission was to be paid never occurred. Very certain is it that nothing was paid by Venezuela to Idler or to the personal representatives on the footing of the judgment. To apply, then, the writing of September 25, 1832, to the state of affairs brought about more than half a century afterwards by the award made by a mixed commission acting upon an international treaty would be a perversion of the paper and would work the greatest injustice to the estate of Idler. The whole situation had radically changed without his fault. His judgment had utterly failed him. The allowance of the claim was ultimately secured by the action of an independent tribunal proceeding upon original grounds. The favorable result was due to the long-continued personal exertions of Idler and his associates and the services at a vast expense of other agents and attorneys. All this the evidence shows. To the result neither Chataing nor his personal representatives contributed aught.

"We do not consider it a matter of any moment that in pressing their claim before the mixed commissions Idler's administrators relied upon the Venezuelan judgment of 1832. That judgment was a part of the complicated transactions between their intestate and the government of Venezuela. It perhaps afforded some evidence of the correct amount of the indebtedness in dispute. Nor is it important how the majority of the commissioners may have regarded that judgment. Neither its correctness nor its existence was recognized by either of the treaties. The mixed commissions were to decide with reference to the merits of all claims submitted to them. The opinion filed on behalf of the majority of the last commission shows that the Idler claim was investigated and sustained by them upon its original merits. They were at liberty, had the facts so warranted, to have found against the claim altogether. That they awarded the face amount of *the judgment with inter- [412] est is of no consequence. The reasons for their award are immaterial here. The important fact is that whatever moneys Venezuela paid on the Idler claim were paid on the awards of the mixed commissions and not otherwise. Construing the paper of September 25, 1832, with reference to its terms, its subject-matter, and the situation of the parties, we conclude that no payment or satisfaction of the judgment therein recited was ever made or realized within the true intent of the parties, and that the stipulated commission to Chataing never became payable. It follows, therefore, that the reserved question of law appertaining to this branch of the case should have been decided in favor of the defendants."

As to the claim for the balance of the 4,400 pesos and interest, the circuit court of appeals held that the proof of its actual payment by Idler in his lifetime was remarkably full, considering its antiquity, and that its nonassertion for over fifty years was inexplicable ex-

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cept upon the hypothesis of full payment in the lifetime of Chataing, but that, independently of the proof of payment, the presumption of payment arose after the lapse of twenty years, and that, even on plaintiff's own view, the moneys received in 1871 on the first award were in excess of 4,400 pesos, and consequently that presumption had operated against the debt before suit was brought. The opinions of the circuit court and of the circuit court of appeals are reported in 65 Fed. Rep. 910. A writ of error to this court having been allowed, the cause came on, on a motion to dismiss or affirm.

Messrs. **Edward H. Weil** and **M. Hampton Todd** for defendants in error, in favor of motion to dismiss.

Messrs. **Samuel F. Phillips, Frederic D. McKenney,** and **Henry R. Edmunds** for plaintiff in error, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138 [37: 1030], we held that when the original jurisdiction of a circuit court of the United States is invoked upon the ground [413] that the *determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character, of which the circuit court could properly take cognizance at the time its jurisdiction is invoked; and that when the jurisdiction of a circuit court is invoked solely on the ground of diverse citizenship, the judgment of the circuit court of appeals is final, although another ground for jurisdiction in the circuit court may be developed in the course of subsequent proceedings in the case. It was there said: "By the Judiciary Act of March 3, 1891, it is provided that the review by appeal, by writ of error, or otherwise, from existing circuit courts, shall be had in this court, or in the circuit court of appeals thereby established, according to the provisions of the Act regulating the same. The writ of error in this case was brought under section six of that statute, which provides that 'judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states,' and also that 'in all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. 26 Stat. at L. 826, 828, § 6, chap. 517. If the judgment of the circuit court of appeals for the eighth circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the circuit court of appeals was not final, it must appear that the jurisdiction of the circuit court was not dependent entirely upon the opposite parties being citizens of different states."

Applying these principles to the case at bar, it is apparent that this writ of error will not lie. The jurisdiction of the circuit court was invoked by the issue of summons of September 15, 1892, followed by the filing of the statement of claim or declaration, September 22, 1892, and therefrom it appeared that the suit was one of which cognizance could properly be taken on the ground of diverse citizenship, and it did *not appear therefrom [414] that jurisdiction was rested or could be asserted on any other ground.

By the fifth section of the Act of March 3, 1891, appeals or writs of error from the district and circuit courts of the United States to this court were allowed, among other cases, "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question," but it was not suggested in the summons and statement of claim that the validity or construction of any treaty made under the authority of the United States was drawn in question, and no such question was decided either by the circuit court or the circuit court of appeals. It is unreasonable to contend that any question was raised directly touching the validity or construction of either of the treaties of Venezuela by plaintiff's statement of claim or by clear and necessary intendment therefrom, and, under the rule laid down in Turck's Case, this writ of error must be dismissed. The jurisdiction of the circuit court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this court from the circuit court, the writ of error could not have been entertained.

We do not think, indeed, that the validity or construction of either of the treaties was actually drawn in question, and the ground of the judgment really involved neither such validity nor construction.

The point was long ago settled in principle upon the record of a suit in a state court.

The twenty-fifth section of the Judiciary Act of 1789 (1 Stat. at L. 85), provided that a writ of error would lie to a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, "where is drawn in question the validity of a treaty or statute of . . . the United States, and the decision is against their validity, . . . or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United *States, and the [415] decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission."

In *Gill* v. *Oliver*, 52 U. S. 11 How. 529, 545 [13: 799, 806], on error to the court of appeals of Maryland, it was held, where an award had been obtained under a treaty with Mexico and both parties claimed under the award, that the introduction of the treaty and the award merely as part of the history of the case did not in any way involve the validity of the treaty or its construction and that the writ of error could not be maintained. See *Williams* v. *Oliver*, 53 U. S. 12 How. 111 [13: 915]; *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 225 [32: 918].

Writ of error dismissed.

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PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* BRYANT, *Plffs. in Err.*,
v.
S. W. HOLLADAY, GEORGIA C. O. HOLLADAY, MARY W. MASTICK, Executrix of S. L. MASTICK, Deceased, and R. G. DAVISSON.

(See S. C. Reporter's ed. 415-417.)

Review of state judgment.

This court will not review a state judgment unless a Federal question has been decided by the state court against the plaintiff in error. The question of estoppel and bar by former judgments is one of general law, and not a Federal question.

[No. 566.]

Submitted Nov. 1, 1895. Decided Nov. 11, 1895.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court. *On motion to dismiss. Dismissed.*

See same case below, 68 Cal. 439, 93 Cal. 241, 102 Cal. 661.

This is a motion by defendants in error to dismiss the writ of error herein, on the ground that the record presents no Federal question and therefore that this court has no jurisdiction.

This action was brought by the people of the state of California, at the relation of a citizen and taxpayer, A. J. Bryant. In the trial court defendants recovered judgment which, on appeal, was affirmed by the supreme court of California. Plaintiffs sued out the present writ of error, which defendants now move to dismiss.

The subject-matter of this action is land in the city of San Francisco, state of California. Defendants are in possession, claiming the same in fee simple absolute, which possession, with claim of title, has continued for above forty years last past.

The complainant alleges that a certain piece of land (describing a tract four blocks in extent, including the part thereof here in dispute) "was heretofore, to wit, on the 11th day of March, A. D. 1858, by the lawful owner and proprietor thereof, lawfully dedicated to public use as a public square, by the name of "Lafayette Park," and such dedication accepted by the public, and then was and still is laid down upon the official map of said city and county as a public square as aforesaid;" that the defendants have erected fences within said public square which enclose and are the means of excluding plaintiffs from a certain piece or parcel of said public square (describing the land in dispute); and that defendants have erected and maintained a dwelling house and other permanent improvements within and upon the premises which interfere with and hinder the use by the public of said public square, and which are accordingly public nuisances, and the prayer is that they be abated, etc.

Defendants answered. They denied that the land ever was dedicated; admitted their occupation of the land in dispute, and their intention to keep out the public; and as special defenses they pleaded three judgments in bar and estoppel. One of the judgments so pleaded runs against the people of the state of California, and two of them run against the city and county of San Francisco.

The actions in which those judgments were made in each instance involved the same land and the same question of dedication as here in dispute; and the prevailing parties were these defendants or their predecessor in interest.

The trial court decided herein that each of the two judgments against the city and county of San Francisco, is, as a plea, a bar, and as evidence conclusive against the claim of dedication made by the plaintiffs in the present action; and that the court is thereby precluded from again inquiring into the question or claim of dedication made by the plaintiffs in this action. That decision was affirmed by the supreme court of the state, and from its judgment the case is brought to this court by a writ of error.

The plaintiffs in error allege that the following Federal question is involved:

"The supreme court of the state of California first decided that the land in controversy was in fact dedicated to the public, as alleged in the complaint, by the Van Ness ordinance, the act of the legislature of California, and the act of Congress of July 1, 1864, entitled "An Act to Expedite the Settlement of Titles to Land in California." It then decided that the dedication was annulled by the judgments given in the suits of *S. W. Holladay* v. *The City and County of San Francisco*, and of *The City and County of San Francisco* v. *S. W. Holladay and others*. To these two records the people of the state of California were strangers. The state never consented that the city and county might submit the rights of the public to judgment in either of these actions. Hence the claim that those judgments, so far as the people are concerned, were given without due process of law.

Messrs. **S. W. Holladay** in person, and **E. Burke Holladay** for defendants in error, in favor of motion.

Messrs. **W. F. Fitzgerald**, Attorney General of California, **Wm. Matthews**, and **Wm. Craig** for plaintiff in error, in opposition.

THE CHIEF JUSTICE: The opinions of the supreme court of California in this case are reported 68 Cal. 439, 93 Cal. 241, 102 Cal. 661. The motion to dismiss is sustained on the authority of *San Francisco* v. *Itsell*, 133 U. S. 65

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4:97; Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of the United States Supreme Court to declare state law void as in conflict with state Constitution: to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37. 267.

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[33: 570]; *Beatty* v. *Benton*, 135 U. S. 244 [34: 124]; *Bustis* v. *Bolles*, 150 U. S. 361 [37: 1111], and cases cited. And see *Hoadley* v. *San Francisco*, 94 U. S. 4 [24: 34], 124 U. S. 639 [31: 558].

Writ of error dismissed.

HYMAN SONN and HERMANN SONN, Partners as SONN BROTHERS, *Plffs. in Err.*,

v.

DANIEL MAGONE, Collector of the Port of New York.

(See S. C. Reporter's ed. 417-423.)

Construction of Tariff Act—interpretation of words—meaning of the words "seeds" and "vegetables"—dried lentils and beans.

1. In construing a Tariff Act, in order that the commercial use of a word or phrase may prevail over its ordinary signification, the commercial designation must be the result of established usage in commerce and trade, which at the passage of the act was definite, uniform, and general, and not partial, local, or personal.
2. The interpretation of words of common speech is within the judicial knowledge and matter of law.
3. The words "seeds" and "vegetables" are words of common speech, and if they have not acquired a special meaning by usage or in science, it is for the court, in construing a Tariff Act, to decide whether certain articles are properly classified as vegetables or seeds.
4. Dried lentils and beans are vegetables, and not seeds, within the meaning of the Tariff Act of 1883.

[No. 16.]

Argued Oct. 15, 1895. Decided Nov. 11, 1895.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for the defendant in a suit brought by Hyman Sonn *et al.* against Daniel Magone, Collector of the Port of New York, to recover duties illegally exacted upon imported goods. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was an action to recover duties exacted by the collector of customs of the port of New York, and paid by the importers under protest in order to get their goods. The importations were made in the years 1887 and 1888, and the articles were invoiced in four of the six invoices as "white hand-picked Danubian beans," in one as "haricots," and in another as "Bohemia lentils."

By section 2502 of the Customs Duties Act, passed March 3, 1883, chap. 121 (22 Stat. at L. 488), as a substitute for Title XXXIII. of the Revised Statutes, duties were levied on the following articles: Under Schedule A, entitled "Chemical products," paragraph 94: "All barks, beans, berries, balsams, buds, bulbs, and bulbous roots and excrescences, such as nut-galls, fruits, flowers, dried fibers, grains, gums, and gum-resins, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds (aromatic, not garden, seeds), and seeds of morbid growth, weeds, woods used expressly for dyeing, and dried insects, any of the foregoing of which are not edible, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, and not specifically enumerated or provided for in this Act, ten per centum ad valorem." Par. 16. "Castor beans, or seeds, fifty cents per bushel of fifty pounds."

Under Schedule G, entitled "Provisions," paragraph 259: "Wheat, twenty cents per bushel." Par. 260. "Rye and barley, ten cents per bushel." Par. 263. "Indian corn or maize, ten cents per bushel." Par. 264. "Oats, ten cents *per bushel." Par. 285. "Pota-[419 toes, fifteen cents per bushel of sixty pounds." Par. 286. "Vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this Act, ten per centum ad valorem." Par. 287. "Vegetables, prepared or preserved, of all kinds, not otherwise provided for, thirty per centum ad valorem."

Under Schedule N, entitled "Sundries," Par. 452: "Hemp seed and rape seed, and other oil seeds of like character, other than linseed or flaxseed, one quarter of one cent per pound." Par. 465. "Garden seeds, except seeds of the sugar beet, twenty per centum ad valorem." Par. 466. "Linseed or flaxseed, twenty cents per bushel of fifty-six pounds; but no drawback shall be allowed on oil cake made from imported seeds."

By section 2508 the following articles were exempted from duty:

Par. 686. "Drugs, barks, beans, berries, balsams, buds, bulbs, and bulbous roots and excrescences, such as nut-galls, fruits, flowers, dried fibers; grains, gums, and gum-resin; herbs, leaves, lichens, mosses, nuts, roots, and stems; spices, vegetables, seeds aromatic, and seeds of morbid growth; weeds, woods used expressly for dyeing, and dried insects, any of the foregoing of which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this Act.

Par. 760. "Plants, trees, shrubs, and vines of all kinds not otherwise provided for, and seeds of all kinds except medicinal seeds not specially enumerated or provided for in this Act." Par. 761. "Plants, trees, shrubs, roots, seed cane, and seeds imported by the Department of Agriculture or the United States Botanical Garden." Par. 778. "Seeds of the sugar beet." Par. 808. "Tonquin, Tonqua or Tonka beans."

The importations were classified by the collector as vegetables, under paragraph 286, and subjected to duty accordingly, while the importers claimed that they should have been classified as seeds, under paragraph 760, and admitted free. The circuit court directed a verdict for the defendant, and *judgment hav-[420 ing been rendered thereon, this writ of error was brought.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 12: 397.

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Messrs. **Henry Edwin Tremain** and *Mason W. Tyler* for plaintiffs in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

These articles were not string beans or beans in the pod, but mature beans in a dry state, consisting of two varieties, lentils and white medium beans. It appeared that the main use of both lentils and beans was for food, though sometimes they were sold for seed, and that they were never bought and sold under the name of vegetables or under the name of seeds, but simply as beans or lentils, as the case might be. Some evidence was adduced to the effect that although the seed, root, or top of the plant might properly be called a vegetable, if green, yet that if the article were mature and dried, it thereupon ceased to be a vegetable and became a seed. But, as the circuit judge well said, the testimony did not deal in the commercial designation of the article or what it was called in trade and commerce, but only tended to show how the witnesses thought it should be classified. It is true that one of the plaintiffs stated that if a customer inquired for a certain kind of field bean, he would ask him whether he wanted the "field pea bean," or "the seed of the field pea bean," or "the seed of the white medium bean," or what kind of beans he wanted; and that they imported the seeds of the lentil and the seeds of the bean, though they did not import the seed of the wheat plant, of the rye plant, or of the oat plant. It would be absurd to regard this as tending to establish a commercial designation.

In construing a tariff act, when it is claimed that the commercial use of a word or phrase in it differs from the ordinary signification of such word or phrase, in order that the former prevail **421**] *over the latter it must appear that the commercial designation is the result of established usage in commerce and trade, and that at the time of the passage of the Act that usage was definite, uniform, and general, and not partial, local, or personal. *Maddock* v. *Magone*, 152 U. S. 368 [38:482].

The articles were known in trade and commerce as lentils and beans. They did not come within the paragraphs of the tariff, specially enumerating certain beans and seeds, or referring to inedible beans, seeds, and vegetables; but the words "seeds" and "vegetables" are employed in other paragraphs, and it is conceded that these articles fell under the one or the other. The word "seeds," as found in paragraph 760 in the free list, is joined with "plants, trees, shrubs, and vines," the obvious intention being to encourage agriculture, horticulture, and arboriculture by facilitating seeding and transplanting, and the words being applicable to seeds used for seeding purposes —in common understanding, for propagation. The word "vegetables" is found in paragraph 286, under the heading "provisions," and in common parlance applies to articles of food. The predominant use of lentils and beans is for food, and as so used they are commonly called vegetables although they may be regarded botanically as seeds, and may sometimes be used for seeding purposes. Under such circumstances, ordinary use, not occasional or subsequent use, furnishes the guide for classification. *Maillard* v. *Lawrence*, 57 U. S. 16 How. 251 [14:925]; *Worthington* v. *Robbins*, 139 U. S. 337 [35:181]; *Magone* v. *Heller*, 150 U. S. 70 [37:1001]. The words "seeds" and "vegetables" are words of common speech, and there is no room here for the contention that they had acquired a special signification by usage or had a scientific—different from the popular—meaning. Whether the articles were properly classified as vegetables was a matter for the court to decide. The interpretation of words of common speech is within the judicial knowledge, and matter of law. *Martel* v. *Merritt*, 116 U. S. 11 [29:550]; *Nix* v. *Hedden*, 149 U. S. 304 [37:745]; *Cadwalader* v. *Zeh*, 151 U. S. 171 [38:115]; *Saltonstall* v. *Wiebusch*, 156 U. S. 601 [39:549].

As stated by counsel for the government, a verdict should *not be directed where, be-[**422** fore the meaning of the statute can be known, it is necessary to learn from conflicting evidence the controlling use of the article in question; or its similitude to some other article; or the values of its component materials; or its weight and fitness; or whether labor is necessary to fit it for use by the consumer; or its commercial designation; but we have no such case before us.

We entirely concur with the circuit court in the course pursued, which was in harmony with the ruling in *Robertson* v. *Salomon*, 130 U. S. 412 [32:995]. There practically the same question was raised, that is, whether beans were free of duty as seeds or dutiable at ten per cent as vegetables, and *Mr. Justice* Bradley, in delivering the opinion of the court, after stating that beans were seeds in the language of botany and natural history, but not in commerce or in common parlance, said: "On the other hand, in speaking generally of provisions, beans may well be included under the term 'vegetables.' As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced. But on the trial, the parties deemed it important to introduce a great deal of testimony. The court, however, did not allow the defendant to prove the common designation of beans as an article of food. . . . The common designation as used in everyday life, when beans are used as food (which is the great purpose of their production), would have been very proper to be shown in the absence of further light from commercial usage. We think that the evidence on this point ought to have been admitted. In addition to this, the court told the jury that 'the commercial designation of the article, or what the article is called in trade and commerce, or the name bean, has nothing to do with the question.' We think the court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. But if the *commercial designation fails to [**423** give an article its proper place in the classifica-

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tions of the law, then resort must necessarily be had to the common designation. We think, therefore, that the court erred both in its charge and in the exclusion of the evidence offered; especially as, without any evidence, and with the common knowledge which we all possess, the court might almost have been justified in directing a verdict for the defendant." In this case the court was not only almost but altogether justified in such direction, and while there are expressions in that opinion which have been laid hold of as qualifying the general rule as to judicial knowledge, they must be treated as induced by the state of the record, and are not to be regarded as having that effect.

Many exceptions were taken to the exclusion and admission of evidence, and to the refusal of the court to give instructions asked on plaintiff's behalf, but we find no reversible error in either of the rulings thus questioned and they need not be discussed.

Judgment affirmed.

THORN WIRE HEDGE COMPANY, *Appt.*, *v.* WASHBURN & MOEN MANUFACTURING COMPANY.

WASHBURN & MOEN MANUFACTURING COMPANY, *Appt.*, *v.* THORN WIRE HEDGE COMPANY.

(See S. C. Reporter's ed. 423-425.)

General release—equitable doctrine—burden of proof—laches—contract of collection—contract to pay royalty—voluntary payment.

1. A release from all claims and demands of every kind and nature which the releasor has or can have against another for moneys received for infringement of a patent or for licenses or thereafter received for damages for infringements prior to the release, or for licenses, releases all claim for back damages received subsequent to its date, or for royalties due under licenses previously granted.
2. The equitable doctrine devised to protect those disabled by age or inexperience, who give a release upon inadequate consideration during the existence of a fiduciary relation, will not be extended to cover the case of a business corporation managed by a president and directors.
3. The burden of proof to set aside a settlement deliberately executed is upon the plaintiff who attacks it, and that burden is increased by the fact that eight years elapsed before the plaintiff attempted to set it aside by suit.
4. Courts of equity will not assist one who has slept upon his rights and shows no excuse for his laches; and where he refrains from asserting them for prudential reasons he is entitled to less favorable consideration than if his conduct has been that of mere inaction.
5. A contract to use due diligence and lawful means to collect certain royalties does not import that the contractor shall guarantee the payment of the royalties, but only use reasonable diligence in their collection.
6. A contract by one to pay royalty on all barbed fence wire made and sold by him under certain letters patent does not prevent him from buying from another a subsequent patent and making and selling barbed fence wire under it and an acquiescence for five years in his doing so, by the other party to the contract, discredits any claim by the latter against the former for royalties for wire sold under the later patent.
7. Moneys voluntarily paid to one to whom they are due and who has the right to receive them, with full knowledge of the facts by the payor, cannot be recovered back by the latter.

[Nos. 57, 58.]

Argued April 29, 30, 1895. Decided Nov. 11, 1895.

APPEALS from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing a suit in equity brought by the Thorn Wire Hedge Company against the Washburn & Moen Manufacturing Company, for a discovery and for an accounting, and dismissing also the cross suit brought by said defendant. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

In the year 1875 the Washburn & Moen Manufacturing Company, a Massachusetts corporation doing business at Worcester, Massachusetts, was engaged extensively in *the[425 manufacture of wire. Having had its attention directed to barbed fence wire, an article then little known or used, the company determined to begin the making of it, conceiving that the future demand for such wire might serve to increase the output of its mill. There being no machine then in use for making barbed wire by steam power, the company contracted with H. W. Putnam, of Bennington, Vermont, for the invention of one; and in the fall of 1875 such a machine was made in accordance with Putnam's plans, and a patent for it granted to him on February 15, 1876. The rights of Putnam in the invention were purchased by the company on September 28, 1875, the consideration being the sum of 25 cents per 100 pounds on all barbed fence wire that might thereafter be made by the company and its licensees, the company reserving the right, however, to cease the payment of such sums by paying, at any time, a sum of money which, added to the amounts previously paid, should equal $150,000.

The persons engaged in the barbed wire business in the spring of 1876 were J. F. Glidden and I. L. Ellwood, of De Kalb; Jacob Haish, of De Kalb; H. B. Scutt, of Joilet; and Charles Kennedy, of Aurora,—all of the state of Illinois; Doolittle & Co. (licensees of Kennedy), of Bridgeport, Connecticut; and the Thorn Wire Hedge Company, a corporation organized under the laws of Illinois, and having its place of business at Chicago.

Various patents had been granted for barbed fence wire and machines for making the same, and of these J. F. Glidden, I. L. Ellwood, and Charles Kennedy owned the W. D. Hunt reissued patent No. 6976, dated March 7, 1876, and the L. B. Smith reissued patent No. 7137, dated May 23, 1876; J. F. Glidden and I. L. Ellwood owned the J. F. Glidden patent, No. 157,124, dated November 24, 1874, and the J. F. Glidden reissued patents, No. 6913 (division A), dated February 8, 1876, and No. 6,914 (division B), dated February 8, 1876, being

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divisions of a reissue of an original patent, No. 150,683, dated May 12, 1874; Charles Kennedy owned the Charles Kennedy patents, No. 153,965, dated August 11, 1874, and No. 164,-181, dated June 8, 1875; Jacob Haish owned, 426] besides other patents, *the Jacob Haish patent, No. 167,240, dated August 31, 1875; and the Thorn Wire Hedge Company owned the Michael Kelly reissued patent, No. 6902, dated February 8, 1876, and the Michael Kelly reissued patents, No. 7035 (division A), dated April 4, 1876, and No. 7036 (division B), dated April 4, 1876, being divisions of a reissue of an original patent, No. 84,062, for an improvement in "metallic fences," dated November 17, 1868. Of the machine patents, the Washburn & Moen Manufacturing Company owned the Putnam patent; J. F. Glidden and I. L. Ellwood owned the J. F. Glidden and P. W. Vaughan patent, No. 157,508, dated December 8, 1874; and the Thorn Wire Hedge Company owned the E. W. Mitchell patents, No. 172,760, dated January 25, 1876, and No. 173,491, dated February 15, 1876.

On May 10, 1876, the Washburn & Moen Manufacturing Company purchased the interest of J. F. Glidden in the said Hunt, Smith, and Glidden wire patents, and in the Glidden and Vaughan machine patent, paying him therefor the sum of $60,000, and agreeing to pay him, in addition, 25 cents per 100 pounds on all wire manufactured and sold under those patents after the date of the purchase; and on the 23d of the same month the company bought of Kennedy his own patents, and his interest in the Hunt and Smith patents, the consideration being the payment to him of 25 cents per 100 pounds on all wire that should thereafter be manufactured and sold under the patents in which the company, by this purchase, acquired his interest, until the aggregate of the amounts paid should equal $100,000.

At the same time that the Washburn & Moen Manufacturing Company purchased the interest of Glidden in the patents, it purchased also his interest in the manufacturing business of Glidden & Ellwood, and a new partnership was formed for the purpose of making barbed fence wire at De Kalb, Illinois, under the style of I. L. Ellwood & Co.; C. F. Washburn, as trustee of the company, becoming a partner with Ellwood.

On July 3, 1876, the company purchased of the Thorn Wire Hedge Company the said Kelly patents, agreeing to pay for them, as appears by a contract in writing executed by the companies 427]*on that date, the sum of 37½ cents per 100 pounds upon all barbed fence wire which the Washburn & Moen Manufacturing Company should manufacture and sell and cause to be manufactured and sold, under the said (Kelly) patents, or any one of them, and also upon all barbed fence wire which might be manufactured and sold by others under any license which might be granted by it under the said patents, or any one of them, for which pay should have been received by such licensees, for and during the term of the said patents. It was agreed, as further appears by the written contract, that the Washburn & Moen Manufacturing Company should keep separate and accurate accounts of the entire product manufactured and sold under the said patents, and of the part of the product for which they should actually receive pay in any form: that the Washburn & Moen Manufacturing Company should enter upon the manufacture of barbed fence wire under the said patents, and should use reasonable and diligent efforts "to supply the demand for this article" throughout the country, and should also use proper and reasonable diligence in prosecuting infringers of the said patents, or any of them, to the end that the said patents might be fully enforced and sustained; that the consideration received by the Thorn Wire Hedge Company for the said patents was to be the payment to them of the percentage upon sale as above specified, and that if, at any time, the Washburn & Moen Manufacturing Company should, for any reason whatever, discontinue permanently the manufacture of barbed fence wire under the said patents, then the said patents should be retransferred to the Thorn Wire Hedge Company within ninety days from the receipt of a written demand from it for such retransfer; that the Thorn Wire Hedge Company should assign all its interest in all claims for damages and profits for past infringements of the said several patents and each of them; and that the Washburn & Moen Manufacturing Company might prosecute in the name of the Thorn Wire Hedge Company all suits that they might wish to institute against past infringers of the said several patents, or any of them. The agreement also contained, among other provisions, the following: "Said Washburn & Moen *Manufacturing Company, party [428 of the second part, agrees that three eighths of one cent per pound shall be paid on all the barbed fence wire which was made by Glidden and Ellwood and I. L. Ellwood & Company, from the dates of the several reissue patents aforesaid up to the date hereof; and also the same amount per pound upon all wire upon which they shall recover from past infringers of said reissue patents, or either of them, under any suit or suits which they may hereafter institute and prosecute to final judgment, or which may be settled without judgment by payment of royalty by the defendants."

At the same time, July 3, 1876, the Thorn Wire Hedge Company assigned the said Mitchell patents to the Washburn & Moen Manufacturing Company, and the latter granted to the former a license to use the Mitchell machines, under the Mitchell patent, at a single shop or factory in Chicago, or elsewhere, and a license to manufacture and sell the forms of wire described in the Kelly patents at a single shop or factory in that city, or elsewhere, after giving thirty days' notice of intention to remove.

The Washburn & Moen Manufacturing Company and I. L. Ellwood & Company began the manufacture and sale of barbed fence wire in the spring of 1876. The rights which the company asserted under the patents acquired by it were not at once generally acquiesced in, and the making and selling of barbed fence wire was for a time carried on by a few persons without the company's authority. Licenses were granted on December 7 and 18, 1878, to the Ohio Steel Barb Fence Company, of Cleveland, Ohio, and to H. B. Scutt, doing business as H. B. Scutt & Co. (successor to the Joliet Wire Fence Company), of Joliet, Illi-

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nois. In granting these licenses the company released all claims it might have against the licensees on account of damages for past infringement of its patents. The company granted no other licenses until January, 1881.

Some matters of dispute having arisen between the Thorn Wire Hedge Company and the Washburn & Moen Manufacturing Company as to the time in which payments were to be made on wire previously made by the firm of 429]Glidden & *Ellwood, and the suggestion having been made by the latter company that the former, in using the Mitchell machines, was infringing the Putnam patent, and it being thought for some reason that the 87½ cents per 100 pounds provided for in the agreement of July 3, 1876, should be reduced, the companies, on December 2, 1878, executed another agreement, as an amendment and supplement to that of July 3, 1876. This contract made provisions adjusting the matters of difference between the companies, and reduced the amount required to be paid to the Thorn Wire Hedge Company to 25 cents per 100 pounds. A portion of the contract was as follows: "The party of the first part [the Washburn & Moen Manufacturing Company] hereby covenants and agrees that it will make monthly reports of the amount of wire reported as sold by each of its licensees, said report to be on or before the 15th of each and every month, and to embrace the report of the sales of the licensees made during the previous month, or any month not previously reported, and that it will pay over to the party of the second part, or its legal representatives, the money that it collects of said licensees, that is to be paid to the party of the second part hereto quarterly; that is to say, on or before the last day of each January, April, July, and October, it will pay the party of the second part such proportion of the money that it has received from its licensees during the previous quarter as royalties, as one fourth of a cent per pound is to the entire amount per pound which said licensees agree to pay as royalty; and the said party of the second part hereby agrees to waive and does hereby relinquish any and all claim on the said first party, for royalties on barbed wire, made by its licensees, which it may so fail to collect, after using due diligence and lawful means to collect the same, but in that case the party of the first part shall make a report to the party of the second part of all such royalties as it shall fail to collect, and from whom due, and the cause of such failure to collect; and the first party agrees to make each of its licensees agree to pay it for the second party one quarter of a cent a pound on all the barbed wire it makes and sells during the term of the Kelly patents, 430] and to use its best endeavors to *collect the same." The agreement also provided: "And the party of the second part also releases all right and claim it may have on the party of the first part and the parties hereinafter named on account of the infringement of any of the Kelly patents, so called, which it formerly owned, by the Ohio Steel Barb Fence Company, Jacob Haish, the Joliet Wire Fence Company and H. B. Scutt, and James Ayres and Alexander C. Decker and their customers on account of selling their respective barbed wires; provided, however, the party of the first part makes a settlement with them or either of them whereby it condones or waives the past royalties or damages in the settlement of the suits which it, or it and I. L. Ellwood, now have pending against them or either of them, then and in that case the party of the second part releases as aforesaid as to the party so settled with."

About the time such reduction was made in the amount required to be paid to the Thorn Wire Hedge Company, reduction was also made by another of the assignors, thus reducing the aggregate of the amounts to be paid by the Washburn & Moen Manufacturing Company to the assignors of the patents, to 87½ cents per 100 pounds.

As already shown, the Washburn & Moen Manufacturing Company, a short time after the execution of the agreement, granted licenses to the Ohio Steel Barb Fence Company and H. B. Scutt & Co. Other persons engaged in making barbed wire refused, however, to become licensees and pay royalty, and in January, 1879, they formed an association for the purpose of resisting the efforts which, by litigation and other means, were being made by the company to stop infringement by them of the patents, and to induce them to take licenses. The Ohio Steel Barb Fence Company reported sales of wire under its license for the months of March, April, and May, 1879, but refused to pay royalties after April 30, 1879. H. B. Scutt & Co. continued to manufacture under their license, and paid royalty at the rate 187½ cents per 100 pounds.

On August 7, 1879, the Washburn & Moen Manufacturing Company and the Thorn Wire Hedge Company executed a third agreement, supplemental to the contracts of July 3, 1876, *and December 2, 1878, a part of which[431 was as follows: "That for the purpose of increasing the manufacture and sale of the barbed fence wire mentioned in said agreements and license, and inducing other parties to pay royalties thereon, it is mutually agreed by the parties hereto that the party of the second part [the Thorn Wire Hedge Company] will reduce the amount to be paid to it per pound by the party of the first part on all barbed fence wire hereafter manufactured or caused to be manufactured and sold by it, as provided by the said contracts of July 3, 1876, and December 2, 1878, to 15 cents per 100 pounds, and it is understood and agreed that all the provisions and agreements hereinbefore referred to, relating to the price per pound in said agreements agreed to be paid by the party of the first part to the party of the second part, shall apply to the price per pound to be paid as reduced by this supplemental agreement; and the said party of the first part agrees to reduce the royalty or amount required to be paid to it on account of its ownership of any patents used in the manufacture of said wire by it or its licensees, or persons manufacturing or selling barbed fence wire under its authority, or who shall hereafter be so licensed by it, to at least seventy-five cents per hundred pounds of said barbed fence wire so manufactured and sold."

Reductions were also made by other assignors, so that after August 7, 1879, the aggregate

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of the amounts required to be paid by the Washburn & Moen Manufacturing Company on account of the various patents was 68¼ cents per 100 pounds.

On August 10, 1879, the company reduced the royalty payable to it by H. B. Scutt & Co. to 81¼ cents on general sales and 56¼ cents on Texas sales; and on August 1, 1880, a further reduction was made to 50 cents on all sales of that firm.

The company and I. L. Ellwood continued the prosecution of suits against alleged infringers of the patents and in 1880 about fourteen of these suits were pending in the Circuit Court of the United States for the Northern District of Illinois, and were being contested by the association of unlicensed manufacturers. A final decision was reached in the cases 432] on *December 15, 1880, by which the Kelly reissued patent No. 6902 and the Hunt and Glidden patents were held valid, and subsequently decrees were entered referring the causes to a master to ascertain and report the amounts of damages. The Kelly reissued patent No. 7035, in so far as it may have been relied upon to affect the cases, was held invalid. It did not appear to the court that any of the defendants had infringed the Smith patent, and therefore the question of its validity was not passed upon. *Washburn & M. Mfg. Co.* v. *Haish*, 4 Fed. Rep. 900, 7 Fed. Rep. 906. After this decision was announced, a large number of manufacturers recognized the rights asserted by the company under the patents, and applied to it for license. C. F. Washburn, vice president of the company, and I. L. Ellwood met the applicants in the city of Chicago, and in January and February, 1881, granted more than forty licenses. Each of the persons licensed paid to the company either damages for past infringement, estimated at 60 cents per one hundred pounds on all wire that the licensee had theretofore made, or a bonus of from five to ten dollars for each ton of wire authorized to be made in any one year thereafter, and in most instances both damages and bonus were exacted. The company also required all the licensees, except two, to assign to it whatever patents they owned.

The licenses were printed and were all of the same form, with the exception of the date, name of licensee, and amount of tonnage authorized; and each license provided for the payment of royalty at the rate of three fourths of a cent per pound. The printed form contained this provision: "And the royalty to be paid under this license shall not be greater than that charged to any other party licensed after the —— day of December, A. D. 1880, under the said several letters patent, or any of them, hereinbefore mentioned by date and number, by said Washburn & Moen Manufacturing Company; that is, if said Washburn & Moen Manufacturing Company shall hereafter conclude to and does license any other party or parties during the continuance of this license to manufacture and sell barbed fence wire in the United States and territories, and this license is confined to the United States and 433] territories, under *said letters patent, or any of them hereinbefore mentioned by date and number, at a less sum per pound than —— of a cent, then and thereafter the royalty to be paid by said —— to said Washburn & Moen Manufacturing Company under this license shall be the same as such reduced royalty."

When the licenses were granted in January and February, 1881, the Thorn Wire Hedge Company requested Mr. C. F. Washburn to furnish it a statement of the amount of the said back damages and bonuses. The statement not being furnished, the Thorn Wire Hedge Company wrote to the Washburn & Moen Manufacturing Company on March 21, 1881, saying: "We have not yet received report of sales for month of February, nor official notice of settlements with the various infringing companies, all of which should be due by the 15th of this month." On the 28th of the same month the Washburn & Moen Manufacturing Company answered: "With reference to official notice of settlements with the various infringing companies, etc., we shall defer making our report on that subject until we have an opportunity of seeing Mr. Ellwood here in Worcester, which will happen early in the month of April." On April 25, 1881, the Washburn & Moen Manufacturing Company wrote again to the effect that it was under no obligation to pay the Thorn Wire Hedge Company any part of the damages recovered or received in settlement for past infringement of the patents, or any part of the bonus money. The Thorn Wire Hedge Company answered this letter on May 16, 1881, and submitted an opinion of its counsel, asserting its right to a share in the back damages.

More correspondence followed, but no adjustment of these differences between the companies was made until one was effected by an agreement in writing, dated July 27, 1881. About that time there was also made what is called in the testimony and argument the "Haish settlement," which it is necessary here to explain.

Jacob Haish was one of the persons against whom the above-mentioned decision was rendered at the suit of the Washburn & Moen Manufacturing Company on *December 15, [434 1880. An interlocutory decree had previously been entered requiring Haish to pay into court an amount equal to 75 cents per 100 pounds on all wire made by him after such decree, and up to the entry of the final decree against him he had paid into court the sum of $25,000. After the decision of December 15, 1880, Haish, instead of following the course which was adopted by all the other defendants and making settlement with the company, refused to become its licensee, and continued its opposition to its patents. This placed the company, as it believed, in a very unfavorable position. Haish was the owner of patents which the company feared might be used by him to disturb its licensees, and for various reasons his persistent opposition was regarded by the company as harmful to its interests. Vigorous efforts were therefore made to effect a settlement with him, and these resulted in a statement by him on June 29, 1881, of the terms upon which a settlement would be consented to. The terms proposed by him were, (1) a release from all claims for back damages; (2) each party to pay his own costs in court; (3) a license to him from

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the company to manufacture 10,000 tons of barbed wire a year, he to pay royalty at the rate of 75 cents per 100 pounds; (4) he to assign to the company all his patents and to receive from it an exclusive license under the same; (5) the company to pay him for the patents $10,000 cash and 75 cents per 100 pounds on all barbed wire made by himself up to the quantity of 4,000 tons per year, and the further amount of 25 cents per 100 pounds on the next 4,000 tons made by him in the same year.

Under date of July 26, 1881, the Washburn & Moen Manufacturing Company and Haish executed an agreement in writing which recited that the company had theretofore granted divers licenses under several patents for barbed wire fencing and for machinery; that Haish claimed that some of the licensees were infringing patents owned by him; that for the better protection of the licensees it had become necessary for the company to acquire, by purchase from Haish, all his patents relating to barbed fencing or machinery; that Haish, by an instrument of even date, had assigned all his pat- [435] ents to *the company, and transferred to it all claims for damages for the infringement of the same, and had released the company and its licensees from all claims for damages for infringement of the patents; and that Haish had accepted from the company a license to manufacture 10,000 tons of barbed fence wire annually under the patents, and agreed to pay royalty at the rate of 75 cents per 100 pounds. The agreement then provided, in substance, that the company or its licensees should manufacture 8,000 tons of barbed fence wire every year until February 27, 1894, and should pay to Haish until that time 75 cents per 100 pounds on the wire so manufactured, not exceeding 4,000 tons each year, and a further sum of 25 cents per 100 pounds on any excess over that quantity each year, up to but not exceeding 4,000, tons; that the company should not, however, pay any part of such sum to Haish unless he should first have paid or tendered to the company, as royalty under the license accepted by him, a sum equal to the amount which he should demand from the company.

On the some day Haish assigned his patents to the company and Ellwood, and released the company and its licensees and Ellwood from all damages for past infringement of the same, and received from the company the license mentioned in the recitals of the above agreement and exclusive licenses to make barbed fence wire and to use machinery under the patents assigned by him to the company without paying royalty. He also received from the company and Ellwood a release of all claims for damages for infringement of their patents, and the company paid him the sum of $10,000 in cash, and agreed that he might withdraw the money which he had paid into court, and that decrees might be entered in the suits against him for nominal damages without costs.

Under date of July 27, 1881, the Thorn Wire Hedge Company executed the following instrument: "In consideration of the sum of one dollar and other valuable considerations to it paid, the Thorn Wire Hedge Company, a corporation duly organized under the laws of the state of Illinois, and located at the city of Chicago, in said state, does authorize the Washburn & Moen Manufacturing Company and Isaac L. Ellwood *to make settlement [436] with Jacob Haish, of De Kalb, Illinois, for his past infringements of the letters patent for barbed fence wire and machinery for making the same, owned by the Washburn & Moen Manufacturing Company, or by said company and Isaac L. Ellwood, and to grant to the said Haish a license to manufacture and sell annually ten thousand tons of barbed fence wire under said patents, as provided in a proposed agreement between the Washburn & Moen Manufacturing Company and the said Jacob Haish, and assented to by Isaac L. Ellwood (copies of which proposed agreement and license being hereto attached), and does release the said Washburn & Moen Manufacturing Company from all its agreements with the said Thorn Wire Hedge Company, dated respectively July 3, 1876, December 2, 1878, and August 7, 1879, to account for any proportion of the moneys received from the said Jacob Haish whether in settlement of past infringements or for royalties hereafter paid under the said license, which may be required to be expended or remitted in the settlement with said Jacob Haish, or in payment of the consideration money for the transfer and conveyance of all the patent rights to letters patent and inventions, which are or shall be conveyed by the said Haish to the said Washburn & Moen Manufacturing Company and Isaac L. Ellwood, as provided in said proposed agreement."

On the same day that the settlement with Haish was consummated, the companies, as already stated, reached an agreement with regard to the back damages and bonuses. This agreement was expressed in an instrument of writing, bearing date July 27, 1881, a portion of which was as follows:

"Whereas there are certain agreements in writing subsisting between the parties above named, bearing date, respectively, July 3, 1876, December 2, 1878, and August 7, 1879, to which reference may be had for all matters therein contained; and whereas the Thorn Wire Hedge Company claims that under the effects of said agreements it is entitled to a share of the damages or moneys or other valuable things which the Washburn & Moen Manufacturing Company have received from the different persons, firms, or corporations who have infringed *upon the patents owned [437] by the said Washburn & Moen Manufacturing Company and I. L. Ellwood, who have accepted licenses from them to manufacture barbed fence wire under the several patents owned and controlled by them; and also claims that it is entitled to share in certain bonuses or premiums which have been paid by various licensees for the privilege of obtaining a license; and for other causes makes other claims for damages or compensation on various grounds against said Washburn & Moen Manufacturing Company:

"Now, therefore, in consideration of the premises and of the sum of ten thousand dollars to it paid, the said The Thorn Wire Hedge Company does by these presents hereby release and discharge the said Washburn & Moen Manufacturing Company from all claims or demands of every kind and nature whatsoever,

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which it has or can have against said company for and on account of any moneys, properties, or valuable things which the said Washburn & Moen Manufacturing Company has received from any persons in settlement for damages or profits accruing to it, or to it and I. L. Ellwood, on account of infringements committed upon any letters patent for barbed fence wire or machinery for making the same, and also for and on account of any moneys which it has received by way of bonuses or premiums paid to it by parties receiving licenses from it and from I. L. Ellwood to manufacture barbed fence wire; and does also discharge and release the said Washburn & Moen Manufacturing Company from any obligation to account to the Thorn Wire Hedge Company for any sums of money or valuable things which it shall or may hereafter receive or acquire from any parties in settlement of suits or claims for damages for the infringements, prior to the date of this agreement, of letters patent owned by the said Washburn & Moen Manufacturing Company, or by it and I. L. Ellwood, or for moneys which it shall hereafter receive for bonuses or premiums paid for licenses.

"Furthermore, in the execution of the existing agreements between the parties, bearing date July 3, 1876, December 2, 1878, and August 7, 1879, before referred to, providing for 438] *the payment of fifteen cents by the Washburn & Moen Manufacturing Company to the Thorn Wire Hedge Company, as consideration money for the Kelly patents, upon every one hundred pounds of barbed fence wire manufactured and sold by it, or its licensees, or by its authority, the said the Thorn Wire Hedge Company does release and surrender any claim against the Washburn & Moen Manufacturing Company for any share in or proportion of the license fees or royalties which it shall receive from Jacob Haish, under the agreement between the Washburn & Moen Manufacturing Company and the said Jacob Haish (a copy of which has been furnished to the Thorn Wire Hedge Company) which shall be required under said agreement to be applied by the Washburn & Moen Manufacturing Company or used in the payment of any consideration for the purchase from said Haish of certain patent properties, and the release of claims for infringements against licensees under said agreement."

As heretofore stated, most of the manufacturers of barbed fence wire throughout the country applied to the Washburn & Moen Manufacturing Company in January and February, 1881, and obtained licenses. Subsequently, however, some persons in Iowa and Missouri began manufacturing without license, and the company thereupon brought suits against them for infringement of the patents which had been held valid in the northern district of Illinois. The Circuit Court of the United States for the Eastern District of Missouri, in which some of these cases were heard, decided adversely to the company on June 4, 1883, holding that the Kelly and Glidden reissued patents were void. *Washburn & M. Mfg. Co.* v. *Fuchs*, 16 Fed. Rep. 661. This decision, although its direct effect was confined, of course, to the states composing the eighth circuit, tended greatly to weaken the company's control over the barbed wire business, and in order to maintain its position as a receiver of royalties it became necessary for it to reduce the royalties required to be paid by its licensees to 80 cents per one hundred pounds. The more important of the Kelly patents having been held valid in the seventh circuit, the company was not disposed to exercise its option, provided *for in its contract with the Thorn [439 Wire Hedge Company on July 3, 1876, of discontinuing its manufacture under those patents and reassigning them to the last-named company, but entered into an agreement in writing with that company, dated June 12, 1883, by which the Thorn Wire Hedge Company agreed to reduce the amounts to be paid to it to five cents per 100 pounds, and to shorten the time for which the payments should continue to be made from November 17, 1885, to February 12, 1885. Among the provisions of this agreement were the following:

"Seventh. Said Washburn & Moen Manufacturing Company agree to pay said reduced royalty of five cents on each and every one hundred pounds of barbed fence wire which it shall license to be made, or which shall be sold under a license from it, on and after June 1, 1883, to and including February 11, 1885. Payments of said reduced royalty of five cents for each one hundred pounds on licensed wire to be made in accordance with the said original agreement and the amendment thereof; but no payments or royalty on licensed wire to be made until it shall have been first collected by said Washburn & Moen Manufacturing Company.

"Eighth. Said party of the second part [the Washburn & Moen Manufacturing Company] further covenants and agrees with the party of the first part, its successors or assigns, that it will pay the said reduced royalty of five cents per one hundred pounds to the party of the first part, its successors or assigns, on the barbed wire made and sold by itself, I. L. Ellwood & Co., or its licensees, at the time, in the manner, and on the same terms and conditions as payments are now required to be made by the provisions of the agreements now existing between the parties hereto, and that such payments when due and payable shall be promptly and punctually made to said party of the first part, or its successors or assigns, without any delay or rebate on account of any claim or demand, or question of claim or demand, of said party of the second part, or said I. L. Ellwood & Co., against said party of the first part, and independently of any and all questions of dispute or otherwise which may arise between said party of *the first part [440 and said party of the second part, or said I. L. Ellwood & Co., or any or either of them."

After February 12, 1885, the Thorn Wire Hedge Company made certain demands upon the Washburn & Moen Manufacturing Company, asserting that that company had failed in various ways to perform its obligations under the several contracts. The justice of these demands having been denied, the Thorn Wire Hedge Company, on June 6, 1887, filed its bill in equity in the superior court of Cook county, Illinois, against the Washburn & Moen Manufacturing Company, setting up the grounds of

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its complaint and praying for discovery and an accounting. Upon petition of the defendant the cause was removed, on June 21, 1887, into the circuit court of the United States for the northern district of Illinois, where the defendant company filed its answer on July 2, 1887. After the greater part of the testimony had been taken, the complainant, on June 19, 1889, filed an amended bill, and the defendant, on the 21st of the same month, filed an amended answer and a cross bill. The complainant filed its answer to the cross bill on June 29, 1889. The taking of testimony was resumed and completed, and the cause having been heard in the said circuit court upon the pleadings and evidence a final decree was entered on November 29, 1889, dismissing both the bill and the cross bill for want of equity. Thereupon both parties appealed to this court.

Mr. **George C. Fry** for the Thorn Wire Hedge Company.

Messrs. **F. W. Lehmann** and **C. G. Washburn** for the Washburn & Moen Manufacturing Company.

Mr. Justice **Shiras** delivered the opinion of the court:

This record contains nearly thirteen hundred pages, consisting chiefly of evidence. There were no findings of facts, nor did the court below file any opinion. It has hence been necessary to make a long statement, of no interest except to the parties, which will occupy many pages of the reports.

The Thorn Wire Hedge Company sought, **441**] by its bill of *complaint, to compel the Washburn & Moen Company to account for moneys claimed to be due under certain contracts subsisting between the companies.

It was one of the provisions of those contracts that the Washburn & Moen Company should pay, at a stipulated rate, a royalty upon all barbed fence wire which should be manufactured and sold by third parties, under licenses granted them by said company; and one of the complaints in the bill is that the Washburn & Moen Company had not correctly reported to the complainant, from time to time, the issuing of licenses and the amount of moneys collected or of settlements made. Further complaints are that the Washburn & Moen Company had, in some instances, accepted notes from its licensees, and refused to account to complainant for its proper share thereof; that the Washburn & Moen Company had received moneys from infringers for damages and certain bonuses, which had not been accounted for; and that, after the making of the supplemental agreement of August 7, 1879, whereby the rate of royalties to be paid by the licensees was reduced, the Washburn & Moen Company did not, in point of fact, in some cases, reduce said royalties, but continued to collect at the old rate, and had failed to account therefor. To meet these charges the Washburn & Moen Company put in evidence the agreement and release, dated July 27, 1881. Thereupon the complainant amended its bill by adding allegations respecting the said release, seeking to have it declared void because executed in ignorance of all the facts and because the complainant was fearful that legal proceedings against the Washburn & Moen Company would imperil complainant's royalties for the remaining four years of the term of contract. The Washburn & Moen Company, by amendments to its answer, denied the allegations attacking the release and settlement, and averred that the complainant had executed the same with full knowledge.

Did this agreement of July 27, 1881, legally import a settlement and release of the claims in question, and, if so, were the facts and circumstances attending its execution such as to relieve the complainant from its operation?

*The complainant's contention is that [**442** the release was, when drawn and executed, intended only to apply to the bonuses and damages received by and unaccounted for by the Washburn & Moen Company prior to the date of said release; that it does not purport to release that company from back damages received subsequent to its date, or for royalty due upon the product of the Washburn & Moen Company, or upon the product of its licensees previously sold under licenses granted by said company.

We are unable to accept this view of the scope and effect of the release. Its language plainly was, that in consideration of the payment of ten thousand dollars and of a release by the Washburn & Moen Company of certain specified claims made by said company against the company complainant, the latter would and did "release and discharge the said Washburn & Moen Manufacturing Company from all claims and demands of every kind and nature whatsoever, which it has or can have against said company for and on account of any moneys, properties, or valuable things which the said Washburn & Moen Manufacturing Company has received from any persons in settlement for damages or profits accruing to it, or to it and I. L. Ellwood, on account of infringements committed upon any letters patent for barbed wire fence or machinery for making the same, and also for and on account of any moneys which it has received by way of bonuses or premiums paid to it by parties receiving licenses from it and from I. L. Ellwood to manufacture barbed fence wire; and does also discharge and release the said Washburn & Moen Manufacturing Company from any obligation to account to the Thorn Wire Hedge Company for any sums of money or valuable things which it shall or may hereafter receive or acquire from any parties in settlement of suits or claims for damages for infringements, prior to the date of this agreement, of letters patent owned by the said Washburn & Moen Manufacturing Company, or by it and I. L. Ellwood, or for moneys which it shall hereafter receive for bonuses or premiums paid for licenses."

It is indeed true, as argued by complainant's counsel, that general expressions in a release may not carry its effect *beyond the[**443** particular matters which the parties had in view, but the language in the present instance seems to us to be clear and explicit, and to be unmistakably applicable to the matters complained of in the bill.

But it is claimed that, in the circumstances disclosed by this record, a court of equity should not permit the release to stand.

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The first reason urged is that the payment of ten thousand dollars was not a sufficient consideration for the release. It has often been held that where the party executing the release, by reason of youth or advanced age, was incapacitated to act judiciously, or where the release was executed during the existence of fiduciary relations, calculated to beget unquestioning confidence, courts of equity will grant relief where the consideration was plainly inadequate. It is enough to say that the present is not such a case. The parties, in respect to their capacity to act, stood upon an equal footing. We are scarcely prepared to extend a doctrine, devised in equity to protect those who are disabled by age or inexperience, to cover the case of a business corporation whose affairs are managed by a president and board of directors. Moreover, it is not clear that the consideration, in the present case, was inadequate. While it is true that the evidence tends to show that, upon the theory of the complainant's bill, a much larger sum than ten thousand dollars was due, yet the release discloses that, in addition to the payment of that amount, and as a further consideration, the Washburn & Moen Company released the complainant from claims theretofore made by the former, and also agreed to protect the complainant from any suit for infringement of the patents held by Jacob Haish.

The validity of the release is also assailed because neither the complainant nor its counsel were fully advised as to the facts, and because the Washburn & Moen Company falsely misrepresented and fraudulently concealed the facts from the complainant.

This contention presents an issue of facts under the allegations of the amended bill and answer. Although an oath to the answer was 444] waived and thereby the force of the *latter as evidence was prevented, still the burden of proof to set aside a settlement deliberately executed is upon the complainant, and that burden is greatly increased by the fact that eight years had elapsed before the complainant attempted to avoid the operation of such settlement by the allegations of its amended bill.

We do not think it necessary to extend this opinion by a minute analysis of the evidence adduced under this issue. That evidence consists of a large amount of testimony and of a correspondence by letter between the parties for a period of several years. We have examined and considered this evidence and the full and able discussion of it found in the briefs of the counsel. Our conclusion is that the complainant has failed to show such a state of facts as would warrant a court of equity in holding the release and settlement of July 27, 1881, to be void, either for gross inadequacy of consideration, or by reason of any false statements or fraudulent concealment on the part of the Washburn & Moen Manufacturing Company. Not only is there a failure of convincing affirmative evidence on the part of the complainant, but the long period during which the settlement was allowed to stand is, of itself, almost enough to estop the complainant. The effort made to explain and extenuate such delay does not help the complainants' case. It is said that complainant was constrained to execute the release and rest under it, because it feared that litigation to recover its demands would imperil its receipt of future royalties under the contract. Courts of equity, it has often been said, will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. The complainant's excuse, in this instance, that it preferred, for prudential reasons, to receive money and an acquittance of claims from the Washburn & Moen Company, and to abide by the settlement for a period of several years, rather than to assert its existing demands, is entitled to a less favorable consideration by a court of equity than if its conduct had been that of mere inaction. *Lane & B. Co.* v. *Locke*, 150 U. S. 201 [37: 1052]; *Hager* v. *Thompson*, 66 U. S. 1 Black, 80 [17: 41].

Besides the claims covered by the settlement of July 27, *1881, there were certain oth- [445 er demands made by the complainant which shall now receive our attention.

It appears that on June 12, 1883, the parties entered into a supplementary agreement whereby the royalty which the Washburn & Moen Company was to pay to complainant on barbed wire made by itself or its licensees was reduced from fifteen cents to five cents per hundred pounds from June 1, 1883, to February 12, 1885; and it is now claimed that complainant did not pay for royalties payable by its licensees at the rate of fifteen but at the rate of five cents per hundred pounds for the month of May, 1883, and that hence the Washburn & Moen Company, owes complainant for barbed wire made by the licensees of the former during said month, the difference between five and fifteen cents per hundred pounds. As against this claim, the Washburn & Moen Company point to a clause of said agreement which provides that said company "shall not be under obligation to pay said royalty on the barbed wire manufactured and sold by its licensees until after it shall have collected the same from its said licensees," and gave evidence tending to show that they only collected from their licensees, for the complainant, royalties at the rate of five cents per hundred pounds for the month of May, 1883. It is plausibly contended on behalf of the complainant that the clause cited did not relieve the Washburn & Moen Company from accounting for the higher rate of license until and after June 1, 1883, and if, indeed, the Washburn & Moen Company had actually received from its licensees royalties at the rate of fifteen cents per hundred pounds for the month of May, 1883, it would apparently be accountable therefor. As, however, that company only received royalties for said month for the complainant at the rate of five per cent and so reported to the complainant, which receipted for the royalties so collected, and as the matter stood unchallenged for so long a period, we think no injustice is done by leaving the settlement undisturbed. It is permissible to infer from the conduct of the complainant that it acquiesced in the construction put by the Washburn & Moen Company on the clause in question, as exonerating them from liability *for license fees which were not actually [446 paid to and received by it for the month of May, 1883.

The fourth, fifth, and seventh assignments

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claim error in the failure of the court below to decree that complainant was entitled to recover from the Washburn & Moen Company royalty upon barbed fencing made and sold by divers licensees of said company prior to February 12, 1885, the royalty accruing on which was abated, released, or compromised by the said company. To dispose of these errors we must turn our attention to a settlement or agreement made by the Washburn & Moen Company with one Jacob Haish.

Haish was the owner of certain patents relating to barb wire and barb wire machinery. Litigation had arisen between him and the Washburn & Moen Company, as the owner of the Kelly and other patents, on questions of infringement. Ultimately the Washburn & Moen Company deemed a settlement with Haish to be for the benefit of all concerned, and hence, on July 26, 1881, such settlement was effected, whereby the Washburn & Moen Company and Ellwood purchased from Haish his patents, and he took a license from them authorizing him to manufacture ten thousand tons of barb wire per annum. As a condition of this settlement the Thorn Wire Hedge Company executed a collateral agreement, authorizing the Washburn & Moen Company to make said settlement with Haish, and releasing said company from all obligation under its agreements with the Thorn Wire Hedge Company "to account for any proportion of the moneys received from the said Jacob Haish, whether in settlement of past infringements or for royalties hereafter paid under the said license, which may be required to be expended or remitted in the settlement with said Jacob Haish, or in payment of the consideration money for the transfer and conveyance of all the patents, rights to letters patent, and inventions, which are or shall be conveyed by the said Haish to the said Washburn & Moen Manufacturing Company and Isaac L. Ellwood, as provided in said proposed agreement."

Subsequently, certain other licensees of the Washburn & Moen Company refused to pay 447] their royalties because of the *settlement made by that company with Haish. They claimed that the agreement with Haish in effect gave him a free license for four thousand tons annually, and a license at fifty cents per hundred pounds for four thousand tons more. Owing to this contention, the Washburn & Moen Company was disabled from collecting royalty from some of their licensees until new arrangements were made with them, and the claims of the Thorn Wire Hedge Company we are now considering are for its proportion of the royalties made uncollectible or released by the Haish settlement. The complainant construes the release which it had given to the Washburn & Moen Company as extending only to the royalty accruing to it on Haish's own manufacture, and not to the royalty upon wire manufactured and sold by any other licensee, and as not releasing the Washburn & Moen Company from its duty to "use due diligence and lawful means" to collect such royalties.

That the settlement with Haish was made with the full knowledge and approval, as to substance and terms, of the Thorn Wire Hedge Company, cannot be denied. That such settlement would operate to release any other licensees, in whose royalties both the Washburn & Moen Company and the Thorn Wire Hedge Company had interests, was probably not foreseen by either party. When it was subsequently determined by the supreme court of Illinois, in the case of *Washburn & M. Mfg. Co.* v. *Chicago Galvanized Wire Fence Co.* 109 Ill. 71, 119 Ill. 80, that the other nonassenting licensees of the latter company had a right to object to those terms of the settlement with Haish which, to some extent, relieved him from license fees, and it hence became necessary for the Washburn & Moen Company to make new terms with such licensees, we think it by no means follows that the Washburn & Moen Company became liable to the Thorn Wire Hedge Company to make good the loss thereby occasioned. On the contrary, such a result of the settlement with Haish must be deemed to have been an incident thereof, and to have been, in a legal sense, within the contemplation of the Thorn Wire Hedge Company.

*Nor do we find any satisfactory evi- [448 dence that, in the litigation, or in the settlements made with the other licensees, the Washburn & Moen Company were guilty of negligence, passive or active, which would create any liability on its part to the complainant company. To occasionally take promissory notes from licensees in lieu of cash for accrued royalties would, if done in good faith, not be so far out of the course of ordinary business transactions as to render the Washburn & Moen Company liable for losses occurring through the insolvency of any of the licensees. The contract was to pay quarterly to the Thorn Wire Hedge Company its share of royalties that had been collected and received by the Washburn & Moen Company, obviously showing that the parties contemplated that the royalties would not necessarily be paid as they accrued.

Upon this part of the case our conclusion is, that the contracts between these parties did not import that the Washburn & Moen Company should guarantee the payment by the licensees of the royalties, but should exercise reasonable diligence in their collection; and that the evidence does not disclose any such want of diligence or of good faith as to create the liability asserted in the bill.

The tenth assignment avers error in the court below in not decreeing that appellant was entitled to have and recover of and from the appellee royalty upon the barbed fencing manufactured and sold by defendant under the designation of Brinkerhoff Barbed Fencing.

The allegation of the bill touching this ground of complaint was as follows: "There was manufactured and dealt in by the defendant a certain patented barbed wire, known as the 'Brinkerhoff patent;' that the form or construction of such wire was slightly different from the barbed wire made under the Kelly patent, heretofore mentioned, but orator claims that the same was and is *barbed wire* within the meaning of said contracts."

In respect to this the defendant, in its answer, stated: "It admits that there was manufactured and sold by it a certain patented article known as the 'Brinkerhoff Fencing,' but *says [449 that the form and construction of such fencing was widely different from the barbed wire made under the Kelly patent heretofore mentioned,

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and says that the same was not and is not *barbed wire* within the meaning of said contracts."

The evidence discloses that the Washburn & Moen Company manufactured and sold, prior to February 19, 1895, upwards of 4,000 tons of Brinkerhoff barbed wire, upon which it paid no royalty to appellant. The contract provided that the Washburn & Moen Company should enter upon the manufacture of barbed fence wire under the Kelly patents aforesaid, and use reasonable and diligent efforts to supply the demand for this article throughout the country, and also should use proper and reasonable diligence in prosecuting infringers of the several letters patent as aforesaid, or any of them, to the end that said patents might be fully enforced and sustained.

If the issue thus raised under the pleadings presented the question whether the Washburn & Moen company should account for royalty received by it from the sale of Brinkerhoff barb fencing, because such fencing was an infringement of the Kelly patents, and thus within the terms of the contract, it would be necessary for us to investigate the state of the art at the time the patents were granted, as well as to compare the several claims of the respective patents, and our inspection of this record has not disclosed to us the materials necessary to enable us to do this intelligently.

We do not, however, perceive that such an issue or question was raised by the pleading or was intended by the parties. That the complainant did not intend to raise an issue under the patent laws of the United States is seen in the fact that it filed its bill of complaint in a state court. Nor did the defendant, in its petition for removal, place the right to remove upon any allegation that the subject-matter of the suit belonged exclusively to the Federal court, but upon the diverse citizenship of the parties. But any doubt upon this subject is removed by the admission of the appellant's counsel, who, in his careful brief, says: "The question of infringement upon the Kelly letters patent is not raised by the pleadings in this case. The bill is not drawn in the form of, nor does [450] it contain, *the usual allegations requisite to a bill for infringement of letters patent. The answer does not aver that the Brinkerhoff patent does not infringe the Kelly patents, or any of them. This issue is not presented."

The learned counsel then proceeds to state and discuss the question as he claims it to be, and that is, that the terms of the contract import a covenant, on the part of the Washburn & Moen Company, not to manufacture and sell barb wire under any other letters patent than the Kelly patent, and to use reasonable diligence to supply the demand for the article made under the Kelly patents, and not made under patents in competition with them.

Our reading of the contract between the parties fails to reveal any express covenant to the effect claimed, nor do we perceive that such a covenant can be fairly implied from the language used, even when read in the light of all the facts and circumstances.

The provision of the contract is that the Washburn & Moen Company shall pay royalty on all barb fence wire which shall be made and sold "under said several letters patent or any of them." The letters patent referred to are expressly mentioned, and do not include the Brinkerhoff patent, which, indeed, was subsequently granted. Nor does the history of the case show any reason for the contention that the Washburn & Moen Company was disabled by the contract from buying the Brinkerhoff patent, and making wire under it. If that company had not purchased the Brinkerhoff patent, the owner could have made and sold wire outside of the Kelly patents, and such competition would plainly have been more largely detrimental to the common interests of the parties to this controversy than that which arose under the purchase as made.

It is true that, in 1881, the Thorn Wire Hedge Company claimed that the Brinkerhoff wire strip was covered by the agreement, and demanded an account of royalty thereon. But this claim was then rejected by the Washburn & Moen Company, which, while admitting that no sales under the Brinkerhoff patent had been reported, asserted that it was in no sense subject to the Kelly patents.

*No further claim in this behalf was [451] made by the appellant for five years, during which period reports were duly made by the Washburn & Moen Company, without including any statement of sales made by it of wire made under the Brinkerhoff patent, and monthly settlements were made and differences adjusted. So long a period of acquiescence discredits any renewal of the demand.

In the absence, then, of any express covenant, and in view of the long course of dealing between the parties, in which this claim sunk out of sight, we think the complainant's claim for an account of royalty for wire made under the Brinkerhoff patent cannot be sustained. We therefore find no error in the decree of the court below dismissing the original and amended bill of complaint.

This brings us to a consideration of the cross appeal of the Washburn & Moen Manufacturing Company, wherein complaint is made of the court below in dismissing the defendant's cross bill.

The Washburn & Moen Company seeks by its cross bill to recover from the Thorn Wire Hedge Company its alleged proportion of moneys which the Washburn & Moen Company had been compelled to refund to certain licensees by reason of its purchase of the Haish patents. But the Thorn Wire Hedge Company was not a party to the purchase. True, as we have seen, it assented to the purchase and released the Washburn & Moen Company from any obligation arising out of it, but we are unable to see that the relation between the parties justifies the demand that the Thorn Wire Hedge Company should return any part of the moneys theretofore or thereafter paid to it. The payments to it were of moneys due to it, and which it had a right to receive. The subsequent disclosure that, by its settlement with Haish, the Washburn & Moen Company became responsible to its own licensees for damages arising out of the transaction with Haish, did not, in our judgment, operate to affect the payments previously made to the Thorn Wire Hedge Company. Besides, the record discloses that the latter company continued to pay over royalty, month by month, to the Thorn Wire Hedge Company after *the date of the fil-[452]

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ing of the bill by the Chicago Galvanized Wire Fence Company, in September, 1881, down to the time of filing the cross bill in July, 1889, without abating or diminishing such payments by setting off the moneys now demanded. Moreover, the moneys now sought to be recovered in the cross bill were for royalties accruing to the Thorn Wire Hedge Company prior to the amendment or supplement of June 12, 1883, and no claim or suggestion was then made on account of the demands of the other licensees, although the adverse decision in favor of the Chicago Galvanized Wire Company had been rendered eight months before. These payments were therefore voluntarily made, with full knowledge of the facts.

Without pursuing the subject further, our conclusion is that the court below committed no error in dismissing as well the cross bill as the original and amended bill, and its decree is accordingly affirmed; the costs in this court to be paid by the appellant in each case.

UNITED STATES, *Appt.*, v JUAN CHAVES ET AL.

(See S. C. Reporter's ed. 452-465.)

Property in ceded territory—land in New Mexico—judicial notice—presumption of grant—title by record—grant from Mexico.

1. It is the usage of the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants.
2. Where land in New Mexico was the property of the claimants before and at the time of the treaties for the cession of territory between Mexico and the United States, its protection is guaranteed by the treaties, as well as by the law of nations.
3. The courts of the United States are bound to take judicial notice of the laws and regulations of Mexico pertaining to grants made prior to said cession.
4. A grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years.
5. Lapse of time, accompanied by acts done or other circumstances, may warrant the jury in presuming a grant or title by record.
6. The evidence in this case shows a grant from Mexico, legal under the forms of Mexican law, and a juridical possession given thereunder, and exclusive possession by claimants and their ancestors for over half a century, and establishes their title.

[No. 196.]

Argued Oct. 23, 1895. Decided Nov. 11, 1895.

APPEAL from a decree of the Court of Private Land Claims in the matter of the claim for certain lands in Valencia county, New Mexico, commonly called the "Cubero" land grant. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

*This is an appeal on behalf of the [453 United States from a decree of the court of private land claims, made on the 26th day of September, 1892, in the matter of the claim for certain lands in Valencia county, New Mexico, commonly called the "Cubero" land grant.

NOTE.—*As to construction and operation of treaties*, see note to United States v. The Amistad, 10: 826.

Title by adverse possession; what constitutes such adverse possession as will give title; cotenants.

Possession, to be adverse, must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely. Sherin v. Brackett, 36 Minn. 152; Sadtler v. Peabody Heights Co. 66 Md. 1; Logan v. Friedline (Pa.) 12 Cent. Rep. 677; Straus v. Imperial F. Ins. Co. 94 Mo. 182; Wells v. Austin, 59 Vt. 157; Hollingsworth v. Sherman, 81 Va. 668; Thomas v. England, 71 Cal. 456; Litchfield v. Ferguson, 141 Mass. 97.

To bar a recovery, it must be continuous and uninterrupted, as well as open, notorious, actual, exclusive, and adverse. Armstrong v. Morrill, 81 U. S. 14 Wall. 120 (20: 765).

It is a well-settled rule that to constitute an adverse possession there need not be a fence, a building, or other improvement made; it suffices for this purpose that visible, notorious acts are exercised over the premises in controversy for twenty-one years after an entry under a claim and color of title. Ewing v. Burnet, 36 U. S. 11 Pet. 41 (9: 624); Ellicott v. Pearl, 35 U. S. 10 Pet. 412 (9: 475).

When acts done upon a tract of land are such as to give unequivocal notice to all persons of a claim to it adverse to a claim of all others, accompanied by actual possession, possession is adverse whether the land be inclosed or not. Richards v. Smith, 67 Tex. 610.

In the absence of actual occupation some acts of ownership must be done about the land that will give notice of an adverse claim. Leeper v. Baker, 66 Mo. 400; Turner v. Hall, 60 Mo. 377.

To constitute disseisin the occupation must be of that nature and notoriety that the real owner may be presumed to know that there is a possession adverse to his title. Kennebeck Purchase Proprs. v. Springer, 4 Mass. 416, 3 Am. Dec. 227.

Possession, to be adverse, must be under a claim of title hostile to the true owner. Pease v. Lawson, 33 Mo. 35; Peoria, D. & E. R. Co. v. Forsyth, 118 Ill. 272.

It must be in denial of the title of the true owner or with an intention to make title against him. Miller v. Feenane, 50 N. J. L. 33.

The intent to claim is one of the qualities necessary to constitute a disseisin. Bradley v. West, 60 Mo. 33.

It is not essential that it should be under color of title. Roots v. Beck, 109 Ind. 473.

All that is necessary is that it be accompanied by a claim of right. Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Hall v. Stevens, 9 Met. 418.

Which claim need not be undisputed. Liddon v. Hodnett, 22 Fla. 442.

The possession must be such as to notify the real owner, at least, of the hostile claim. Fugate v. Pierce, 49 Mo. 441; Mylar v. Hughes, 60 Mo. 115.

Whether possession is adverse or otherwise is a question of fact for the jury. McMasters v. Bell, 2 Penr. & W. 180; Taylor v. Horde, 1 Burr. 60.

Adverse possession not only bars recovery, but gives title. Merchants' Bank v. Evans, 51 Mo. 335; Shepley v. Cowan, 52 Mo. 550; Barry v. Otto, 56 Mo. 177; Ridgeway v. Holliday, 59 Mo. 444; Farrar v. Heinrich, 86 Mo. 521.

Adverse possession gives title, but it must be actual, open, notorious, with intent to claim, to constitute a disseisin. Farrar v. Heinrich, *supra*; Bowman v. Lee, 48 Mo. 335.

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The case as presented in the pleadings is as follows:

It is claimed by the petitioners that, in the year 1833, the republic of Mexico, by Francisco Sarricino, the governor of the territory of New Mexico, granted to Juan Chaves, and about sixty others, "and to the town of Cubero, whose establishment and incorporation were intended and declared by the terms of said grant," a tract of land now situated in the county of Valencia, New Mexico.

The description of the land as claimed is set out in the petition; and is there said to contain about eleven square leagues.

They allege the loss and destruction of said grant and the testimonio as a reason for not being able to state accurately its date or the description of the land or the act of possession.

They allege that the chief alcalde of that jurisdiction did, during the same year, put them in possession, but they are unable to state who was the alcalde or what the date was of such delivery of possession.

That the petitioners are the heirs and legal representatives of the original grantees, except Juan Antonio Duran, who is the only survivor of such grantees.

Adverse possession of real estate for the statutory period confers such a title as will support an action of ejectment. Joy v. Stump, 14 Or. 361; Craig v. Cartright, 65 Tex. 413.

Open, notorious, and adverse possession of land for seven consecutive years confers title upon the possessor which will support an action of ejectment against his disseisor. Crease v. Lawrence, 48 Ark. 312.

Possession of property for ten years, in Nebraska, vests one with a valid title to the same. Parker v. Starr, 21 Neb. 680.

The lapse of time not only bars the remedy, but it extinguishes the right and vests a perfect title in the adverse holder. Bicknell v. Comstock, 113 U. S. 149 (28: 962).

It is evidence of the highest title known to the law; and twenty years' possession will defeat the holder of the paper title. Herff v. Griggs, 121 Ind. 471.

It is evidence of notice, not only of the adverse holding, but of the title under which the possession is held. Landes v. Brant, 51 U. S. 10 How. 348 (13: 449).

Title by adverse possession for a period such as is required by statute to bar an action is a fee-simple title, and is as effective as any otherwise acquired. Cox v. Cox, 7 Mackey, 1.

It may be set up against any title whatsoever, either to make out a title under the statute of limitations, or to show the nullity of a conveyance executed by one out of possession. Bradstreet v. Huntington, 30 U. S. 5 Pet. 402 (8: 170).

Adverse possession, in the absence of color of title, must be hostile in its inception, actual, peaceable, open, notorious, and continue uninterruptedly for twenty years, and be of such character as to notify the true owner of an adverse claim and invasion of his rights. Chicago & N. W. R. Co. v. Galt, 133 Ill. 657; Shaw v. Schconover, 130 Ill. 448; Hogan v. Kurtz, 94 U. S. 773 (24: 317); McDonald v. Fox, 20 Nev. 364; McLean v. Smith, 106 N. C. 172; Hughes v. United States, 71 U. S. 4 Wall. 232 (18: 303); Bonnell v. Bonnell (Pa.) 12 Cent. Rep. 686.

A title as undoubted is obtained as a deed in fee simple from the true owner, and all inquiry into the title or its incidents is cut off. Harpending v. Reformed Protestant Dutch Church, 41 U. S. 16 Pet. 455 (10: 1029).

In Oregon it must be of such a character as to afford the owner the means of knowing of it and of the claim. Hicklin v. McClear, 18 Or. 126.

And if inquiry is neglected, those put to inquiry are not entitled to any greater consideration than though they had made it and ascertained the actual facts of the case. Hughes v. United States, 71 U. S. 4 Wall. 232 (18: 303).

To sustain a title by adverse possession there must have been an actual occupancy of the land, beyond which the possession cannot be extended by construction; and such possession must be, not only actual, but continued, visible, notorious, distinct, and hostile. Porter v. Miller, 76 Tex. 593.

And proof of such occupancy marked out by and within visible and defined boundaries, and of a subjection of such land to the dominion of the occupant to the exclusion of all others, is sufficient to show a *possessio medis*, which, if continued a sufficient time, will establish title whether there be an inclosure or not. Spotts v. Hanley, 85 Cal. 155.

What constitutes adverse possession is a question of law. The fact of adverse possession in any case is a question of fact for the jury. Bradstreet v. Huntington, 30 U. S. 5 Pet. 402 (8: 170).

In order to operate as a disseisin, possession and occupation must be distinct and well defined, and of a character clearly inconsistent with, and adverse to, the title of any other person. Litchfield v. Ferguson, 141 Mass. 97.

A possession which operates a disseisin or dispossession of the true owner will, if continued for the period and under the conditions prescribed by the statute, confer upon the possessor title to the thing possessed. Craig v. Cartwright, 65 Tex. 413.

Acts which might constitute a disseisin by a stranger may not have that effect when done by a tenant in common. Hudson v. Coe (Me.) 3 New Eng. Rep. 627.

An adverse possession for fifty years, though with knowledge of a better title, constitutes a good defense against that title. Alexander v. Pendleton, 12 U. S. 8 Cranch, 462 (3: 624).

One tenant in common may acquire the title of a cotenant by adverse possession; and an ouster will be presumed after an exclusive possession and receipt of the entire profits, with a claim of right to the whole thereof, for twenty-one years. Abrams v. Rhoner, 44 Hun, 507; Hicks v. Bullock, 96 N. C. 164.

Adverse possession by a cotenant is not established by mere occupation and appropriation of rents and profits. Todd v. Todd, 117 Ill. 92.

A silent possession, accompanied by no act which can amount to an ouster, or give notice to his cotenant that his possession is adverse, does not constitute an adverse possession. Clymer v. Dawkins, 44 U. S. 3 How. 674 (11: 778).

Even the sole possession by one tenant in common is not presumed adverse to a cotenant; and the ordinary presumption is that such possession is held in right of both tenants. Farmers' & M. Nat. Bank v. Wallace (Ohio) 10 West. Rep. 469; Logan v. Friedline (Pa.) 12 Cent. Rep. 677.

The statute of limitations will begin to run in favor of a cotenant in possession against a cotenant out of possession from the time there is an ouster of the latter by the former. Coogler v. Rogers, 25 Fla. 853.

Where a cotenant asserts possession under a deed professing to convey the whole title, he will be deemed to have ousted his cotenant. Wright v. Kleyla, 104 Ind. 223.

There can be no adverse possession against a cotenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession. Morris v. Davis, 75 Ga. 169.

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That they are now in possession and occupation of such land, claiming under said grant.

This said grant was unconditional, except so far as the colonization law imposed conditions.

They charge that preliminarily to the making of the said grant the said governor required the parties petitioning first to purchase certain improvements which had been made upon the said land by one Francisco Baca, a Navajo Indian chief who had been residing on the tract by permission of the government.

That they did purchase of said Indian chief the said improvements, which said Indian chief relinquished to them and vacated the land.

454] *That said preliminary conditions having been performed, the governor and chief alcalde delivered to the grantees a duplicate of the granting decree and of the act of juridical possession, and placed the originals of said decree and act in the Mexican archives at Santa Fé.

They allege that said originals, although once in the custody of the defendant (the United States), after the solemnization of the treaty of Guadalupe Hidalgo, were wrongfully and negligently destroyed or lost by the defendant.

That the duplicates were intrusted by the grantees to Juan Chaves, one of their number, and he kept them until his death in 1846. Since his death they have not been found, and plaintiffs aver that they were stolen and carried away and destroyed or lost by one Vicente Margarito Hernandez.

They charge that the original grant papers having been lost, a controversy arose between the petitioners and the pueblo of Laguna in the year 1841, and in that controversy the boundary line on the side next to Laguna was fixed and adjusted.

They allege that the grant was made to the inhabitants of Cubero at that time for the purpose of establishing a town thereon, and that since that time they have been in possession of the whole of the ground.

The answer of the United States puts in issue all of the allegations of the petition.

It denies that there was ever a grant made by the governor of New Mexico to the alleged grantees, as alleged in the petition.

It denies that the alleged testimonio of said grant was ever lost or destroyed, and that the possession of said plaintiffs or any of them was derived by the act of any official of the Mexican government authorized by the laws of Mexico to grant or deliver the same.

It denies that the duplicate of the alleged granting decree and act of possession was ever delivered by the governor or chief alcalde to the alleged grantees, or was ever placed by the governor among the Mexican archives of Santa Fé.

It avers that if a grant was made to the al-455]leged grantees *for the purpose of establishing a town, that the conditions imposed by law have never been complied with, and, therefore, they are not entitled to confirmation under the act creating the court of private land claims.

That a large portion of said grant had been disposed of by the United States to the Atlantic & Pacific Railroad Company, and that it was a necessary party defendant, and a misjoinder of parties was pleaded.

On August 29, 1892, the court entered a decree confirming the grant, and denying the right of the Atlantic & Pacific Railroad Company to intervene, except so far as its right of way was concerned, which right was admitted by the plaintiffs, and from which decree an appeal was taken by the United States.

Messrs. **Matt. G. Reynolds** and **Holmes Conrad**, Solicitor General, for appellant.

No counsel for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

It is provided in the ninth section of the Act of March 3, 1891, establishing the court of private land claims, that, upon any appeal from such court, "the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open."

The present case has been submitted to us on the record of the court below, containing the pleadings, the evidence, and the decree.

The decree finds as follows: "That the complainants are citizens of the United States and residents of the county of Valencia, in the territory of New Mexico; that in the year 1833 a colony grant of the lands in controversy was made by the proper authority of the Republic of Mexico through the governor of the territory of New Mexico, Francisco Sarricino, to *Juan Chaves and sixty-one others for the[456 purpose of colonizing the place of Cubero, and that said colonization was had and made; that the title to the land in controversy in this cause is derived from the Republic of Mexico, and was complete and perfect at the date when the United States acquired sovereignty in the territory of New Mexico, within which this land was situated; that the said complainants are in the possession of the said land embraced within the calls of the said grant, and claim the same; that they and their ancestors and predecessors in right have been in the possession of the same since the issuance of the grant by the Mexican government, and that complainants have such a claim and interest in the land as gives them a right to apply to the court for a confirmation of their title; that the lands claimed embraced an area of about sixteen thousand acres, but the exact area cannot be stated, as the same has never been surveyed; that the intervenor, the Atlantic & Pacific Railroad Company, has no right in or to the real estate and lands included within said grant, except to its right of way for its railroad track as now laid down and operated through and across the lands, which right of way was conceded to said railroad company by said complainants on the trial of the cause."

If these findings of fact are sustained by the evidence in the record, the decree of the court below, adjudging the title and claim of the complainants to be good and valid, and confirming the same in them, their heirs, successors, and assigns, should be affirmed.

The Act provides that all proceedings subsequent to the petition shall be "conducted as

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near as may be according to the practice of courts of equity of the United States; . . . and that, by a final decree, the court shall settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty between the United States and the Republic of Mexico in 1848, and the treaty between the same powers in 1853, and the laws and ordinances of the government from which it is alleged to have been derived."

457] *The first rule of decision thus laid down by Congress for our guidance is that we are to have regard to the law of nations, and as to this it is sufficient to say that it is the usage of the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. *Henderson* v. *Poindexter*, 25 U. S. 12 Wheat. 585 [6: 719]; *United States* v. *Arredondo*, 31 U. S. 6 Pet. 712 [8: 555]; *United States* v. *Ritchie*, 58 U. S. 17 How. 525 [15: 236].

We adopt the language of *Chief Justice* Marshall, in the case of *United States* v. *Percheman*, 31 U. S. 7 Pet. 51, 86 [8: 604, 617], as follows: "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conquerer to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

We are next directed to consider the stipulations of the treaties between the two governments. The provisions of the treaty of 1848 relevant to the present subject are contained in its eighth article (9 Stat. at L. 929), and we find that they declare that "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States as defined by the present treaty, shall be free to continue where they now reside, . . . retaining property which they possess in said territories. . . . In the said territories, property of every kind now belonging to Mexicians not established there shall be inviolably respected. . . . The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

458] And in the ninth article it is further *provided that, pending the admission of such territories into the Union of the United States, Mexicans who reside therein "shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

The sixth article of the treaty of 1853 (10 Stat. at L. 1035) provides that "no grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day—twenty-fifth of September—when the minister and subscriber to this treaty on the part of the United States proposed to the government of Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, nor will any grants previously made be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico."

With such articles contained in the treaties, and their meaning, submitted to our consideration, we have no difficulty in holding that the question is whether the land in controversy was the property of the claimants before the treaties, and, if so, that its protection is guaranteed by the treaties as well as the law of nations.

The next guide prescribed by the Act is a regard for "the laws and ordinances of the government from which it—the grant—is alleged to have been derived."

In this part of our inquiry we shall draw our information from a treatise on the Spanish and American land laws, recently published by Matthew G. Reynolds, the United States attorney for the court of private land claims, and which is referred to in the brief filed for the government in the present case. From this we learn that the general constituent Congress of Mexico passed, on August 18, 1824, a colonization law, providing for the colonization of the territories of the Republic; that New Mexico, at the date of the passing of this law, was a territory, and so continued until December 30, 1836, when it became a department.

A code of colonization was adopted on November 21, 1828, which contains regulations for the colonization of the *territories, where-[459 by the political chiefs or governors of the territories are authorized to grant the public lands of their respective territories to contractors, families, or private persons, Mexicans, or foreigners, who may apply for them, and are directed, when a grant is definitely made, to sign and give a document to serve as a title to the party in interest, it being stated therein that the grant is made in entire conformity with the provisions of the law, in virtue of which the possession shall be given.

A question is raised in the brief for the government whether the courts of the United States can take judicial notice of the laws and regulations of Mexico pertaining to grants made prior to the cession. It was said in *Fremont* v. *United States*, 58 U. S. 17 How. 557 [15: 245], referring to a similar question under the treaties with Spain, ceding territories to the United States, "it is proper to remark that the laws of these territories under which titles were claimed were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages."

The same position was asserted in the case of *United States* v. *Perot*, 98 U. S. 428 [25: 251].

It is, indeed, suggested that the seventh section of the Act establishing the court of private

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land claims, in respect that it provides that "the decree shall, in all cases, refer to the treaty, law, or ordinance under which such claim is confirmed or rejected," implies a contrary view. We do not so regard that provision, nor do we perceive, in any features of the Act, an intention on the part of Congress to restrict the powers of the court recognized by the previous decisions.

We shall now proceed to apply these principles to the facts of the case.

It is conceded by the government's brief that the claimants or their ancestors did come to Cubero in 1833, and were put in possession of the lands claimed, and have held them ever [460] since. *But it is contended that there is no sufficient evidence that the title asserted by the claimant was lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the Republic of Mexico having lawful authority to make grants of land, as prescribed by section 13 of the Act; and it is said that the only title and interest acquired by the claimants was purchased by these settlers from one Francisco Baca, a Navajo Indian.

We have examined the evidence on this point contained in the record, and are of opinion that it warranted the finding of the court below that the complainants' title was derived from the Republic of Mexico, and was complete and perfect at the date when the United States acquired sovereignty in the territory of New Mexico, within which the land was situated.

Without undertaking to give the evidence in full, we shall briefly state its principal features:

Penito Baca, a witness on behalf of the claimants, testified that he was eighty years old, and had resided on these lands since the year 1833; that the settlers were put in possession by the government; that Sarracino was governor, who held the government at Santa Fé. He enumerated by name a number of the colonists, and stated that there was in their possession a written grant from the governor, which he had heard read and had seen; that this writing, which was in the custody of Juan Chaves, could not be found after the death of the latter. He also described the boundaries of the grant, and testified that portions of these lands were distributed among the settlers, twenty-five varas to each, and that the remaining land was given for the common use, for the stock of all.

Jose Antonio Duran testified that he was ninety-two years of age; that he was one of the settlers of the town of Cubero in the year 1833, and had there resided ever since; that their title was a written title, made to them by Francisco Sarracino, the governor. He gave a description of the boundaries of the land and the names of some of the original settlers of 1833. He stated that Don Juan Chaves and Don Juan Garcia, as commissioners, put them in possession. The witness could read and write Spanish, and he had seen and read the writ- [461] ten title *from the governor, Sarracino. He testified that when Juan Chaves died the title paper was missing, and that it was currently reported that one Vicente Margarito Hernandez, who had been his secretary, had carried off the testimonio or official copy of the grant; that since 1833 the settlers and their children have lived upon and cultivated the land. He further stated that when they applied for the grant from the government, an Indian, named Francisco Baca, was on the land, and that it was made a condition that the Indian would abandon it.

Pablo Pino was a witness, eighty-two years of age, and had lived in the town of Cubero for forty-eight years, where he had purchased some land from the original settlers, in possession of which he had remained ever since.

Pedro Molina, eighty years of age, was one of the original settlers in 1833, and had lived with his children on these lands, and cultivated them ever since.

Juan Duran had lived in Cubero since 1833. His father and grandfather were original settlers. He had heard the original grant read. The papers were in the possession and read by Juan Garcia and one Juan Chaves, judge and commissioner. That it was one of the conditions before they were allowed to settle that they should buy the claim of Francisco Baca, the Navajo Indian. This witness testified to the tradition that the title papers of the grant had been stolen or carried away by Vicente Margarito Hernandez. The witness had been a school teacher for many years; could read and write Spanish, and had seen the original testimonio of the grant and heard it read, and that it was given by the governor, Francisco Sarracino.

The record likewise contains translations of documents found in the archives of Valencia county, pertaining to a dispute between the town of Cubero and the pueblo of Laguna as to boundaries. These papers were dated in 1835, 1840, and 1841, and disclose a settlement of the dispute, certified to by Jose Francisco Chavez of Baca, judge commissioner in the second district of the department of New Mexico. In this certificate the lands within Cubero are stated to have been purchased from Francisco Baca, the Navajo.

*A number of original deeds were like- [462] wise in evidence, variously dated from 1841 to 1856, showing sales of parcels of these lands; also a petition by the people of the town of Cubero to the surveyor general of the territory of New Mexico, dated April 2, 1856, stating that they were in possession under authority of a grant from the Mexican government about the year 1834; that the original documents were lost; and asking that their lands should be surveyed, etc.

The claimants likewise proved, by quite a number of witnesses, residents of the territory of New Mexico, that about 1870 a considerable portion of the archives of that territory, containing documents relating to Mexican grants made to lands within that territory, were lost; that these papers were deposited in the territorial library, where some of the witnesses had seen them in 1868 and 1869; that they were sold as waste papers by the librarian, Bond, and were scattered through the country. Many of these were Spanish documents and pertained to grants of land. When the governor of the territory heard that there was a complaint made by the people of this treatment of public archives, he made efforts to get them

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returned, but the evidence is clear that many of them were destroyed and lost. The claimants also called as a witness William M. Tipton, who had been employed for several years in the office of the surveyor general of the territory of New Mexico, and had charge of the Spanish and Mexican archives. He testified that the books and records in that office purporting to contain the registry of land grants made by the Spanish and Mexican governments, prior to the time the government of the United States took charge, are in a disconnected, fragmentary form, and that one of the most important books, containing a record of grants made by the Spanish and Mexican governments, is missing, and is supposed to have been stolen. He also stated that there was not in the surveyor general's office any index of the dates, list of original expedientes or warrants of title to Spanish and Mexican grants.

This evidence was adduced to sustain the allegation in the petition that the governor and chief alcalde delivered to the settlers a duplicate 463]of the granting decree and of the act *of juridical possession of the chief alcalde in the premises, and placed the originals of said decree and act in the Mexican archives at Santa Fé, and that said originals, with a great part of other valuable archives of the Mexican government, although once in the custody of the United States after the treaty of Guadalupe Hidalgo, were negligently destroyed or lost.

The only evidence adduced by the United States was the testimony of Ira M. Bond, who had acted as territorial librarian in 1869 and 1870, and who testified that, under instructions of Governor Pile, he had sold and disposed of a lot of the old records, supposing them to be of no value; that this created quite a talk in the town; that, finally, the governor instructed him to recover them back, and that most, but not all of them, were recovered. This witness said that he could not read Spanish; that these documents were in that language, and that there might have been grants among them.

In view of this large body of uncontradicted evidence we think that the court below was plainly right in finding that the claimants had satisfactorily sustained the allegations of their petition. Not only was their evidence of the existence of an original grant by the government of New Mexico, and of the loss of original records sufficient to justify the introduction of secondary evidence, but there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisturbed possession and enjoyment of this tract of land. The counsel for the government, indeed, contend that the court of private land claims and this court have no power to presume a grant upon proof of long-continued possession only; that their power is confined to confirming grants lawfully and regularly derived from Spain and Mexico.

It is scarcely necessary for us to consider such a question, because, as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the governor of New Mexico, who, under the laws then in force, had authority to make the grant. However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed *in this case. With-[464 out going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. 1 Greenl. Ev. (12th ed.) § 17; *Ricard* v. *Williams*, 20 U. S. 7 Wheat. 109 [5: 410]; *Coolidge* v. *Learned*, 8 Pick. 504.

Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *Nullum tempus occurrit regi;* yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev. § 45.

The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon (Best, Ev. § 366), and was therefore a feature of the Mexican law at the time of the cession.

Finally, the rule of the law of nations, that private property ceded by one nation to another, when held by a title vested before the act of cession, should be respected; the express provisions to that effect contained in the treaty between Mexico and the United States; the evidence of the fact of a grant, legal under the forms of Mexican law, and of a juridical possession given thereunder; and the strong presumption growing out of an exclusive and uninterrupted possession and enjoyment of more than half a century,—bring us to concur in the decree of the court below.

*The objection that the Atlantic & [465 Pacific Railroad Company, as grantee from the United States of a part of the tract in question, was a necessary party defendant, has not been pressed in argument, and we only notice it to say that, under the provisions of the fifth section of this Act, the private rights of third parties are not affected by any proceeding or decree under said Act.

The decree of the court below is affirmed.

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THE INCANDESCENT LAMP PATENT.

(See S. C. Reporter's ed. 465-477.)

Invalid patent.

The claims of the Sawyer and Man patent No. 317,076, issued May 12, 1885, for an incandescing conductor for an electric lamp, composed of carbonized fibrous or textile material, are (except the third claim) too indefinite to sustain the patent, and it is therefore invalid.

[No. 10.]

Argued October 29, 30, 1894. Decided November 11, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Pennsylvania dismissing a suit in equity brought by the Consolidated Electric Light Company against the McKeesport Light Company to recover damages for the infringement of letters patent, 317,076, issued May 12, 1885, to the Electro-Dynamic Light Company, assignee of Sawyer and Man, for an electric light, and holding the patent to be invalid. *Affirmed.*

See same case below, 40 Fed. Rep. 21.

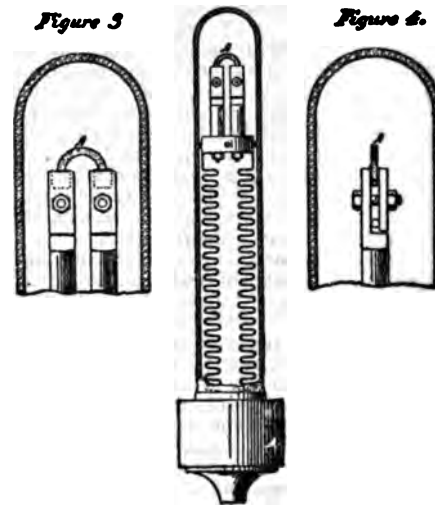
Statement by *Mr. Justice* **Brown:**

This was a bill in equity, filed by the Consolidated Electric Light Company against the McKeesport Light Company, to recover damages for the infringement of letters patent No. 317,076, issued May 12, 1885, to the Electro-Dynamic Light Company, assignee of Sawyer and Man, for an electric light. The defendants justified under certain patents to Thomas A. Edison, particularly No. 223,898, issued January 27, 1880; denied the novelty and utility of the complainant's patent, and averred that the same had been fraudulently and illegally procured. The real defendant was the Edison Electric Light Company, and the case involved a contest between what are known as the Sawyer and Man and the Edison systems of electric lighting.

466] *In their application, Sawyer and Man stated that their invention related to "that class of electric lamps employing an incandescent conductor enclosed in a transparent, hermetically sealed vessel or chamber, from which oxygen is excluded, and . . . more especially to the incandescing conductor, its substance, its form, and its combination with the other elements composing the lamp. Its object is to secure a cheap and effective apparatus; and our improvement consists, first, of the combination, in a lamp chamber composed wholly of glass, as described in patent No. 205,144," upon which this patent was declared to be an improvement, "of an incandescing conductor of carbon made from a vegetable fibrous material, in contradistinction to a similar conductor made from mineral or gas carbon, and also in the form of such conductor so made from such vegetable carbon, and combined in the lighting circuit with the exhausted chamber of the lamp."

The following drawings exhibit the substance of the invention:

Figure 2.



*The specification further stated that: [467

"In the practice of our invention we have made use of carbonized paper, and also wood carbon. We have also used such conductors or burners of various shapes, such as pieces with their lower ends secured to their respective supports and having their upper ends united so as to form an inverted V-shaped burner. We have also used conductors of varying contours—that is, with rectangular bends instead of curvilinear ones; but we prefer the arch shape."

NOTE—*As to assignments of patents, their construction and effect; licenses to use patents; royalties*, see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

As to anticipation of patents; prior patents and publications; application and issue; claims and specifications, see note to Leggett v. Standard Oil Co. 37: 737.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects, see note to Grant v. Walter, 37: 553.

As to reissued patents for inventions, when valid; effect of issue; laches, see note to National Meter Co. v. Yonkers Water Comrs. 37: 614.

As to what constitutes infringement of patents; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

For what patents are granted; when declared void, see note to Evans v. Eaton, 4: 433.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

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"No especial description of making the illuminating carbon conductors, described in this specification and making the subject-matter of this improvement, is thought necessary, as any of the ordinary methods of forming the materi..l to be carbonized to the desired shape and size, and carbonizing it while confined in retorts in powdered carbon, substantially according to the methods in practice before the date of this improvement, may be adopted in the practice thereof by any one skilled in the arts appertaining to the making of carbons for electric lighting or for other use in the arts."

"An important practical advantage which is secured by the arch form of incandescing carbon is that it permits the carbon to expand and contract under the varying temperatures to which it is subjected when the electric current is turned on or off, without altering the position of its fixed terminals. Thus the necessity for a special mechanical device to compensate for the expansion and contraction which has heretofore been necessary is entirely dispensed with, and thus the lamp is materially simplified in its construction. Another advantage of the arch form is that the shadow cast by such burners is less than that produced by other forms of burners when fitted with the necessary devices to support them."

"Another important advantage resulting from our construction of the lamp results from the fact that the wall forming the chamber of the lamp through which the electrodes pass to the interior of the lamp is made wholly of glass, by which all danger of oxidation, leakage, or short circuiting is avoided."

"The advantages resulting from the manufacture of the carbon from vegetable, fibrous, or 468]textile material instead of *mineral or gas carbon are many. Among them may be mentioned the convenience afforded for cutting and making the conductor in the desired form and size, the purity and equality of the carbon obtained, its susceptibility to tempering, both as to hardness and resistance, and its toughness and durability. We have used such burners in closed or hermetically sealed transparent chambers, in a vacuum, in nitrogen gas, and in hydrogen gas; but we have obtained the best results in a vacuum or an attenuated atmosphere of nitrogen gas, the great desideratum being to exclude oxygen or other gases capable of combining with carbon at high temperatures from the incandescing chamber, as is well understood."

The claims were as follows:

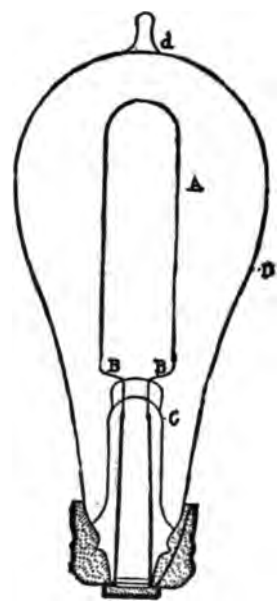
"1. An incandescing conductor for an electric lamp, of carbonized fibrous or textile material and of an arch or horseshoe shape, substantially as hereinbefore set forth."

"2. The combination, substantially as hereinbefore set forth, of an electric circuit and an incandescing conductor of carbonized fibrous material, included in and forming part of said circuit, and a transparent hermetically sealed chamber in which the conductor is inclosed."

"3. The incandescing conductor for an electric lamp, formed of carbonized paper, substantially as described."

"4. An incandescing electric lamp consists of the following elements in combination: first, an illuminating chamber made wholly of glass hermetically sealed, and out of which all carbon-consuming gas has been exhausted or driven; second, an electric circuit conductor passing through the glass wall of said chamber and hermetically sealed therein, as described; third, an illuminating conductor in said circuit, and forming part thereof within said chamber, consisting of carbon made from a fibrous or textile material, having the form of an arch or loop, substantially as described, for the purpose specified."

The commercial Edison lamp used by the appellee, and which is illustrated below, is composed of a burner, A, made of carbonized bamboo of a peculiar quality discovered by Mr. Edison to be highly useful for the purpose, and having a length of about six inches, a diameter of about five one *thousandths of an [469 inch, and an electrical resistance of upwards of 100 ohms. This filament of carbon is bent into the form of a loop, and its ends are secured by good electrical and mechanical connections to two fine platinum wires B B. These wires pass through a glass stem, C, the glass being melted and fused upon the platinum wires. A glass globe, D, is fused to the glass stem C. This glass globe has originally attached to it, at the point *d*, a glass tube, by means of which a connection is made with highly organized and refined exhausting apparatus, which produces in the globe a high vacuum, whereupon the glass tube is melted off by a flame, and the globe is closed by the fusion of the glass at the point *d*.



Upon a hearing in the circuit court before *Mr. Justice* Bradley upon pleadings and proofs, the court held the patent to be invalid, and dismissed the bill. 40 Fed. Rep. 21. Thereupon complainant appealed to this court.

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Messrs. **Edmund Wetmore, Leonard E. Curtis,** *John W. Houston,* and *Thomas B. Kerr* for appellant.

Messrs. **Frederick P. Fish** and *Richard N. Dyer* for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

In order to obtain a complete understanding of the scope of the Sawyer and Man patent, it is desirable to consider briefly the state of the art at the time the application was originally made, which was in January, 1880.

Two general forms of electric illumination had for many years been the subject of experiments more or less successful, one of which was known as the arc light, produced by the passage of a current of electricity between the points of two carbon pencils, placed end to end, and slightly separated from each other. In its passage from one point to the other through the air, the electric current took the form of an arc, and gave the name to the light. This form of light had been produced by Sir Humphrey Davy as early as 1810, and, by successive improvements in the carbon pencils and in their relative adjustment to each other, had come into general use as a means of lighting streets, halls, and other large spaces; but by reason of its intensity, the uncertain and flickering character of the light, and the rapid consumption of the carbon pencils, it was wholly unfitted for domestic use. The *second* form of illumination is what is known as the incandescent system, and consists generally in the passage of a current of electricity through a continuous strip or piece of refractory material, which is a conductor of electricity, but a poor conductor—in other words, a conductor offering a considerable resistance to the flow of the current through it. It was discovered early in this century that various substances might be heated to a white heat by passing a sufficiently [471] strong current of electricity *through them. The production of a light in this way does not, in any manner, depend upon the consumption or wearing away of the conductor, as it does in the arc light. A *third* system was a combination of the two others, but it never seems to have come into general use, and is unimportant in giving a history of the art.

For many years prior to 1880, experiments had been made by a large number of persons, in various countries, with a view to the production of an incandescent light which could be made available for domestic purposes, and could compete with gas in the matter of expense. Owing partly to a failure to find a proper material, which should burn but not consume, partly to the difficulty of obtaining a perfect vacuum in the globe in which the light was suspended, and partly to a misapprehension of the true principle of incandescent lighting, these experiments had not been attended with success, although it had been demonstrated as early as 1845 that, whatever material was used, the conductor must be enclosed in an air-tight bulb, to prevent it from being consumed by the oxygen in the atmosphere. The chief difficulty was that the carbon burners were subject to a rapid disintegration or evaporation, which electricians assumed was due to the disrupting action of the electric current, and hence the conclusion was reached that carbon contained, in itself, the elements of its own destruction, and was not a suitable material for the burner of an incandescent lamp.

It is admitted that the lamp described in the Sawyer and Man patent is no longer in use and was never a commercial success; that it does not embody the principle of high resistance with a small illuminating surface; that it does not have the filament burner of the modern incandescent lamp; that the lamp chamber is defective; and that the lamp manufactured by the complainant and put upon the market is substantially the Edison lamp: but it is said that, in the conductor used by Edison (a particular part of the stem of the bamboo lying directly beneath the silicious cuticle, the peculiar fitness for which purpose was undoubtedly discovered by him), he made use of a fibrous or textile material, covered by the patent to *Sawyer and Man, and is therefore an [472] infringer. It was admitted, however, that the third claim—for a conductor of carbonized paper—was not infringed.

The two main defenses to this patent, are (1) that it is defective upon its face, in attempting to monopolize the use of all fibrous and textile materials for the purpose of electric illumination; and (2) that Sawyer and Man were not, in fact, the first to discover that these were better adapted than mineral carbons to such purposes.

Is the complainant entitled to a monopoly of all fibrous and textile materials for incandescent conductors? If the patentees had discovered in fibrous and textile substances a quality common to them all, or to them generally, as distinguishing them from other materials, such as minerals, etc., and such quality or characteristic adapted them peculiarly to incandescent conductors, such claim might not be too broad. If, for instance, minerals or porcelains had always been used for a particular purpose, and a person should take out a patent for a similar article of wood, and woods generally were adapted to that purpose, the claim might not be too broad, though defendant used wood of a different kind from that of the patentee. But if woods generally were not adapted to the purpose, and yet the patentee had discovered a wood possessing certain qualities, which gave it a peculiar fitness for such purpose, it would not constitute an infringement for another to discover and use a different kind of wood, which was found to contain similar or superior qualities. The present case is an apt illustration of this principle. Sawyer and Man supposed they had discovered in carbonized paper the best material for an incandescent conductor. Instead of confining themselves to carbonized paper, as they might properly have done, and in fact did, in their third claim they made a broad claim for every fibrous or textile material, when in fact an examination of over six thousand vegetable growths showed that none of them possessed the peculiar qualities that fitted them for that purpose. Was everybody, then, precluded by this broad claim from making further investigation? We think not.

The injustice of so holding is manifest in view of the *experiments made and con- [473]

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tinued for several months by Mr. Edison and his assistants, among the different species of vegetable growth, for the purpose of ascertaining the one best adapted to an incandescent conductor. Of these he found suitable for his purpose only about three species of bamboo, one species of cane from the valley of the Amazon, impossible to be procured in quantities on account of the climate, and one or two species of fibres from the agave family. Of the special bamboo, the walls of which have a thickness of about three eighths of an inch, he used only about twenty thousandths of an inch in thickness. In this portion of the bamboo the fibers are more nearly parallel, the cell walls are apparently smallest, and the pithy matter between the fibers is at its minimum. It seems the carbon filaments cannot be made of wood—that is, exogenous vegetable growth—because the fibers are not parallel and the longitudinal fibers are intercepted by radial fibers. The cells composing the fibers are all so large that the resulting carbon is very porous and friable. Lamps made of this material proved of no commercial value. After trying as many as thirty or forty different woods of exogenous growth, he gave them up as hopeless. But finally, while experimenting with a bamboo strip which formed the edge of a palm leaf fan, cut into filaments, he obtained surprising results. After microscopic examination of the material, he despatched a man to Japan to make arrangements for securing the bamboo in quantities. It seems that the characteristic of the bamboo which makes it particularly suitable is, that the fibers run more nearly parallel than in other species of wood. Owing to this, it can be cut up into filaments having parallel fibers, running throughout their length, and producing a homogeneous carbon. There is no generic quality, however, in vegetable fibers, because they are fibrous, which adapts them to the purpose. Indeed, the fibers are rather a disadvantage. If the bamboo grew solid without fibers, but had its peculiar cellular formation, it would be a perfect material, and incandescent lamps would last at least six times as long as at present. All vegetable fibrous growths do not have a suitable 474]cellular structure. In *some the cells are so large that they are valueless for that purpose. No exogenous, and very few endogenous, growths are suitable. The messenger whom he despatched to different parts of Japan and China sent him about forty different kinds of bamboo, in such quantities as to enable him to make a number of lamps, and from a test of these different species he ascertained which was best for the purpose. From this it appears very clearly that there is no such quality common to fibrous and textile substances generally as makes them suitable for an incandescent conductor, and that the bamboo which was finally pitched upon, and is now generally used, was not selected because it was of vegetable growth, but because it contained certain peculiarities in its fibrous structure which distinguished it from every other fibrous substance. The question really is whether the imperfectly successful experiments of Sawyer and Man, with carbonized paper and wood carbon, conceding all that is claimed for them, authorize them to put under tribute the results of the brilliant discoveries made by others.

It is required by Revised Statutes, § 4888, that the application shall contain "a written description of the device and of the manner and process of making, constructing, compounding, and using it in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound, and use the same." The object of this is to apprise the public of what the patentee claims as his own, the courts of what they are called upon to construe, and competing manufacturers and dealers of exactly what they are bound to avoid. *Grant* v. *Raymond*, 31 U. S. 6 Pet. 218, 247 [8: 376, 386]. If the description be so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, the patent is void.

It was said by *Mr. Chief Justice* Taney in *Wood* v. *Underhill*, 46 U. S. 5 How. 1, 5 [12: 23, 24], with respect to a patented compound for the purpose of making brick or tile, which did not give the relative proportions of the different ingredients: "But when the specification of a new composition of matter gives only the *names of the substances which are to be[475 mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent void. And the same rule would prevail where it was apparent that the proportions were stated ambiguously and vaguely. For in such cases it would be evident, on the face of the specification, that no one could use the invention without first ascertaining, by experiment, the exact proportion of the different ingredients required to produce the result intended to be obtained. . . . And if, from the nature and character of the ingredients to be used, they are not susceptible of such exact description, the inventor is not entitled to a patent."

So, in *Tyler* v. *Boston*, 74 U. S. 7 Wall. 327 [19: 98], wherein the plaintiff professed to have discovered a combination of fusel oil with the mineral and earthy oils, constituting a burning fluid, the patentee stated that the exact quantity of fusel oil which is necessary to produce the most desirable compound must be determined by experiment. And the court observed: "Where a patent is claimed for such a discovery it should state the component parts of the new manufacture claimed with clearness and precision, and not leave a person attempting to use the discovery to find it out 'by experiment.'" See also *Béné* v. *Jeantet*, 129 U. S. 683 [32: 803]; *Howard* v. *Detroit Stove Works*, 150 U. S. 164, 167 [37. 1039, 1040]; *Schneider* v. *Lovell*, 10 Fed. Rep. 666; *Welling* v. *Crane*, 14 Fed. Rep. 571.

Applying this principle to the patent under consideration, how would it be possible for a person to know what fibrous or textile material was adapted to the purpose of an incandescent conductor, except by the most careful and painstaking experimentation? If, as before observed, there were some general quality, running through the whole fibrous and textile kingdom, which distinguished it from every other, and gave it a peculiar fitness for the

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particular purpose, the man who discovered such quality might justly be entitled to a patent; but that is not the case here. An examination of the materials of this class carried on for months revealed nothing that seemed to be adapted to the purpose; and even the carbonized paper and wood carbons specified in the patent, 476]*experiments with which first suggested their incorporation therein, were found to be so inferior to the bamboo, afterwards discovered by Edison, that the complainant was forced to abandon its patent in that particular, and take up with the material discovered by its rival. Under these circumstances, to hold that one who had discovered that a certain fibrous or textile material answered the required purpose, should obtain the right to exclude everybody from the whole domain of fibrous and textile materials, and thereby shut out any further efforts to discover a better specimen of that class than the patentee had employed, would be an unwarranted extension of his monopoly, and operate rather to discourage than to promote invention. If Sawyer and Man had discovered that a certain carbonized paper would answer the purpose, their claim to all carbonized paper would, perhaps, not be extravagant; but the fact that paper happens to belong to the fibrous kingdom did not invest them with sovereignty over this entire kingdom, and thereby practically limit other experimenters to the domain of minerals.

In fact, such a construction of this patent as would exclude competitors from making use of any fibrous or textile material would probably defeat itself, since, if the patent were infringed by the use of any such material, it would be anticipated by proof of the prior use of any such material. In this connection it would appear, not only that wood charcoal had been constantly used since the days of Sir Humphrey Davy for arc lighting, but that, in the English patent to Greener and Staite of 1846, for an incandescent light, "charcoal reduced to a state of powder" was one of the materials employed. So also, in the English patent of 1841 to De Moleyns, "a finely pulverized boxwood charcoal or plumbago" was used for an incandescent electric lamp. Indeed, in the experiments of Sir Humphrey Davy, early in the century, pieces of well-burned charcoal were heated to a vivid whiteness by the electric current, and other experiments were made which evidently contemplated the use of charcoal heated to the point of incandescence. Mr. Broadnax, the attorney who prepared the application, it seems was also of 477]opinion that a broad claim for *vegetable carbons could not be sustained because charcoal had been used before in incandescent lighting. There is undoubtedly a good deal of testimony tending to show that, for the past fifty or sixty years, the word "charcoal" has been used in the art, not only to designate carbonized wood, but mineral or hard carbons, such as were commonly employed for the carbon pencils of arc lamps. But we think it quite evident that, in the patents and experiments above referred to, it was used in its ordinary sense of charcoal obtained from wood. The very fact of the use of such word to designate mineral carbons indicates that such carbons were believed to possess peculiar properties required for illumination that before that had been supposed to belong to wood charcoal.

We have not found it necessary in this connection to consider the amendments that were made to the original specification, upon which so much stress was laid in the opinion of the court below, since we are all agreed that the claims of this patent, with the exception of the third, are too indefinite to be the subject of a valid monopoly.

As these suggestions are of themselves sufficient to dispose of the case adversely to the complainant, a consideration of the question of priority of invention, or rather of the extent and results of the Sawyer and Man experiments, which was so fully argued upon both sides, and passed upon by the court below, becomes unnecessary.

For the reasons above stated the decree of the circuit court is affirmed.

EDWARD S. RICHARDS
v.
CHASE ELEVATOR COMPANY ET AL.

(See S. C. Reporter's ed. 477-487.)

What is invention in a patent—combination of old elements, when patentable—void patent.

1. The omission of an element in a combination may constitute invention, if the result of the new combination be the same as before; yet if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention, if the elements retained perform the same function as before.

NOTE.—*As to assignments of patents, their construction and effect; licenses to use patents; royalties*, see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

As to anticipation of patents; prior patents and publications; application and issue; claims and specifications, see note to Leggett v. Standard Oil Co. 37: 737.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects, see note to Grant v. Walter, 37: 553.

As to reissued patents for inventions, when valid; effect of reissue; laches, see note to National Meter Co. v. Yonkers Water Comrs. 37: 614.

As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

For what patents are granted; when declared void, see note to Evans v. Eaton, 4: 433.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

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2. To make a combination of old elements patentable, there must be some new result accomplished, and where the result is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old ways, there is no invention.

3. The device of the Richards patent for a grain transferring apparatus lacks invention.

[Nos. 310-312.]

Petition for rehearing received and distributed June 3, 1896. Decided November 11, 1896.

ON APPLICATION for leave to file petition for rehearing of cases reported in 158 U. S. 299 [39: 991]. *Denied.*

The following is the petition for rehearing by complainant appellant:

And now comes the above-named complainant appellant, and respectfully petitions this honorable court to grant a rehearing in the three several above-entitled causes, and for cause therefor says:

First. It seems to us entirely evident from a reading of the opinion of *Mr. Justice* Brown in this case, that such opinion was arrived at by two mistaken and erroneous conclusions as to questions of fact in regard to the Richards patent in question, and its relation to the grain elevators of this country. It is assumed, in the first place, that the judicial knowledge which this court has of the construction and operation of grain elevators is such that the court can see no patentable distinction or difference between a grain elevator and the grain transferring and weighing devices of the Richards patent. Buildings denominated elevators in this country for the storage of grain are a distinct classification to themselves. Such buildings are called interchangeably elevators, warehouses, and stores, but the entire object and purpose of these elevators, stores, and warehouses is to afford the opportunity of housing and storing vast quantities of grain at desired points.

In the eastern states these buildings are called "stores," in the middle states, "warehouses," and in the principal cities of the western states, 479] "elevators." But their common *object and purpose are the same, namely, the housing and storage of grain in great quantities, for indefinite periods of time.

Now the object of Mr. Richards' invention is to entirely obviate and do away with elevators, and the adoption of the invention of Mr. Richards' patent would mean the conversion of every elevator in this country to other and different commercial purposes. There can be no better practical illustration of the truth of this statement than to call the attention of this court to the fact, which we think the court will take judicial notice of from simply traveling upon the lines of two of the principal railroad defendants in these cases, in late years, namely, the Michigan Central Railroad Company and the Chicago Grand Trunk Railroad Company. Both of these roads have "elevators" of all sizes and capacities in connection with and along the lines of their main track and branches,—"elevators" on the banks of lakes, "elevators" on the banks of rivers, "elevators" on the banks of canals;—yet neither of these defendant roads will or can use such elevators "for transferring and weighing grains without mixing the different lots or loads with each other, thus preserving the identity of each lot while it is being transferred from one car to another." And both of these defendants will let their "elevators" lie idle and and vacant and will build alongside of them the cheap and simple device of Richards' patent, for transferring their grain from one car to another without storage and without mixing, etc.

This court says: "We do not feel compelled to shut our eyes to a fact so well known as that elevators have, for many years, been used for transferring grain from railway cars to vessels lying alongside, and that this method involves the use of a railway track entering a fixed or stationary building; an elevator apparatus; elevator hopper scales for weighing the grain; and a discharge spout for discharging the grain into the vessel."

While it may be true that in some part of an "elevator" building all of the above may be found with no suggestion or capacity of utilization, as described by Richards, we most earnestly contend that the court should not also shut its eyes to the fact that no elevator ever constructed in this country *was ever [480 used or adapted or could be used or adapted for continuous and automatic transfer of grain from one car to another, weighing the grain *in transitu* and preserving the identity of each lot of grain in such transfer.

There is not the slightest capacity in the grain transferring and weighing devices of Richards for any housing or storage capacity. That element has been entirely eradicated by the employment of the Richards device, and intentionally so. We believe that this whole confusion of the Richards invention at stake with elevators arises from the fact of the illustrative drawings which Mr. Richards solicitor saw fit to employ in setting forth Mr. Richards' invention.

Figure 1 of said drawings furnishes grounds of suggestion of the "elevator characteristic," but it will be readily seen, even by reference to figure 1, that such drawing simply discloses a covered framework for weather protection in the employment of the transferring apparatus of Richards from one car to another. There is no possible opportunity of storage or warehouse purposes present in such drawings, as the hopper H is merely a unit part of the hopper scales and serves its only purpose in retaining the grain on the scales until the desired weight is registered. This whole question of "elevator identity" was raised in the Patent Office, and that office, upon an investigation of the facts, at once recognized the distinction between every and all classes of elevators in this country and the Richards invention, and passed the patent to grant, and all we ask in this case is that this great court will not itself decide these mechanical questions and the question of mechanical effects, upon a recollection of devices, wherein there is opportunity for mistake and an equal opportunity of making certain disputed questions by testimony in relation to which there can be no mistake.

Take, for example, where this court finds that in the "elevators" of this country there can be found "hopper scales for weighing

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grain." This court certainly cannot take judicial notice of the fact, for such fact never exists, that grain is taken from one car and delivered directly to these hopper scales for any purpose whatever; much less for automatically 481] weighing *the grain by such scales and delivering such grain without deposit in the elevator to a companion car for continuous transferring.

Take, for example again, the quoted reference of a judicial knowledge of this court as to a discharge spout. This court cannot certainly take judicial notice that there has ever existed in any elevator construction a spout connected with hopper scales, wherein grain is weighed by such scales and delivered continuously and instantly therefrom to an awaiting railroad car. To make our position more apparent, supposing Mr. Richards, in the drawings of his patent, had not disclosed the skeleton framework of the building for supporting his transferring and weighing mechanism, but had simply disclosed the means for effecting such transfer, and his claim had read as follows: "What I claim as new and desire to secure by letters patent is: In combination with two oppositely facing railroad tracks and cars, means for continuously receiving and elevating the grain of one car into elevated hopper scales, means for automatically weighing and registering such elevated grain by such hopper scales, and means for discharging such elevated grain, so weighed and registered, into said oppositely facing railroad car, continuously by one operation."

Could there have been any contention that this invention so stated would be met by any elevator or warehouse in this country, and of which this court could take judicial notice? Yet the above represents the actual invention of Mr. Richards, and we most earnestly contend that the awkward and inartistic description of his invention by such statement of his specification as associates and connects such invention in the mind of the court with a supposed elevator building should not stand to the destruction of his patent and invention, without any opportunity given him by a trial and day in court to demonstrate and convince this court of the correctness of his contentions.

Second. The second ground of contention upon which we base this petition for rehearing resides in the statement of *Mr. Justice* Brown 482] that "not a new function or result *is suggested by the combination in question." Most earnestly and emphatically do we take issue with this statement.

We again state in italics Mr. Richards' statement of the invention as taken from his patent: "*The purpose of my invention is to provide improved means for transferring and weighing grain without mixing the different lots or loads with each other, thus preserving the identity of each lot, while it is being transferred from one car to another.*"

Every function and result of this means and apparatus are new. What was the new function or result suggested by the combination in question? Briefly stated, such new function and result of Richards' combination was its continuous transfer by the mechanical means described of a car load or lot of grain from one car to another, weighing the grain in its travels, so that when the grain was lodged in a desired car by a continuous operation its identity had been preserved and its weight actually ascertained. No such function or result in any kind of a combination had ever existed in this country, as can be shown, absolutely by unassailable testimony, if the opportunity is given, and nothing can be more clearly demonstrated if such opportunity is given, that in no "elevator," warehouse, or store in this country was such function or result known or capable of employment. In every elevator that exists or ever existed in this country, as can be demonstrated and proved if the opportunity is offered, it is simply impossible to transfer and weigh the grain without mixing the different lots or loads with each other, and it was and is simply impossible to preserve the identity of one lot or load one from the other in any elevator ever constructed, or to continuously transfer one car load of grain to another, weighing the grain as a part of such transfer, and no contention has ever been made that such function or result could be accomplished in any elevator in this country. The Lake Shore & Michigan Southern Railroad Company paid the patentee, Richards, more than $100,000 for employing this new function and result, that railroad having elevators galore along the sides of their track at the time they made such payment and incurred its obligation. Is it too much to ask at the *hands of this court an opportunity [483 to prove the correctness of this statement, that the function and result of this combination is new, especially as the government has so decided and given Richards his grant here in contest therefor?

We fail to appreciate the relevancy of the suggested parallelism between Mr. Richards' invention of means for transferring and weighing grain "without mixing different lots" and the conditions set forth in the opinion of *Mr. Justice* Brown.

Take, for example, the statement of the opinion, as follows: "Suppose, for instance, it were old to run a railroad track into a station or depot for the reception and discharge of passengers, it certainly would not be patentable to locate such stations between two railroad tracks for the reception of passengers on both sides, and to add to the accommodations a ticket office, a newspaper stand, a restaurant, and cigar stand or the thousand and one things that are found in buildings of that character. It might as well be claimed that the man who first introduced an elevator into a private house, it having been previously used in public buildings, was entitled to a patent for a new combination." What connection have these conditions to do with Mr. Richards' invention when analyzed and applied?

A fair illustration of the value of Mr. Richards' inventions, using the conditions set forth in the above quotation from the opinion, can be illustrated as follows: Supposing Mr. Richards had invented an improved means by which the railroad depots and stations for the reception and housing of passengers could be done away with in this country, and the passengers in the different cars, first and second class and parlor cars, could be transferred to their respective associate and companion cars

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upon oppositely facing tracks without delay, and harmoniously and continuously, by mechanical devices, without any effort, danger, or responsibility upon the part of the passengers themselves, would not the doing away with the passenger stations and depots of this country and the mechanical transferring of passengers from one car to another be an invention of a high order, the principal element of which would have been the avoidance of expense and 484]delay attendant to the erection, *support, and continuance of the railroad stations and depots of the country? Such conditions would be analogous to the inventions of Mr. Richards who has done away with the elevators of this country, and the housing of grain therein, and has substituted therefor the mechanical devices of his patent for transferring and weighing grain at terminal points without the necessity, use, or employment of elevators.

Third. The third ground of complaint we have against the reasoning and opinion of the court in the disposal of Mr. Richards' patent is the closing sentence of the opinion, namely: "In fact, the combination claimed is a pure aggregation." It is most difficult to reconcile the above statement with the apparent facts in this case. Having in view, however, the function and result of the combination, namely, the transfer of grain from one car to another and the weighing of the same is such continuous operation of transfer, keeping such lot and load distinct and separate from the other, wherein can it be contended that any portion of the mechanism or devices utilized to produce this result is, in any sense, an aggregation? From the track and car where the loaded grain is first taken and acted upon to the track and car where it is taken to and deposited, the operation is continuous and uninterrupted. Every mechanical element entering into the carrying out of and production of this result coacts, either simultaneously or successively, with every other element of the combination. Not a single element entering into any one of the mechanical combinations of Richards to transfer and weigh grain as identified by either claim can be omitted without destroying the combination and its effectiveness, function, and result. How, then, can it be claimed that a combination of mechanical means and devices, producing a result, coacting together, wherein no one element of the combination can be omitted without destroying the combination, function, and result, is a pure aggregation? We confess we are at a loss to appreciate or understand. Moreover, whether or not an alliance of mechanism is a mere aggregation and juxtaposition of parts is a question which, if disputed, can only be determined by proof, and we most earnestly and confidently 485]contend that if the opportunity *is offered the patentee Richards to determine this question of aggregation, as represented by his combination, abundant proof can be offered that cannot be contradicted, to the effect that every element of his combination enters into and produces the new function and result identified as his invention, and that all parts coact together to produce this result, and that such result and function would be impossible if any of the identified parts should be omitted from the combination. For the above reasons, briefly stated, we submit that this petition for rehearing should be granted, and Mr. Richards should be given his day in court to demonstrate, not only the patentability and validity of his patent grant in question, but also its great value commercially as an invention over every and all of the old devices that can be arrayed as an anticipation or comparison therewith.

Respectfully submitted,
Charles K. Offield.

I, Charles K. Offield, the undersigned, hereby certify that I am the counsel for the complainant, appellant, in the foregoing entitled cause, and that I have prepared the foregoing petition for a rehearing therein. I further certify that in my opinion and judgment the said petition is well founded in law and fact, and is proper to be filed in said cause.

Charles K. Offield,
Counsel for Edward S. Richards,
Complainant, Appellant.

Mr. **Charles K. Offield** for petitioner.
No counsel in opposition.

Mr. Justice **Brown** delivered the opinion of the court:

A petition was filed at the last term for a rehearing in these cases upon the ground that the court erred in assuming judicial knowledge of the construction and operation of grain elevators, and in holding that these elevators contained practically the same elements as the grain transferring apparatus of the Richards patents. The argument is that the object of Mr. Richards' invention was to obviate and do away with elevators, by securing the continuous and automatic transfer of grain from one car to another, weighing it in transit, and preserving the identity of each lot; whereas, in the ordinary elevator, the grain is raised from the car or vessel, deposited in a storage bin where its identity is lost, and other grain is withdrawn, as required, from the storage bin, to take its place.

That the device described may be a convenient and valuable method of transferring grain from one car to another is not denied. The question is whether it involves invention.

There is certainly no novelty in the result, since the grain may be transferred by shovels from one car to a platform or *bin, where[486 it may be weighed, and again transferred to a receiving car, though doubtless this is a slow and laborious process. Is there any novelty in the method by which this is done? The grain is shoveled from one car into a chute, from which it passes into the elevator leg, through which the buckets move upward, and is discharged into a hopper. It is there weighed, without being mixed with other grain, a valve is opened, and the grain discharged into the receiving car. There is clearly no novelty in the individual steps of this transfer. Indeed, the failure to claim either one of the elements separately raises a presumption that no one of them is novel.

The novelty, then, must be in the combination, which differs from the combination of an ordinary elevator only in the omission of the storage feature, by which grain is housed in transit, and its identity lost. While the omis-

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sion of an element in a combination may constitute invention, if the result of the new combination be the same as before; yet if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention, if the elements retained perform the same function as before. This is well illustrated in the case of *Stow* v. *Chicago*, 3 Bann. & Ard. 92, decided in the same circuit. If, for instance, another person should take out a patent for this same combination, with the weighing hopper omitted, such patent would clearly be void, unless another method of weighing were substituted. The invention in this case is said to consist in the fact that the grain is not stored in transit, but is delivered directly from one car to another. Of course its identity is not lost, and cannot be lost, since the storage feature, which destroys the identity of the grain in the elevator, is omitted. But this is a mere accident, and not a new function of the transferring device. The same thing would happen in the case of an elevator if, while a cargo of wheat were being transferred from a vessel to a train of cars, there happened to be no other grain in store with which the cargo in question could become mixed. In the Richards' device there is never but one lot of grain being transferred at a time, so that there is no possibility of the grain losing its identity, while the ordinary course 487]of *business in an elevator is for the grain to be dealt with in large cargoes, so that the identity of a particular lot is lost by its being mixed with others. After all, the invention resolves itself into the omission of the storage feature and a necessary incident thereto.

To make a combination of old elements patentable, there must be some new result accomplished, and as the result in this case is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old way, we see nothing upon which a claim to invention can be based. The device is undoubtedly a convenient one, and appears to have proven profitable to the patentee, but we are unanimously of opinion that it lacks the necessary quality of invention.

The application is therefore denied.

WEBBER ISAACS, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 487-491.)

Application for continuance—charge to jury—proof of corpus delicti.

1. An application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused.
2. It is not error for the court, on a trial for murder, to charge the jury that the fact that the man killed was a white man may be shown by the testimony of the defendant, as well as by other means; that fact bears only upon the jurisdiction of the court.
3. It is not error for the court to charge that the *corpus delicti* can be established by circumstantial testimony, without adding that such circumstantial evidence should be such as creates cogent, irresistible grounds of presumption, where there was no request by defendant to add such qualification, and the court charged the jury that the crime and every element thereof must be made out to their satisfaction beyond a reasonable doubt.

[No. 609.]

Submitted Oct. 23, 1895. Decided Nov. 11, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment adjudging the defendant, Webber Isaacs, guilty of murder. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

The plaintiff in error, Webber Isaacs, a Cherokee Indian, was indicted, with two others, for the murder of a white man in the Indian country. There were four counts in the indictment, two charging that the murdered man was Mike P. Cushing, and two that he was an unknown white man. No witness who testified saw the act of killing; but it was shown *by the testimony of several witnesses, [488 that a peddler, about sixty years of age, with gray whiskers, and riding a gray pony, was seen going towards Isaacs' house, several days before the body was found. Some days thereafter, within a mile of Isaacs' house, and off from the public road, the body of a horse, corresponding to the one the peddler was riding, was found. The appearances indicated that he had been shot. Near the horse were the remains of a man, with the clothing and flesh nearly consumed by fire. The ground indicated that the body had been dragged from where the horse lay to where it was found, the feet having tied about them what appeared to be a portion of the bridle, which was found cut up. There was evidence that the remains were those of a white man. Under his chin were some gray whiskers unconsumed by the fire. Near the body were found some bills and letters identified as belonging to Cushing. The head was crushed and there were holes under the arm. Shortly after the killing, several witnesses saw defendant with money.

Defendant admitted that a peddler was at his house on the day that Cushing was last seen alive, and said that he rode away with one Jack Chewey, who told him the next day that he had killed the peddler. He admitted that he had never asked Chewey any questions as to when, how, or where he had killed him, and that he had never told any person that Chewey had told him of the killing. Five witnesses also swore that defendant told them that he and Chewey had killed a white peddler at a time corresponding with the disappearance of Cushing.

The jury found the defendant guilty of murder as charged in the first count of the indictment, and the court sentenced him to be hanged. Whereupon he sued out this writ of error.

No counsel for plaintiff in error.

Mr. **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

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Mr. Justice **Brown** delivered the opinion of the court:

489] *In the absence of an oral argument and of a brief by plaintiff in errror, we are compelled to dispose of this case upon the record and the brief of the Attorney General.

1. The first error assigned is to the action of the court in overruling a motion for a continuance, requested because of the absence of a material witness for the defense.

That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question. *Woods* v. *Young*, 8 U. S. 4 Cranch, 237 [2: 607]; *Barrow* v. *Hill*, 54 U. S. 13 How. 54 [14: 48]; *Crumpton* v. *United States*, 138 U. S. 361 [34: 959]; *Cox* v. *Hart*, 145 U. S. 376 [36: 741]; *Earnshaw* v. *United States*, 146 U. S. 60, 68 [36: 887, 889]; *Means* v. *Bank of Randall*, 146 U. S. 620 [36: 1107]. It appears that forty-nine days before the case was called for trial an application was made and granted to have the witness whose testimony was desired summoned at the expense of the government, the affidavit showing that she was within the jurisdiction of the court. It was not shown that any diligence was used to procure the attendance of the witness, or that any attachment was asked for, although the trial continued for several days, or why the subpœna was not served. The affidavit did not show that the defendant could not make the same proof by other witnesses, or that he could not safely go to trial without the testimony of the witness in question. In fact, all that the affidavit showed that the witness could prove was established by other testimony, including that of the defendant himself. There was clearly no abuse of discretion.

2. The second assignment was to the charge of the court "that the fact that the man killed was a white man might be shown by the statement of the defendant in establishing the *corpus delicti*."

The charge of the court is not accurately set out in the assignment, but was, in substance, that the fact that Cushing was a white man might be shown by the testimony of the defendant as well as by any other means, or that it might be shown by that in connection with other facts and circumstances.

490] *We do not understand that any inference can properly be drawn from this that the court intended to charge that the *corpus delicti* might be shown by the mere statement of the defendant, but only that his statement, taken in connection with other facts, might be used to show that the murdered man was a white man. If any inference could be drawn to the effect that the court intended to charge that the *corpus delicti* might be proved by the confession of the defendant, it is completely removed by the further charge that "that state of case" (namely, the death of Cushing by violence inflicted criminally) "must be proved by circumstances, or by positive proof, one or the other, before the declarations or admissions or confessions of the defendant can be taken as sufficient to warrant a jury in convicting. Now, do not make any mistake about this proposition: the proposition called the *corpus delicti*—the fact that a crime was committed, or the fact that the man charged in the indictment, either as Mike P. Cushing or an unknown white man, was murdered—must be proved by evidence outside of the confession of the defendant;" and that "whenever that state of case is established, then you may take the declarations of the defendant as tending to show his guilt."

As there was abundant evidence in the case outside of defendant's confession, not only that the man had been murdered, but considerable evidence that he was a white man, we think there was no error committed in the charge that the fact that he was a white man might be shown by the testimony of the defendant as well as by other means, or by that in connection with other facts and circumstances. The fact that the murdered man was a white man had no bearing upon the question of the *corpus delicti*, or of the fact that the defendant murdered him, and bore only upon the jurisdiction of the court.

3. The next assignment is to the charge "that the *corpus delicti* could be established by circumstantial testimony, without saying that this circumstantial evidence should be such as creates cogent, irresistible grounds of presumption." Without any request on the part of the defendant to add the *qualification sug-[**491** gested, there was no error in the charge actually given. It is no ground for reversal that the court omitted to give instructions, where they were not requested by the defendant. It is sufficient that the court give no erroneous instructions. *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1, 15 [7: 327, 332]; *Texas & P. R. Co.* v. *Volk*, 151 U. S. 73, 78 [38: 78, 80].

Beyond this, however, any possible misapprehension upon this point would be removed by the charge that the law says that "if the propositions I have named to you make up the crime, and the further proposition that brings the crime home to this defendant are proved beyond a reasonable doubt in the case, that your duty in the premises is imperative; it is to find a verdict of guilty of murder against the defendant. If they are not proved in that way, either one of them,—that is, to such a degree of certainty that they come under that legal definition of proof beyond a reasonable doubt,—then your duty will be to acquit the defendant." As the court charged the jury repeatedly that the crime and every element thereof must be made out to their satisfaction beyond a reasonable doubt, it is impossible that they could have been misled by the omission of the qualification suggested.

The remaining assignments are either covered by those already considered, or are so obviously frivolous that no discussion of them is necessary.

The judgment of the court below is therefore affirmed.

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JAMES D. SHIVER, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 491-499.)

Homestead entry—right to cut and remove timber.

1. Lands duly and properly entered for a homestead, under the homestead laws, are and continue to be, from the time of entry, and pending proceedings before the land department, and until final disposition by that department, lands of the United States within the purview and meaning of U. S. Rev. Stat. § 2461.
2. Where a citizen has made a regular entry upon the public lands under and in accordance with the homestead laws, such citizen can be held liable in a criminal prosecution under § 2461 or § 5388, U. S. Rev. Stat., or either of said sections, for cutting and removing after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead.
3. A settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, or fences, and perhaps to exchange for lumber to be devoted to the same purpose, but cannot sell the same for money except when the timber is cut for the purpose of cultivation.

[No. 548.]

Submitted Oct. 15, 1895. Decided Nov. 11, 1895.

ON CERTIFICATE from the Circuit Court of Appeals for the Fifth Circuit certifying certain questions to this court in a criminal case appealed to that court from the District Court for the Southern District of Alabama, in which the defendant, James D. Shiver, was convicted of cutting and removing trees from a section of public land which he had entered previously as a homestead. *First question answered in the negative and the second in the affirmative.*

Statement by *Mr. Justice* **Brown:**

Shiver was tried upon an information filed in the district court for the southern district of Alabama for cutting and removing two hundred pine trees from a quarter section of land in Monroe county, which he had entered as a homestead on January 26, 1894. It appeared that the cutting began about the first of April, and that all the standing timber, amounting to about five hundred trees, had been, either before or after complaint was made against him, cut and removed from the land; that the defendant and his family were living on the land, and had erected a box house worth about one hundred dollars; that the lumber was cut and hauled from the land by defendant's procurement; that it had been cut all over the land; that the land cleared amounted to about an acre; that the house was not yet completed; that the timber was taken to the mill of the Bear Creek Mill Company, of which defendant was an employee; that defendant was not living on the land when the cutting began, and that the trees would make upwards of 150,000 feet of lumber; that they were not cut for the purpose of clearing the land for cultivation, and that *such timber was cut [493 within four months after defendant had made his homestead entry; that the trees yielded an aggregate of the sum of $126, while the improvements made upon the land cost $229. The lumber put into the building amounted to 9,765 feet.

There was conflicting evidence as to the motives of the defendant in cutting and selling the timber. He claimed that the logs were exchanged for lumber and building material, all of which were put into his improvement; the government claiming that it was cut for the purpose of sale and profit.

The court instructed the jury that defendant had the right to cut timber on his homestead suitable and sufficient to build necessary and convenient houses, fences, etc., for a home, and to have that timber sawed into suitable lumber to make such improvements on his homestead; that he could have exchanged timber for lumber to make such improvements, but only so much as was necessary, and that if he only did this, and did it in good faith, he should be acquitted. On the contrary, that any cutting in excess of the number necessary to make his improvements would be unlawful. That he had no right to cut trees for the purpose of sale for profit, or to pay debts or loans of money, or to pay his expenses, or to buy supplies; in short, he had no right to cut them for sale for any such purpose.

Defendant was convicted, and appealed to the circuit court of appeals, which certified to this court the following questions:

1. Whether lands duly and properly entered for a homestead, under the homestead laws of the United States, are, from the time of entry, and pending proceedings before the land department, and until final disposition by that department, so appropriated for special purpose, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of the Revised Statutes of the United States.

2. Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry *is in all respects regular, can such [494 citizen be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead?

Messrs. **J. W. Smith** and **M. D. Wickersham** for plaintiff in error.

Mr. **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

This case turns upon the question as to what are "lands of the United States" within the meaning of Rev. Stat. § 2461, providing for the punishment of persons guilty of cutting timber upon such lands other than for the use

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of the navy. Obviously the question is not whether such lands are so far withdrawn from sale as to be no longer subject to appropriation by any railroad or other person or corporation to which a land grant has been made, but whether they are still so far the property of the United States that the government may protect itself against an unlawful use of them. Indeed, this court has settled, by repeated decisions, that the claim of a homestead or pre-emption entry made at any time before filing a map of definite location of a railway prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently abandoned. *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 [28: 1122]; *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357 [33: 363]; *Whitney* v. *Taylor*, 158 U. S. 85 [39: 906]; *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32 [36: 64]. The same principle applies where lands have been reserved for any purpose whatever. *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498 [10: 264]; *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 [18: 339]; *Newhall* v. *Sanger*, 92 U. S. 761 [23: 769]; *Kansas P. R. Co.* v. *Atchison, T. & S. F. R. Co.* 112 U. S. 414 [28: 794].

While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation, or that they cease to be the property of the government. Upon the contrary, it was said by this court, as early as 1839, in *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498, 516 [10: 264, 273], that "with the exception of a few cases, nothing but the patent passes a perfect and consummate title." So, in *Frisbie* v. *Whitney*, 76 U. S. 9 Wall. 187, 193 [19: 668, 671]: "There is nothing in the essential nature of these acts" (entering upon lands for the purpose of pre-emption) "to confer a vested right, or, indeed, any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right." In this case, the following extract from an opinion of Attorney General Bates was quoted with approval: "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase lands in preference to others. . . . His settlement protects him from intrusion or purchase by others, but confers no right against the government." A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw land which had been pre-empted from entry or sale, though this might defeat the imperfect right of the settler. In *Hutchings* v. *Low* ("*The Yosemite Valley Case*") 82 U. S. 15 Wall. 77 [21: 82], the construction given to the pre-emption law in *Frisbie* v. *Whitney* was approved, the court observing, p. 88 [85]: "It is the only construction which preserves a wise control in the government over the public lands, and prevents a general spoliation of them under the pretense of intended pre-emption and settlement. The settler, being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the government, a convenient protection for any *trespass and waste in the de- [496 struction of timber or removal of ores which he might think proper to commit during his occupation of the premises."

The right which is given to a person or corporation, by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But, as to the government, his right is only conditional and inchoate. By the Homestead Act (Rev. Stat. § 2289) certain classes of persons therein specified are entitled to enter a quarter section of land subject to pre-emption at a certain price, upon making an affidavit of facts (§ 2290) before the register or receiver, including in such affidavit a statement that "his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person." By a later Act, adopted in 1891 (26 Stat. at L. 1098), this affidavit is now required to state that the settler "will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as the agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon." By section 2291, no patent shall issue until the expiration of five years from the date of the entry, the settler being required to prove by two credible witnesses that he has resided upon or cultivated the land for such term of five years immediately succeeding the time of filing the affidavit, and that no part of such land has been alienated, except for certain public purposes. By section 2297, if, before the expiration of the five years, the settler changes his residence or abandons the land for more than six months at any time, the lands so entered shall revert to the government; and by section 2301, the settler may, at any time before the expiration of the five years, obtain a patent for the lands, by paying the minimum price therefor, and making proof of settlement and cultivation, as provided by law, granting pre-emption rights.

*From this résumé of the Homestead [497 Act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to devestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the Act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation, and to that ex-

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tent the act limits and modifies the act of 1831, now embraced in Revised Statutes, § 2461. It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not, in the meantime, ruin its value to others, who may wish to purchase or enter it.

With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. In this connection, it is said by Washburn in his work upon Real Property (1st ed.) vol. 1, p. 108: "In the United States, whether cutting of any kind of trees in any particular case is waste seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminish the value of the land as an estate."

"Questions of this kind have frequently arisen in those states where the lands are new and covered with forests, and where they cannot be cultivated until cleared of the timber. In such case, it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value 498]of the timber. . . . *Wood cut by a tenant in clearing the land belongs to him, and he may sell it, though he cannot cut the wood for purposes of sale; it is waste if he does."

By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth $100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute,—a construction consonant both with the protection of the property of the government in the land and of the rights of the settler,—we think, restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation.

While this question never seems to have arisen in this court before, in *United States* v. *Cook*, 86 U. S. 19 Wall. 591 [22: 210].—a suit in trover for the value of timber cut from an Indian reservation,—it was held that while the right of use and occupancy by the Indians was unlimited, their right to cut and sell timber, except for actual use upon the premises, was restricted to such as was cut for the purpose of clearing the land for agricultural purposes; that while they were at liberty to sell the timber so cut for the purpose of cultivation, they could not cut it for the purpose of sale alone. In other words, if the cutting of the timber was the principal, and not the incident, then the cutting would be unlawful, and the timber when cut became the absolute property of the United States. Their position was said to be analogous to that of a tenant for life, the *government holding the [499 title with the rights of a remainderman.

In the courts of original jurisdiction, it has been uniformly held that a similar rule applied to homestead entries. *United States* v. *McEntee*, 23 Int. Rev. Rec. 368; *United States* v. *Nelson*, 5 Sawy. 68; *The Timber Cases*, 11 Fed. Rep. 81; *United States* v. *Smith*, 11 Fed. Rep. 498; *United States* v. *Stores*, 14 Fed. Rep. 824; *United States* v. *Yoder*, 18 Fed. Rep. 372; *United States* v. *Williams*, 18 Fed. Rep. 475; *United States* v. *Lane*, 19 Fed. Rep. 910; *United States* v. *Freyberg*, 32 Fed. Rep. 195; *United States* v. *Murphy*, 32 Fed. Rep. 376. This general consensus of opinion is entitled to great weight as authority.

While we hold in this case that, as between the United States and the settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, we do not wish to be understood as expressing an opinion whether, as between the settler and the state, it may not be deemed the property of the settler, and therefore subject to taxation. *Carroll* v. *Safford*, 44 U. S. 3 How. 441 [11: 671]; *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 [18: 339]; *Kansas P. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 603 [21: 373]; *Union P. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444 [22: 747]; *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 496 [33: 687].

As the land in question continued to be "the land of the United States," within the meaning of section 2461, the first question must be answered in the negative and the second in the affirmative.

GEORGE W. PATTON ET AL., *Plfs. in Err.*, [500
v.
UNITED STATES.

(See S. C. Reporter's ed. 500-510.)

Duties on wool—woolen waste—double duty—manufacture of wool—Tariff Act of 1883.

1. Wool tops broken up and prepared for spinning are not woolen waste dutiable only at ten cents per pound under the Tariff Act of 1883, but, being wool of the first class costing under thirty cents a pound and as such liable to a duty of ten cents a pound, are liable to treble that duty for being imported scoured, and to double that result, being sixty cents a pound, when their character or condition is changed for the purpose of evading the duty.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 12: 397.

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2. The term "woolen waste" in the absence of a certain, uniform, and general commercial designation, will be presumed to have been used in the Tariff Act in its ordinary sense of refuse.

3. Waste produced by a process which Congress has refused to recognize is not relieved from the double duty imposed upon wool whose character or condition is changed, whether known commercially as waste or not.

4. Woolen waste artificially produced by the breaking up of wool tops cannot be considered a manufacture of wool, under the Tariff Act of 1883.

5. Wools which have, in fact, undergone the process of scouring, are properly classified as imported scoured, although they may not be known commercially as scoured wools.

[No. 36.]

Argued Oct. 16, 1895. Decided Nov. 11, 1895.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment of that court affirming a judgment of the District Court in favor of the United States, plaintiff, against George W. Patton *et al.*, defendants, for duties due on imported goods entered by the importer as wool waste. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was an action by the United States in the district court against the importing firm of George W. Patton & Co. to recover certain duties claimed to be due on thirty-three bales of merchandise entered by the importers as "wool waste," and claimed by them to be dutiable at ten cents per pound under the following clause of schedule K of the Tariff Act of 1883: "Woolen rags, shoddy, mungo, waste, and flocks, ten cents per pound." At the time of the importation (November, 1888) the duties were accordingly assessed and paid at this rate.

The appraiser subsequently returned the goods as "scoured wool, broken tops, class 1, costing under thirty cents per pound in the [501] unwashed condition, sixty cents *per pound." The collector accordingly fixed the duty at sixty cents per pound, under the following paragraphs of the Act (22 Stat. at L. 508):

"All wools . . . shall be divided for the purpose of fixing the duties to be charged thereon, into the three following classes:

"Class one, clothing wools—that is to say, merino . . . wools," etc.

"The duty on wools of the first class which shall be imported washed shall be twice the amount of the duty to which they would be subjected if imported unwashed; and the duty on wools of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed."

"The duty upon wool . . . which shall be imported in any other than ordinary condition, as now and heretofore practiced, or which shall be changed in its character or condition for the purpose of evading the duty . . . shall be twice the duty to which it would be otherwise subject."

The collector first imposed a duty of ten cents a pound upon this as wool of the first class costing under thirty cents per pound in the unwashed condition, then trebled this duty, because they were imported scoured, and again doubled the result upon the ground that they had been changed in their character or condition for the purpose of evading the duty. This made the aggregate duty sixty cents per pound, which appears to have been greater than the whole value of the goods. To recover the difference paid upon the entry and the duty imposed by the collector, the United States brought this suit.

Upon trial before a jury, the court charged that the importation in question could not be considered as wool waste, as it did not consist of refuse or broken particles thrown off in the process of manufacture, and was made intentionally by tearing up what are called "wool tops," which consist of wool which has been subjected to several processes, and prepared for spinning; and that it could not be considered as a manufacture of wool; and hence the court left it to the jury to say whether the wool was imported scoured, and in a condition other than that in which such wool was customarily imported in March, *1883, and previous-[502] ly. The court expressed the opinion that the plaintiff was entitled to recover the amount of the duties assessed, but submitted the case to the jury upon the evidence.

The jury found a general verdict for the plaintiff in the sum of $10,887.26, and further found, in answer to a special question submitted to them by agreement, "that the tops which were broken into fragments constituting this importation were so broken for the purpose of changing the condition of the wool from tops into the fragments resembling waste for the purpose of evading the duty to which the wool in the form of tops would be subjected on importation into this country, or evading duty to which the importers believed the tops would be liable."

Judgment having been entered upon this verdict, defendant sued out a writ of error from the circuit court of the United States, which affirmed the judgment of the court below. Defendants thereupon sued out a writ of error from this court.

Messrs. **Frank P. Prichard** and *John G. Johnson* for plaintiffs in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

1. The first assignment of error is that which is taken to the instruction to the jury that the importation in question, though called wool waste, seems to be so called only because of its resemblance to what was formerly known by this designation; that it does not consist of refuse or broken particles thrown off in the process of manufacture, but is made intentionally by tearing up what are called "wool tops," which consist of wool which has been put through several processes and prepared for spinning, and that the term "waste" did not embrace this commodity.

The correctness of this instruction turns upon the meaning *of the words "woolen [503] waste," as used in the Act of 1883. As bearing upon this, we are at liberty to consider its ordinary definition, which will be controlling,

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except so far as it may be varied by a commercial designation obtaining at that time. *Saltonstall* v. *Wiebusch*, 156 U. S. 601 [39: 549]. *Waste* is defined by Webster as "that which is of no value; worthless remnants; refuse. Specifically: remnants of cops, or other refuse resulting from the working of cotton, wool, hemp, and the like, used for wiping machinery, absorbing oil in the axle boxes of railroad cars, etc." In this connection, and in the same clause of the statute, other words are included, undoubtedly referring to articles of the same or of a similar nature. These are "*rags; shoddy*," defined as "a fibrous material, obtained by 'deviling' or tearing into fibers, refuse woolen goods, old stockings, rags, druggets, etc.;" "*mungo*," which properly signifies the disintegrated rags of woolen cloth, as distinguished from those of worsted, which form shoddy; and "*flocks*," defined as "woolen or cotton refuse, old rags, etc., reduced to a degree of fineness by machinery, and used for stuffing upholstered furniture;" and also as "very fine sifted woolen refuse, especially that from shearing the nap of cloths, used as a coating for wall paper to give it a velvety or clothlike appearance." The prominent characteristic running through all these definitions is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable and used for purposes for which merchantable material of the the same class is unsuitable.

The importation in question consisted of wool which had been scoured, then carded and prepared; then put upon a comb, from which it comes in long lengths, known as slivers or slubbing. It is then put through a process called gilling, which forms the slivers into a less number of slivers of greater thickness. These slivers are then taken into the drawing room and finished, from whence they come out in the form of round balls, called "tops." These tops become new articles of merchandise, which are sold to the spinners who spin them into worsted yarn.

504] *In the process of making the tops, short ends of wool are produced, which are called and sold in the trade as "Botany laps" or "Botany waste," the two terms being synonymous in the English market. After the top is produced, it sometimes happens that it is shorter in staple than was anticipated, or not of the proper color, or that it has to be recarded to get out the burrs, or for some other reason it becomes unmerchantable. In such cases, it has always been the practice in England to break up the tops as unfit for ordinary use, and in that condition they are sold for the same purpose as wool waste, and are known and sold commercially as Botany laps or Botany waste. It was not claimed, however, that they formed a recognized article of commerce in this country, or to any great extent in England. At and prior to 1883, there was no quotable market price for waste, for the reason that the manufacture was not large, though it was bought and sold to a certain extent on its merits upon the market.

In 1887 or 1888, owing to the depression of the wool trade in England, and the demand for waste in this country, the price of tops became so low and the price of waste so high that the deliberate breaking up of tops began for the purpose of exporting them to America as waste, though there is no evidence of any importation of this character prior to 1887. The discovery that the tops thus broken up might be entered at the American customhouses as "waste" produced such a sudden demand for exportation that while the amount declared at the American consulate at Bradford, the center of this trade, for the last two months of 1887, and the first two months of 1888, was only 190,088 pounds, for the corresponding months of 1888 and 1889 it rose to 1,803,558 pounds.

It appeared, from the evidence, that the waste, whether intentionally or unintentionally produced, was an article having different qualities from the merchantable wool, and was used as an adulterant. It is, however, used like other scoured wool, being mixed with it in the carding machine, and is worth only ten or fifteen cents less per pound *than scoured [505 wool of the same character; and hence, in view of the difference in tariff rates, is an article of much more value than scoured wool for the purposes of importation. While these broken tops became a large import under the designation of waste, they never seem to have been prepared in this country for the purposes of sale, the tops being much more valuable in their unbroken condition; while in England, in 1888, the broken tops were more valuable than the unbroken ones. The testimony upon both sides indicates that this artificial kind of waste is, for obvious reasons, more uniform and clean, and therefore more valuable, than genuine waste. It was not disputed that the importations in question consisted of tops deliberately broken up for the purposes of sale. The main question is whether the action of the collector was correct in refusing to allow them to be entered under the denomination of "waste."

If the ordinary definition of "waste," as refuse matter thrown off in the process of manufacture, is to control, it is quite clear that the importations in question are not susceptible of this meaning. The common definition of "waste" lends no support to the theory of the defendants.

With regard to its commercial designation there was undoubtedly some testimony tending to show that, in England, merchantable tops broken up for the purpose of exportation had acquired the commercial designation of waste, or more properly, "broken top waste;" that the importations in question were ordered by the defendants under the latter designation, and that such waste was preferred to the ordinary waste or refuse, because the latter had too much slubbing. This designation, however, was confined to such waste as had been purchased since 1887, and threw no light upon the commercial designation of the article in question at or prior to March, 1883. There is little or nothing to indicate that the practice of breaking up merchantable tops for export prevailed in England prior to 1887, when the attention of wool dealers there seems to have been called to the profits that could be made by exporting broken tops to America. There

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were, however, several witnesses produced by [506] the defense, who were *residents of the United States, and who swore that the article in question had been known in this country as top waste since 1866, and that there was no difference in the commercial designation of the article, whether it was intentionally or unintentionally produced.

This must, however, be taken in connection with the undisputed testimony that merchantable tops had never been broken up in England to form waste prior to 1887 or 1888, when the attention of dealers was first directed to the profits which could be made by importing them into this country under that denomination. The witnesses upon cross-examination admitted that they had never known of merchantable tops being broken up and imported here as waste prior to 1887, and their testimony, so far as it bears upon preceding years, indicates that the top waste referred to was that produced by the breaking up of discolored or otherwise unmerchantable tops, the product of which was known commercially and properly as waste or top waste. In short, the testimony upon this subject falls far short of establishing a commercial designation applicable to these articles with the certainty, uniformity, and generality required by the decisions of this court. *Maddock* v. *Magone*, 152 U. S. 368, 371 [38: 482, 483]; *Berbecker* v. *Robertson*, 152 U. S. 373, 377 [38: 484, 485]; *Sonn* v. *Magone*, *ante*, 203. In default of such evidence, the term will be presumed to have been used in the Tariff Act in its ordinary sense of refuse. *Swan* v. *Arthur*, 103 U. S. 597 [26: 526]; *Schmieder* v. *Barney*, 113 U. S. 645 [28: 1130]. Taking the testimony altogether, we think there was no such evidence of a commercial designation of the articles in question as made it incumbent upon the court to submit the question to the jury.

But had the evidence upon this point been much stronger than it was, it is difficult to see how it could avail the defendant in view of the clause that the "duty upon wool . . . which shall be imported in any other than ordinary condition, as now or heretofore practiced, or which shall be changed in its character or condition for the purpose of evading the duty . . . shall pay twice the duty to which it would otherwise be subject." Although it was sub- [507] mitted as a separate question *to the jury, the testimony was practically undisputed, that the articles in testimony were merchantable tops broken up for the purpose of changing their character or condition from that of tops to that of waste, and that it was done for the purpose of evading the duty to which the wool in the form of tops would be subject on importation, or at least to which the importer believed it would be liable. If such change were made, and made for this purpose, it would make no difference whether the article thus produced was known commercially as waste or not. Assuming that the product would be waste, it would be waste produced by a process which Congress had refused to recognize, and the fact that the classification of the article was thereby changed would not relieve it from the double duty which Congress had imposed upon wool whose character or condition had been changed.

In this connection, we are referred by counsel for defendants to two cases which are supposed to justify the inference that imported merchandise may be treated in such manner as to change its classification, even though such change were made for the purpose of securing its importation at a lower rate of duty. In the first of these cases (*Merritt* v. *Welsh*, 104 U. S. 694 [26: 896]) certain sugars were given an artificial color in the process of manufacture. The sole test of their dutiable quality was their actual color, as graded by the Dutch standard. It had been decided that this meant the color of the sugar obtained by the ordinary process of manufacture, and that any means used to degrade the color after such process was a fraud upon the revenue. As no proof was offered to show that they were artificially colored after the manufacture was completed, the court instructed the jury to find a verdict for the plaintiffs. The real question was whether (supposing that sugars were not artificially colored for the purpose of avoiding duties after being manufactured) their dutiable quality was to be decided by their actual color or by their saccharine strength. It was decided that as the Dutch standard was a color standard only, even if the sugars had been manufactured in dark colors on purpose to evade our duties, the entry at a reduced value was nevertheless lawful, and that the remedy lay with Congress alone.

*In the second case (*Seeberger* v. *Farwell*, 139 U. S. 608 [35: 297]) this court held [508] that certain manufactures of wool, into which a few threads of cotton has been introduced for the purpose of securing the classification of the goods at a lower rate of duty, were properly subject to classification at that rate, although the quantity of cotton was so small as not to materially change the character of the goods as merchandise, the court observing that "Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, the court was of opinion that manufacturers and importers had a right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate." In those cases, however, there was no such provision applicable to sugars or to woolen cloths as exists in this case, providing that where wool unmanufactured shall be changed in its character or condition for the purpose of evading duty a double duty shall be imposed. The object of this legislation seems to have been to make that unlawful with respect to raw wools which had been held to be legitimate with respect to other articles.

2. We are also of opinion that the importations in question cannot be considered as manufactures of wool. Assuming that the tops, before being broken up, represented a stage in the process of converting the wool into cloth, which would entitle them to be considered as manufactures; if the tops be reconverted into wool, so that the process has to be gone through with again, the wool loses its character as a manufacture and resumes its character as

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wool, even though it acquires the new commercial designation of waste. Waste in its ordinary sense being merely refuse thrown off in the process of converting raw wool into a manufacture of wool, cannot be considered a manufacture simply because it acquires a new designation, and if it be artificially produced by the breaking up of tops it is with even less reason entitled to be so considered. Unless natural waste can be treated as a manufacture, artificial waste should not.

509] *The clause in the Tariff Act covering these manufactures imposed both a specific and an ad valorem duty upon "woolen cloths, woolen shawls, and all manufactures of wool of every description." Applying the rule *noscitur a sociis* it can hardly be supposed that wool used for the purpose of waste and as an adulterant in the manufacture of cloths was to be included in the same designation as woolen cloths and shawls, which evidently refer to articles made of wool and having a separate designation of their own. But, however this may be, the article in question does not fall within the definition of manufactures as laid down by this court in numerous cases. Thus, in *United States* v. *Potts*, 9 U. S. 5 Cranch, 284 [3: 102], round copper bottoms turned up at the edge, not imported for use in the form in which they were imported, but designed to be worked up into vessels, were held not to be manufactured copper within the intention of the legislature. So, in *Hartranft* v. *Wiegmann*, 121 U. S. 609 [30: 1012], shells cleaned by acid, and then ground on an emery wheel, and some of them afterwards etched by acid, and intended to be sold for ornaments, as shells, were held to be "shells" and not "manufactures of shell." The question is fully discussed in *Lawrence* v. *Allen*, 48 U. S. 7 How. 785 [12: 914], in which, however, it was held that india rubber shoes made in Brazil by simply allowing the sap of the india rubber trees to harden upon a form were manufactured articles because they were capable of use in that shape as shoes. Indeed, this was the form in which such shoes were at first made. Finally, in *Seeberger* v. *Castro*, 153 U. S. 32 [38: 624], tobacco scrap consisting of clippings from the ends of cigars and pieces broken from tobacco of which cigars are made, in the process of such manufacture, not being fit for use in the condition in which they are imported, were held to be subject to duty as unmanufactured tobacco. This scrap is in the nature of waste, and the case is directly in point.

3. The remaining assignment is as to the charge of the court that, if this wool was imported scoured, and in condition other than that in which such wool was customarily imported in March, 1883, and previously, it fell within the provision of wool imported scoured.

510] There is abundance of testimony to *the effect that the article imported was not known commercially as "scoured wool;" but in the view taken by the court below, which we think was correct, this was immaterial. The act does not impose a duty upon scoured wool as such by its commercial designation, but provides that "the duty on wools . . . which shall be imported washed shall be twice the amount of duty to which they would be subject if imported unwashed; and the duty on wools of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed." In short, the Act refers, not to the commercial designation, but to the fact whether the wool has been actually scoured or washed, or is imported unwashed. If the wools have, in fact, undergone the process of scouring, they are properly classified as imported scoured, although they may not be known commercially as scoured wools.

There was no error in the rulings of the court below of which the defendant was entitled to complain, and the judgment of the court below is therefore affirmed.

CHARLES THIEDE, *Plff. in Errr.*, *v.* PEOPLE OF THE TERRITORY OF UTAH.

(See S. C. Reporter's ed. 510-523.)

Law of Utah as to homicide—U. S. Rev. Stat. § 1033—disqualification of jurors—prejudice—circumstantial evidence—description of defendant—order of testimony—interpreter as a juror—general exception—charge to jury—exceptions, when too late.

1. The law of Utah territory requiring, in cases of homicide, the testimony on preliminary ex-

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NOTE.—*As to jurors, when disqualified and when not, by reason of previously formed opinion.*

A juror forming impressions from reading newspapers, but swearing that he will be governed by the evidence alone, and can try the case impartially, is not incompetent in a homicide case. Hall v. Com. (Pa.) 11 Cent. Rep. 183.

Opinions formed, but not of a fixed character, and which readily yield to evidence, do not disqualify the juror. McCarthy v. Cass Ave. & F. G. R. Co. 99 Mo. 536.

That a juror entertains a fixed opinion that the defendant is guilty is sufficient, under the present statute, to sustain a challenge for actual bias, unless the court finds that he can and will, nevertheless, act fairly and impartially upon the matters to be submitted to him. People v. Brown, 72 Cal. 390.

Hypothetical opinions entertained or expressed by a juror do not, as a rule, disqualify. State v. Bryant, 93 Mo. 273.

On the *voir dire* examination of a juror, an answer by him to a hypothetical question of the district attorney, that if the facts hypothetically stated were true he would not regard the defendant as innocent, shows no bias against the defendant. People v. Copsey, 71 Cal. 548.

A juror in a criminal case cannot be challenged for cause because he has formed an opinion as to defendant's guilt or innocence, unless such opinion would disqualify him from rendering a verdict according to the evidence. State v. Vatter, 71 Iowa, 557.

Jurors who had formed an opinion based upon newspaper statements about the truth of which they had expressed no opinion, but who stated that they could determine the case upon the proof presented, regardless of such opinion, are competent. *Ex parte* Spies, 123 U. S. 131 (31: 80); State v. Bryant, 93 Mo. 273.

It is a good cause for rejecting a juror that he has opinions against hanging a man in any case

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amination, if taken in shorthand, to be transcribed into longhand within ten days thereafter and filed with the clerk, does not forbid a trial before the filing of such transcript; and where the stenographer was present in the court-room on the trial and could be sworn and state such testimony from his notes, the failure so to file worked no substantial injury to defendant.

2. U. S. Rev. Stat. § 1033, giving the defendant in a capital case the right to have, two days before the trial, a list of the witnesses to be sworn, applies only to the United States courts, and does not control the courts of Utah territory.

3. Jurors in Utah territory are, by its statute, not disqualified by reason of having formed an opinion founded upon statements in public journals, if it appears that they can and will, notwithstanding such opinion, act impartially and fairly.

4. That a juror in a capital case has a prejudice against the occupation of defendant, who is a saloon keeper, which might affect the credit he would give to his testimony, does not disqualify him as a juror, where such prejudice would not affect him in passing on the defendant's guilt or innocence.

5. Great latitude is allowable in the reception of circumstantial evidence, such as, on a trial for murder, evidence showing ill treatment by defendant of deceased and a state of bitter feeling between them.

6. Testimony on a trial for homicide that defendant was a strong, powerful man is not incompetent in view of medical testimony that the wound must have been caused by a powerful blow.

7. The order in which testimony shall be admitted is largely in the discretion of the trial court.

8. That one of the jurors was permitted to act as an interpreter, by defendant's consent, cannot be alleged by him as error.

9. A general exception to the refusal of a series of instructions will not be considered, if any one of the series is erroneous.

10. The court need not use, in instructing a jury, the precise language adopted by counsel in his requests of instructions. If the court fully covers the ground indicated by the requests, it is sufficient.

11. Exceptions to the charge of the court, not taken until after the verdict was returned, are too late.

[No. 633.]

Submitted October 21, 1895. Decided November 11, 1895.

IN ERROR to the Supreme Court of the Territory of Utah to review a judgment of that court affirming the judgment of the District Court of Salt Lake County, Utah, finding the defendant, Charles Thiede, guilty of the crime of murder. *Affirmed.*

The facts are stated in the opinion.

No counsel for plaintiff in error.

Mr. **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

On November 5, 1894, in the district court of Salt Lake county, Utah territory, Charles Thiede, the plaintiff in error, was found guilty of the crime of murder, and sentenced to be

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upon circumstantial evidence. Cluverius v. Com. 81 Va. 787; Tatum v. State, 82 Ala. 5.

A person who has formed an opinion by conversation with witnesses is, under Neb. Crim. Code, § 453, incompetent to sit as a juror, notwithstanding he may swear that he can render a fair and impartial verdict. Cowan v. State, 22 Neb. 519.

The expression of opinion which disqualifies a juror is a fixed, deliberate, and determined one which will not yield to evidence. State v. Dorsey, 40 La. Ann. 739.

A juror may be held competent although he has stated that he has formed such an opinion as would require evidence to remove, where he explains that he has not formed such an opinion as would influence his verdict, and that he could be governed entirely by the law and the evidence in court. Livar v. State, 26 Tex. App. 115; Long v. State, 86 Ala. 36; Goins v. State, 46 Ohio St. 457; State v. Smith, 78 Iowa. 32.

A juror is not disqualified because he has formed an opinion of greater or less strength from what he has read in newspapers, if he testifies that he can render a verdict according to the evidence, uninfluenced by previous opinions. Rizzolo v. Com. 126 Pa. 54; West v. State, 79 Ga. 773; Garlits v. State, 71 Md. 298, 4 L. R. A. 601; People v. Gage, 62 Mich. 271.

A juror is not disqualified because he says he has a fixed opinion, where his answers taken together satisfactorily show that this is a misdescription of the opinion he holds. Clark v. Com. 123 Pa. 555.

A juror having an opinion in a case, and whose declaration that he could render an impartial verdict is qualified by a doubt, is incompetent, under N. Y. Code Crim. Proc. § 376. People v. McQuade, 110 N. Y. 284, 1 L. R. A. 273.

A juror's statement that he believes defendant to be guilty because two juries have found him guilty, does not disqualify him where his answers on the *voir dire* show that he has no fixed opinion as to the guilt or innocence of the accused. Blackman v. State, 80 Ga. 785.

Jurors who testify on their *voir dire* that their conscientious scruples are such that they would be "extremely reluctant to find the defendant guilty of murder in the first degree" may be properly challenged for cause by the prosecution, under N. Y. Code Crim. Proc. § 377. People v. Carolin, 115 N. Y. 658.

A juror who has made up his mind against the defendant, and whose opinion is so strong that it would require evidence to remove it, is incompetent. Halsted v. Manhattan R. Co. 26 Jones & S. 276; People v. Shufelt, 61 Mich. 237; Washington v. Com. 86 Va. 405.

No matter from what source a juror formed his opinion, unless it be from conversation with witnesses or reading reports of the testimony, it must be fixed and unqualified in order to disqualify him. Territory v. Bryson, 9 Mont. 32.

The expression of an opinion which disqualifies a juror is a fixed, deliberate; and determined one which does not yield to evidence. People v. Barker, 60 Mich. 277; People v. Shufelt, 61 Mich. 237.

An opinion formed from reading newspapers, which will readily yield to evidence in the case, and which leaves the juror free from bias, does not disqualify him. State v. Cunningham, 100 Mo. 382; Fogarty v. State, 80 Ga. 450.

When a juror states that what he has heard about the case has made some impression upon his mind, but that he could go into the jury box free from bias or prejudice, and try the case fairly and impartially according to the evidence, he is a competent juror. State v. Ford, 42 La. Ann. 255.

An unfavorable opinion of the character of a person accused, without hostility or unfriendliness

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hanged. On March 16, 1895, this judgment was affirmed by the supreme court of the territory, whereupon he sued out this writ of error.

The record of the proceedings in the trial [512] court is voluminous, *consisting of over four hundred printed pages, and we have not been assisted in our examination by either brief or argument on the part of counsel for plaintiff in error. We have, however, carefully examined the record, with the several assignments of error, and now state our conclusions thereon.

The first alleged error is in overruling the defendant's objection to going to trial on October 10, 1894, on the ground that the evidence taken at the preliminary hearing had not been transcribed, certified, and filed with the clerk of the district court, as provided by law. The homicide was charged to have been committed on April 30, 1894. The indictment was returned on September 24. On September 28 the defendant was arraigned and pleaded "not guilty." On October 2 the trial was fixed by order of the court for October 10, and on that day, when the case was called for trial, the objection heretofore referred to was made and overruled. It was admitted that a preliminary examination had been had, that the testimony before the justice of the peace had been taken down in shorthand by one Fred McGurrin, under direction of the justice; that about ten days before the trial said McGurrin was asked by the prosecuting attorney to transcribe the same, and that he declined to do so. McGurrin stated in open court that he had, in a prior case, transcribed the evidence and been refused payment therefor both by the county and the territory, and upon such refusal had brought suit against both, and in such suits it had been adjudged that he had no cause of action against either, and that the only reason he failed to transcribe the testimony was that he would not be paid for the same.

By section 4883, Compiled Laws of Utah, 1888, in cases of homicide the testimony taken upon the preliminary examination is required to be reduced to writing as a deposition by the magistrate, or under his direction. If taken down in shorthand it must be transcribed into longhand by the reporter, within ten days after the close of the examination, and by him certified and filed with the clerk of the district court. The fees for this are to be paid out of the county treasury. The defendant did not ask for a continuance, but simply objected to going to trial because this transcript of the testimony had *not been transcribed, certi- [513] fied, and filed. As the time within which this was, by the statute, required to be done had already passed, the objection, if sustained, would either have been fatal to the entire proceeding, and prevented any trial under that indictment, or at least would have caused a delay of the trial until such time as, by suitable proceedings, the filing of the transcript of the testimony could have been completed, and many things might interfere to postpone or prevent the obtaining of such transcript.

Before a ruling is made which necessarily works out such a result, it should appear either that the statute gives an absolute right to the

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to him, will not disqualify a juror. Helm v. State, 67 Miss. 562.

A juror stating that he is prejudiced in defendant's favor, but that he can find a verdict upon the evidence alone, is properly rejected on a challenge for cause. Giebel v. State, 28 Tex. App. 151.

A juror is competent although he read in newspapers a report of the evidence on a former trial, and formed an opinion, where he states that he can and will hear and render a fair and impartial verdict according to the evidence, uninfluenced by such opinion. State v. Baker, 33 W. Va. 319; Com. v. Taylor, 129 Pa. 534.

A juror is not disqualified by reason of a previously formed opinion, if it appears from his whole examination that he can render a verdict upon the evidence alone, unbiased by such opinion. Com. v. Moss, 6 Kulp, 31; People v. Wah Lee Mon, 37 N. Y. S. R. 283; Hammil v. State, 90 Ala. 577.

The statement of a juror on cross-examination, that he thinks he can try the case fairly and impartially and render an impartial verdict from the evidence, without being biased by his previously formed opinion, although it will take evidence to remove it, renders his rejection a matter within the discretion of the trial judge. Young v. Johnson, 123 N. Y. 226, affirming 46 Hun, 164.

The opinion which renders a juror incompetent must be such as would influence his judgment. Spangler v. Kite, 47 Mo. App. 230.

A statement by a juror that he has conscientious scruples against rendering a verdict of guilty in a capital case, or that he has a fixed opinion of long standing as to the prisoner's guilt or innocence which would influence his conduct in the jury box, is sufficient to warrant his rejection. People v. Wood, 131 N. Y. 617.

A juror called in a murder case is not incompetent because he heard talk about the case at the time of the offense, and may then have had some opinion, where he states that he has no opinion at the time of the trial, stands impartial, and can give the prisoner a fair trial. Lyles v. Com. 88 Va. 396.

One who has formed an opinion which it will require evidence to remove is disqualified for actual bias as a juror in a murder trial, although he states that he will try the case on the evidence and the law. State v. Coella, 3 Wash. 99; *contra*, Com. v. McMillan, 144 Pa. 610.

A juror is not disqualified by the mere fact that he states that the impressions made upon his mind by reading newspaper accounts will remain until he hears evidence, where he swears that, notwithstanding such impressions, he can and will decide according to the evidence and be governed by the evidence alone. People v. McGonegal, 42 N. Y. S. R. 307.

A merely hypothetical opinion of a juror, or one which will in all probability yield to the evidence, will not make him incompetent, especially if he says he believes he can give the parties a fair trial. Hall v. Com. 16 Va. L. J. 547.

A statute providing that a juror shall not be disqualified by forming and expressing an opinion based on newspaper accounts, if he can render an impartial verdict, does not violate a constitutional guaranty of an impartial jury. Coughlin v. People, 144 Ill. 140, 19 L. R. A. 57.

A juror who has formed and expressed a positive opinion of the guilt of a prisoner, and of certain specific and material facts, although it is based solely on newspaper accounts, is disqualified, even if he declares that he can render a fair and impartial verdict upon the evidence alone. Coughlin v. People, *supra*.

Jurors who, after stating that they have formed an opinion which it will require evidence to remove, state that they "think" they could render

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defendant to insist upon this preliminary filing, or else that the want of it would cause material injury to his defense. Neither can be affirmed. A preliminary examination is not indispensable to the finding of an indictment or a trial thereon; and if the examination itself is not indispensable it would seem to follow that no steps taken in the course or as a part of it can be. Further, the statute does not provide that this transcript shall be filed at any time before the finding of the indictment or before the trial, but only within ten days after the examination. There is no prohibition against finding an indictment or bringing on of the trial at any time after the commission of the offense. The statute nowhere expressly places the filing of this transcript as something necessarily happening intermediate the examination and the trial, nor does it make the latter depend upon such filing or even upon a preliminary examination.

Further, supposing the transcript is filed, of what avail is it to the defendant? Simply this, that, as such a transcript is by the statute made prima facie a correct statement of the testimony and proceedings at the preliminary examination, if the defendant wishes to impeach any witness by proof of contradictory testimony at such examination, it is convenient to have on file that which is prima facie such testimony. But if the defendant can secure the same evidence without the transcript, the lack of it is no material injury; and that he could do so in this case appears from the fact that the stenographer was present in the court-room, and his attendance could *have been se- [514 cured by a subpœna, and he compelled under oath to develop from his notes any testimony taken on the preliminary examination. We conclude, therefore, that the law does not forbid a trial before the filing of this transcript, nor was, in this case, the failure so to file an error working substantial injury to the rights of the defendant.

The second matter presented is that the court permitted certain witnesses to testify in the case over the objection of the defendant, when their names were not indorsed on the indictment nor included in a list furnished the defendant by the prosecuting attorney, and defendant had no knowledge that they would be called to testify until the trial had begun.

It appears that on October 2, when the case was set for trial, the defendant's counsel, in open court, requested the district attorney to furnish them before the trial began with the names of all witnesses to be called by the prosecution on the trial, stating that they did not claim it as a matter of right but of favor, and thought it was only fair to the defendant that he should be so advised. Thereupon the district attorney stated that he was unaware of

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an impartial verdict according to the evidence, are properly held competent although they do not use the word "believe." People v. Martell, 138 N. Y. 595.

That the information of a juror is derived from reading a verbatim report of the testimony of a previous trial or hearing does not render him incompetent under N. Y. Crim. Code, § 376, subs. 2, where he declares that he can render an impartial verdict, and that such opinion will not affect his verdict. People v. McGonegal, 136 N. Y. 62.

A juror stating that he has a strong prejudice against a person charged with the crime in question, so strong that it will take overwhelming evidence to remove it, is not disqualified where his prejudice is impersonal and against the crime itself and one guilty of committing it, and not against the defendant. People v. McGonegal, *supra*.

Upon a trial for murder committed with a pistol habitually carried by the accused, a juror who expresses a strong unqualified prejudice against persons carrying pistols, and is not asked to declare on oath that he did not believe such prejudice would influence his verdict, should be excluded for actual bias. People v. Larubia, 69 Hun, 197.

A juror in a prosecution for assault with intent to murder, who, upon examination, states that he had formed an opinion from a newspaper report, but is nevertheless able to fairly and impartially try the action and a true verdict render according to the evidence, may, under Mont. Comp. Stat. div. 3, § 287, subd. 11, be admitted. State v. Sheerin, 12 Mont. 539.

A challenge for cause because the juror has stated that he has formed an opinion in regard to the guilt or innocence of the accused, and that it would take evidence to change his opinion, is properly overruled where he states that such opinion is not fixed, and that he will be guided entirely by the evidence allowed to go to the jury by the court. English v. State, 31 Fla. 340, 356.

On a murder trial it is proper for the court, over the objection of the accused, to excuse a juror who affirms that he has conscientious scruples against the infliction of capital punishment. Gonzales v. State, 31 Tex. Crim. Rep. 508.

Impressions or opinions received from rumor and newspaper statements, and which are not of a fixed and positive character, do not disqualify a juror who appears to be free from bias and prejudice and whose mind is open to a fair consideration of the testimony. State v. Treadwell, 54 Kan. 507.

A juror is not disqualified to sit in a murder trial because he has formed an opinion as to the accused's guilt, based upon newspaper statements, where it will not prevent him from acting fairly and impartially. People v. Collins, 105 Cal. 504.

One who has formed opinions from what he has heard or read of murder, which it would require evidence to change, is nevertheless competent to sit as a juror on the trial of the case if he has the ability and disposition to render a verdict on the evidence alone. Com. v. Crossmire, 156 Pa. 304.

A juror who says there will have to be "strong" evidence to induce him to find for plaintiff, and that he has had litigation of that kind in which he has been defendant, is properly excused. Doherty v. Lord, 55 N. Y. S. R. 160, affirmed in 8 Misc. 227.

A juror who states that only strong evidence would induce him to find in favor of plaintiff in an action for personal injuries is properly rejected. Doherty v. Lord, *supra*.

In an action requiring the testimony of an informer, a juror who testifies that his prejudice against informers is so strong that it would take evidence to remove it, and who speaks very hesitatingly as to whether he would believe one, if corroborated by other witnesses, is properly rejected. People v. Mahoney, 73 Hun, 601.

Jurors are not incompetent because of opinions adverse to the prisoner, where such opinions are based upon rumors only and they state that, after hearing the testimony, they can render a fair and impartial verdict. State v. De Graff, 113 N. C. 688.

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any witnesses other than those whose names were on the back of the indictment, excepting four whom he then named, but promised that if he ascertained there were any others he would give information in regard to them as soon as received; on the 8th of October he furnished the defendant with a list of other witnesses; on the 11th, the day after the trial commenced, he notified the defendant of still another witness, who was in fact not called until the 15th, and four days before the defense rested.

By section 1083, U. S. Revised Statutes, the defendant in a capital case is entitled to have delivered to him, at least two entire days before the trial, a copy of the indictment and a list of the witnesses to be produced on the trial. *Logan* v. *United States*, 144 U. S. 263, 304 [36: 429, 443]. But this section applies to the circuit and district courts of the United States, and does not control the practice and procedure of the courts of Utah, which are regulated by the statutes of that territory. This question was fully considered in *Hornbuckle* v. *Toombs*, 85 U. S. 18 Wall. 648 [21: 966], and was held, overruling prior decisions, that the pleadings and [515] procedure of *the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves. See also *Clinton* v. *Englebrecht*, 80 U. S. 13 Wall. 434 [20: 659], in which it was held that the selection of jurors in territorial courts was to be made in conformity to the territorial statutes; *Good* v. *Martin*, 95 U. S. 90 [24: 341], in which a like ruling was made as to the competency of witnesses; *Reynolds* v. *United States*, 98 U. S. 145 [25: 244], where the same rule was applied to the impaneling of grand jurors and the number of jurors; also *Miles* v. *United States*, 103 U. S. 304 [26: 481], a case coming from the territory of Utah, in which the same doctrine was announced with regard to the mode of challenging petit jurors; *Page* v. *Burnstine*, 102 U. S. 664-668 [26: 268, 269].

Referring, therefore, to the territorial statutes, there is none which directs that a list of the witnesses be furnished to the defendant. Section 4925, Compiled Laws of Utah, requires that the names of witnesses examined before the grand jury be indorsed on the indictment before it is presented. There is no pretense that this direction was not complied with. In the absence of some statutory provision there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial. The action of counsel for defendant in asking that, as a favor, the names be furnished them, indicates their understanding of the extent of defendant's right, and, so far as appears, the district attorney fully complied with this request and furnished the names as fast as he was advised that they would be called. There is no suggestion that the defendant was surprised by the calling of any witness or the testimony that he gave. This allegation of error, therefore, is without foundation.

The third assignment is that the court erred in overruling defendant's challenges for cause directed against four jurors on the ground that on the *voir dire* they showed themselves incompetent to serve. These jurors testified substantially that at the time of the homicide they had read accounts thereof in the newspaper, and that some impression had been formed in *their minds from such reading, but [516 each stated that he could lay aside any such impression and could try the case fairly and impartially upon the evidence presented. Section 5024, Compiled Laws of Utah, reads that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety: *Provided*, It appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him."

The testimony of these jurors clearly placed them within the terms of this statute, and there was no error in overruling the challenges. *Reynolds* v. *United States*, 98 U. S. 145 [25: 244]; *Hopt* v. *Utah*, 120 U. S. 430 [30: 708]; *Ex parte Spies*, 123 U. S. 131 [31: 80]; *Connors* v. *United States*, 158 U. S. 408 [39: 1033].

The defendant was a saloon keeper, and one of the jurors also said that he had a prejudice against that business; that he did not know the defendant and had no prejudice against him individually, but simply against the business of saloon keeping; that such prejudice would not influence him in any way in passing upon the guilt or innocence of the defendant, but that his occupation, like that of any other witness, might affect the credit he would give to his testimony. But the charge against the defendant, the matter to be tried, had no reference to the occupation in which he was engaged, and therefore, a prejudice against such occupation is entirely immaterial. In *Ex parte Spies*, 123 U. S. 131 [31: 80], a juror testified to a decided prejudice against socialists and communists, as the defendants were said to be, but as the charge to be tried was murder, and there was no prejudice against the defendants as individuals, he was accepted and sworn as a juror. In the case at bar the juror was, however, excused by the defendant before all his peremptory challenges were exhausted. *Hopt* v. *Utah*, 120 U. S. 430 [30: 708]; *Hayes* v. *Missouri*, 120 U. S. 68, 71 [30: 578, 580].

A fourth assignment is that the court erred in admitting irrelevant, incompetent, and immaterial testimony. In order to appreciate this assignment of error it becomes necessary to state *briefly the circumstances of the homi- [517 cide. The defendant owned a brewery, and adjoining it kept a saloon; he had for some time prior to the homicide been sleeping in the saloon, while his wife and their child—a girl of about nine years of age—slept at the dwelling house a short distance away. Somewhere about one o'clock in the morning of Tuesday, May 1, 1894, the defendant awakened one Jacob Lauenberger, and informed him that he had found his wife lying dead, with her throat cut. Upon examination it appeared that the head had been almost severed from the body by a wound made with some sharp instrument, probably not a pocket-knife or a razor, but

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some large knife or similar instrument. The deceased was lying within three to five feet of the southeast corner of the saloon. About thirty feet further east was a pool of blood, with evidences of a struggle, and from that point to where the body lay there were marks of blood. The defendant was in or near the saloon during the night until he went with the witness Lauenberger for a physician, and the saloon was lighted during the whole of the night. There was blood upon his hands and upon his clothing. When he awakened Lauenberger, and thereafter when going for a physician, and after his return, he manifested grief at the loss of his wife. There was evidence of ill treatment by the defendant of his wife for a number of years, though this was denied by him, and his denial sustained by other testimony. On the Sunday evening preceding the murder the defendant and his wife had quarreled. The witness Lauenberger called them into his house, and, according to his testimony and that of his wife, the defendant while there slapped his wife in the face, and ordered her to go home, and she refused to go, saying that if she went home the defendant would kill her that night. The last time the deceased was seen by any witness other than the defendant was about ten o'clock Monday evening, when she was sitting outside the defendant's saloon. The night was dark.

Now the most of the testimony objected to was introduced for the purpose of showing ill treatment by defendant of deceased, and a state of bitter feeling between them. This, of course, bears on the question of motive, and tends to 518] rebut *the presumed improbability of a husband murdering his wife. The witnesses testified to hearing the deceased scream at several times; to seeing her with black eyes and a bruised face; to her eyes looking red; to her crying on several occasions, and appearing alarmed and scared; and to bruises and discolorations of her body. The objection was that these witnesses did not connect the defendant with these appearances, or testify that he was the cause of them. It is true these matters do not constitute direct evidence of ill treatment or a long-continued quarrel, but they are circumstances which, taken in connection with the testimony of what was seen and heard passing between the defendant and his wife, were fairly to be considered by the jury in determining the truth in respect thereto. Whether the relations between the defendant and his wife were friendly or the reverse, was to be settled, not by direct or positive, but by circumstantial, evidence, and any circumstance which tended to throw light thereon might fairly be admitted in evidence before the jury. *Alexander* v. *United States*, 138 U. S. 353 [34: 954]; *Holmes* v. *Goldsmith*, 147 U. S. 150 [37: 118]; *Moore* v. *United States*, 150 U. S. 57 [37: 996]. In the second of these cases, page 164 [123], this court observed: "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be."

Another witness, after stating that he knew the defendant prior to the homicide, was permitted to testify that he was "a strong, powerful man." While this was not very material, as the defendant was in the presence of the jury, yet, in view of the medical testimony, that the wound must have been caused by a powerful blow, we cannot say that it was either incompetent or immaterial, or that the court erred in admitting it.

There was testimony that after the defendant had returned with Lauenberger and the physician to his saloon a stranger came in and bought some whisky. This was before daylight on the morning of Tuesday. The physician testified that he *noticed this stranger [519 carefully, and saw him the next day, and that there were no blood stains on him or his clothing. The latter testimony was objected to, yet, as there was evidence tending to show that there must have been something of a struggle between the deceased and her murderer, with the probability that in such struggle blood would have gotten on to the person and the clothing of the latter, we cannot say that the testimony was absolutely immaterial; at any rate, we cannot see how it, in any manner, tended to prejudice the defendant.

We may remark in regard to other alleged errors in the introduction of testimony, that the order in which testimony shall be admitted is largely within the discretion of the trial court; that when the court rules correctly that certain matters are not proper subjects of cross-examination, and at the same time notifies the defendant that he can recall the witness and examine him fully in reference to those matters, and the defendant fails to recall the witness or introduce his testimony thereon, it is difficult to see any ground of complaint; and further, that the credibility of a witness cannot be impeached by asking her whether she has not had some difficulty with her husband.

Another assignment of error is that one of the jurors was permitted to act as interpreter. The record discloses that when Lauenberger was called as a witness one Fritz Lomax was sworn as interpreter. After the examination had proceeded a little while defendant's counsel suggested that the interpreter was not correctly translating the answers of the witness; that the defendant had so informed him, which statement was corroborated by one of the jurors. This juror was asked if he fully understood the peculiar dialect of the German language which the witness spoke, and replied that he did, whereupon, with the consent of defendant, he was sworn to act as an interpreter, and the subsequent examination of the witness was carried on through him. We cannot see that in this any substantial right of the defendant was prejudiced. The juror certainly heard all that the witness stated, and was therefore fully prepared to act with the *other jurors in considering his testimo-[520 ny, and as his interpretation of the witness's testimony was with the consent of the defendant, the latter cannot now question its propriety.

The remaining assignments of error relate to the matter of instructions. It appears that at the close of the testimony the defendant presented a body of instructions in twenty-two paragraphs, and asked the court to give them

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to the jury. They were marked "refused as a whole, except as given," and the only exception to this refusal was in this language, "the defendant excepts to the refusal of the court to give the instructions requested by the defendant, being numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 21." Such an exception is insufficient to compel an examination of each separate instruction. It is enough that any one of the series is erroneous. In *Beaver* v. *Taylor*, 93 U. S. 46, 54 [23: 797, 798], this precise question was presented, and the court said: "The entire series of propositions was presented as one request; and, if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained." See also *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 295 [23: 898, 899]; *Block* v. *Darling*, 140 U. S. 234 [35: 476]; *Bogk* v. *Gassert*, 149 U. S. 17, 26 [37: 631, 635]; *Holder* v. *United States*, 150 U. S. 91 [37: 1010]; *Hickory* v. *United States*, 151 U. S. 303, 316 [38: 170, 176]; *Allis* v. *United States*, 155 U. S. 117 [39: 91]; *Newport News & M. V. Co.* v. *Pace*, 158 U. S. 36 [39: 887].

An examination of the twenty-two instructions shows that they are mainly directed to the matters of reasonable doubt, presumption of innocence, circumstantial testimony, and confessions, in respect to which the court, while not using the language of counsel, substantially expressed the same propositions in its charge. Of course, it was under no obligation to use the precise language adopted by counsel, and if it fully covered the ground indicated by the requests, it is sufficient. One of the requests, to wit, No. 21, reads as follows:

"The jury are instructed that marital discord and quarrels are relevant to prove motive in cases of marital homicide, but, as instances of such quarrels are very numerous, generally expending their force in words, such proof is entitled to little weight, unless connected in some way with the fatal wound."

521] *This, if true under any circumstances, was obviously improper as applied to the facts of this case, for, as there was no evidence of what took place between the deceased and her murderer at the night of the homicide, it might carry the impression to the jury that they were to ignore all the testimony of marital discord and quarrels because there was no express connection shown between such quarrels and the homicide.

It also appeared that defendant's counsel, at the close of the charge, excepted as follows:

"Further, the defendant excepts to the giving of the instructions to the jury on the definition of the word 'malice' and application to this case, as being misleading, confusing, and not correctly stating the law as applicable to this case, and tending to influence the jury to find a verdict not justified by the evidence in this case.

"The defendant excepts to the giving of the instruction of the court to the jury on the question of murder in the second degree, as not being justified by the evidence and tending to mislead and confuse the jury and cause them to render a verdict not sustained by the evidence in this case.

"The defendant excepts to the instruction of the court to the jury in defining deliberation, that the same does not properly and legally define the meaning of the words used in the indictment in this case.

"The defendant excepts to the instruction of the court to the jury in the definition and meaning of premeditation, as misleading and not correct, as charged in the indictment in this case."

It may well be doubted whether these exceptions are sufficiently specific to call the attention of the court to the precise matters complained of. *Beaver* v. *Taylor*, 93 U. S. 46, 55 [23: 797, 798], in which this court observes: "It is not the duty of a judge at the circuit court, or of an appellate court, to analyze and compare the requests and the charge, to discover what are the portions thus excepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there *consider it, and give new [522 and different instructions to the jury, if in his judgment it should be proper to do so." *Allis* v. *United States*, 155 U. S. 117 [39: 91]; *Newport News & M. V. Co.* v. *Pace*, 158 U. S. 36 [39: 887]. But if they are, we find nothing in the charge of the court in respect to those matters which can be deemed erroneous. This was the definition of malice: "The term 'malice' denotes a wicked intention of the mind; an act done with a depraved mind and attendant with circumstances which indicate a wilful disregard of the rights or safety of others indicates malice. Malice aforethought is such wicked intention of the mind previously entertained." Evidently, there is nothing in this of which the defendant can complain. 1 Bishop, New Crim. Law, § 429. Following this definition of malice, the court, in its charge, referred to the divisions of express and implied malice, and discussed them at some length, but we find nothing in such discussion which is not supported by accepted definitions, or which in any manner would tend to the prejudice of defendant's rights.

With reference to the giving of an instruction on the question of murder in the second degree, the accuracy of the instruction is not questioned, and that it was proper to give one has been already determined by this court. In *Hopt* v. *Utah*, 110 U. S. 574, 582 [28:262, 266], it was said: "It was competent for the judge, under the statutes of Utah, to state to the jury 'all matters of law necessary for their information,' and, consequently, to inform them what those statutes defined as murder in the first degree and murder in the second degree. Utah Laws 1878, p. 120; Utah Code Crim. Proc. §§ 283, 284."

As to the other matters, we do not find in the charge any separate definition of the terms "deliberation" or "premeditation." Probably counsel referred to the statement that such deliberation and premeditation need not exist for any fixed period of time; that it is enough that they were formed before the act. This is the accepted law. 2 Bishop, New Crim. Law, § 728.

Again, the verdict was returned on October 21. On November 2 counsel for defendant came into court, and sought to save other exceptions to the charge. The court noted those *exceptions but declined to make any [523

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ruling on them. Obviously, they were too late. *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 298 [36: 162, 163].

These are all the errors assigned. We find nothing in the record of which the defendant has any just complaint, and therefore the judgment is affirmed.

GEORGE L. WHEELER, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 523-526.)

Sufficiency of indictment—overruling new trial—infant, when competent as a witness—qualifications.

1. An indictment for murder which charges that the defendant and the deceased were not Indians nor citizens of the Indian territory, sufficiently alleges that they were not citizens of any Indian tribe or nation.
2. Overruling a motion for a new trial is not assignable as error in this court.
3. There is no precise age which determines the question of competency of an infant as a witness; this depends on the capacity and intelligence of the child, and his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.
4. A boy nearly five and a half years old is competent as a witness on a trial for murder to testify to the homicide, which took place when he was a little less than five years old, if it appears from his examination that he is intelligent, and understands the difference between truth and falsehood, and the consequences of telling the latter, and also what is required by the oath which he has taken.

[No. 571.]

Submitted Oct. 24, 1895. Decided Nov. 11, 1895.

NOTE.—*Competency of a child as a witness; how determined; instruction of child; review of decision.*

A child under twelve years, who knows the nature of an oath, may be a witness. Young v. Slaughterford, 11 Mod. 228.

A child between ten and eleven is competent. Givens v. Com. 29 Gratt. 830.

In State v. Lattin, 29 Conn. 389, a conviction was sustained on the evidence of a child nine years old, uncorroborated as to the principal fact.

If over fourteen the presumption is that he is competent; if under that age, the presumption is otherwise; and it must be removed before he can be sworn. People v. Bernal, 10 Cal. 66.

Under the Indiana statute a child is competent if over ten years old whether he understands the nature and obligations of an oath or not. Holmes v. State, 88 Ind. 147.

If an infant be of the age of fourteen years he is of the age of discretion to be sworn as a witness; but if under that age he may be sworn, if it appear that he hath a competent discretion. 2 Hale, P. C. 278.

The rule at the present time is that a child is competent to testify if he understands the nature and obligation of an oath. Flanagin v. State, 25 Ark. 96; State v. Doherty, 2 Overt. 80; Davis v. State, 31 Neb. 247; Holst v. State, 23 Tex. App. 1, 59 Am. Rep. 770; Oliver v. Com. 77 Va. 590.

If a child appears to possess a sufficient sense of the danger and wickedness of false swearing he may be a witness, no matter what his age. Com. v. Hutchinson, 10 Mass. 225.

A boy ten years old will be permitted to testify if he states that he has been taught that it is wrong to tell a lie and that he knows it is wrong not to tell the truth and that there is some punishment to be administered when a witness sweats to tell the truth and does not. People v. Linzey, 79 Hun. 23.

That a boy thirteen years old does not know what will be done with him in case he does not tell the truth will not prevent his being a witness if he fully understands the difference between truth and falsehood and comprehends the orthodox idea of future reward and punishment. Partin v. State (Tex.) 30 S. W. Rep. 1067.

When discussing the qualifications of a child eleven years old as a witness, the court, in State v. Reddington (S. D.) 64 N. W. Rep. 170, says no witness is required to be able or willing to discuss with the court or counsel either the fact or condition of the future state. He is only required to be able to distinguish the moral difference between right and wrong, and when the law says he must understand the obligation of an oath it means only that, possessing such ability to distinguish, he understands that his position as a witness imposes on him the moral and legal duty to tell only what is true.

A child twelve years old who testifies that he knows it is wrong to tell a lie and that if he tells one he will be punished by law, but does not know what punishment will be inflicted, is competent. Parker v. State (Tex.) 21 S. W. Rep. 604.

A child ten years of age whose examination on his *voir dire* discloses that he is technically qualified, and whose answers to the questions propounded to him by the counsel are unusually bright and intelligent, is a proper witness. Territory v. De Gutman (N. M.) 42 Pac. Rep. 68.

That the child understands the nature of an oath need not be made to affirmatively appear under a statutory provision that children shall be incompetent if under ten years of age, who appear to be incapable of receiving just impressions of the facts respecting which they are examined and of relating them truly, if the evidence given by it shows that it is capable of doing these things. State v. Douglas, 53 Kan. 669.

That a child does not understand the nature of an oath will not exclude her if she understands that penalties are attached to the crime of perjury and seems to have the moral perception of an average girl of thirteen years. McAmore v. Wiley, 49 Ill. App. 615.

A child who states that she knows it is wrong to tell a lie and that if she tells lies she will go to hell and that if she tells the truth she will go to Heaven should be permitted to testify although she is not asked as to her knowledge or belief in a Supreme Being, a rewarder of good and evil. Grimes v. State (Ala.) 17 So. Rep. 184.

A child four years of age is not incompetent to testify by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence, which is to be determined by the trial court by examination of the child in court. State v. Juneau, 88 Wis. 180, 24 L. R. A. 857.

A child who states that she would go to jail if she told a lie and to hell when she died sufficiently understands the nature of an oath to be permitted to testify. Comer v. State (Tex. Crim. App.) 20 S. W. Rep. 547.

A child seven years and six months old, although she states that she does not understand the nature of an oath, is competent if she understands that if she does not tell the truth she will be whipped and that it is wrong to tell anything that is not true, if it appears that she is very intelligent, and understands fully what she is talking about, and the

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IN ERROR to the Circuit Court of the United States for the Eastern District of Texas to review a judgment of that court adjudging George L. Wheeler guilty of the crime of murder. *Affirmed.*

The facts are stated in the opinion.

No counsel for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney-General, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

On January 2, 1895, George L. Wheeler was by the circuit court of the United States for the eastern district of Texas adjudged guilty of the crime of murder and sentenced to be hanged. Whereupon he sued out this writ of error. Three errors are alleged: First, that the indictment is fatally defective in failing to allege that the defendant and the deceased were not citizens of any Indian tribe or nation. It charges *that they were not Indians [524 nor citizens of the Indian territory. The precise question was presented in *Westmoreland* v. *United States*, 155 U. S. 545 [39: 255], and under the authority of that case this indictment must be held sufficient.

Another contention is that the court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore* v. *United States*, 150 U. S. 57 [37: 996]; *Holder* v. *United States*, 150 U. S. 91 [37: 1010]; *Blitz* v. *United States*, 153 U. S. 308 [38: 725].

The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to him on his *voir dire*, said,

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difference between right and wrong. Williams v. United States, 22 Wash. L. Rep. 457.

In White v. Com. 16 Ky. L. Rep. 421, it is stated that the intelligence of the witness is the true test of competency, and that must be determined by the court. A child may be ignorant of God and the evil of lying, and of the punishment prescribed therefor both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which his attention is directed.

The competency of a child to be a witness depends upon the sense and reason he entertains of the danger and impiety of falsehood, and if such sense can be collected from his answers it should be admitted; otherwise, rejected. State v. Morea, 2 Ala. 278.

Children of any age may be examined upon oath if capable of distinguishing between good and evil and possessing sufficient knowledge of the nature and consequences of an oath. Wade v. State, 50 Ala. 164.

When the examination of the child discloses a very intelligent comprehension on her part of the fact that falsehood is not only wrong but will be severely punished in the future, she is competent to testify if at the same time she shows no intellectual or moral deficiency sufficient to disqualify. McGuff v. State, 88 Ala. 151.

Under the Missouri statute children under ten years are excepted from being witnesses who appear incapable of receiving just impressions of facts respecting which they are examined, or of relating them truly. State v. Scanlan, 58 Mo. 206; Brashears v. Western U. Teleg. Co. 45 Mo. App. 445.

When it is shown that a child is capable of receiving correct impressions of the facts and relating them truly, it is competent. Cadmus v. St. Louis Bridge & T. Co. 15 Mo. App. 86.

Under the Texas statute, children who appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligations of an oath, are not competent. Ake v. State, 6 Tex. App. 402, 32 Am. Rep. 586.

It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are to be examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath. People v. Bernal, 10 Cal. 66.

If the child comprehends the obligations of an oath and believes that any deviations from the truth while under oath will be followed by appropriate punishment, he is competent. Blackwell v. State, 11 Ind. 196.

It is enough for mere competency if they know the nature of an oath. And whether they have such knowledge is to be determined by the court, and not by themselves. Moore v. State, 79 Ga. 498.

A child eight years old who, after being instructed by the crier as to the nature of an oath, states in answer to a question: "I've got to tell the truth if I take an oath; if I do not I will go to the big fire,"—is competent. Com. v. Carey, 2 Brewst. 404.

A child who gives remarkably intelligent testimony is properly admitted, who, when asked what would become of him if he swore to a lie, answered: "The bad man will get me." Logston v. State, 3 Heisk. 414.

An ignorant colored child thirteen or fourteen years old who stated that if she swore to a lie she would go to the bad world was held to be competent. Vincent v. State, 3 Heisk. 120.

In Draper v. Draper, 68 Ill. 19, a child was held to be competent who stated that she understood the nature of an oath and that if she did not swear the truth she would get into hell fire.

A boy twelve years old who had never heard of God or the devil, or of heaven or hell or of the Bible, and had no idea of what became of the good, or of the bad, after death, is not a competent witness, although he had heard that the bad man caught those who lied. State v. Belton, 24 S. C. 185, 58 Am. Rep. 245.

That the child stated that she did not know what God or the laws of the country would do to her if she swore falsely is not sufficient to warrant a reversal of the judgment because her evidence was received. Davidson v. State, 39 Tex. 129.

A fourteen-year-old boy who stated that he did not know what would be done with him if he lied, knew that it was wrong to lie but did not know that he would be punished for it, has not the requisite capacity to be a witness. McKelton v. State, 88 Ala. 181.

Where the child had never heard of heaven or hell, of God or the devil, and thought she would be sent to jail if she swore to a lie, but did not know that she would be otherwise punished, she was held to be incompetent, although over eleven years old. Beason v. State, 72 Ala. 191.

A girl nine years old is incompetent where she said she did not know what the Bible was; had never been to church but once; did not know what book it was she laid her hand upon when sworn; had heard of God, but did not know who it was; would be put in jail if she swore to a lie, but did not know that she would be punished in the other world. Carter v. State, 63 Ala. 54, 35 Am. Rep. 4.

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among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and in

The question of competency is for the court. People v. Bernal, 10 Cal. 66.

But after the witness has been admitted, his credibility is for the jury. State v. Le Blanc, 1 Treadw. Const. 354, 3 Brev. 339.

Inquiry must be made by the judge to ascertain the capacity of a child under fourteen, and its admission or rejection depends upon his sound discretion. State v. Richie, 28 La. Ann. 327, 26 Am. Rep. 100.

When a child is produced as a witness it is the duty of the judge to examine him without the interference of counsel further than the judge may choose to allow. Carter v. State, 63 Ala. 54, 35 Am. Rep. 4.

The determination of the fitness of a child to be a witness must be made in public and by the court, and it is reversible error to send a child into an adjoining room, under charge of a committee, for them to examine into his fitness, and to act upon their report. Simpson v. State, 31 Ind. 90.

It is improper for the judge to examine him privately to ascertain his fitness. State v. Morea, 2 Ala. 278.

A defendant may insist that examination be in his presence. People v. McNair, 21 Wend. 608.

The trial may be adjourned that the witness may be instructed. Com. v. Lynes, 142 Mass. 577, 56 Am. Rep. 709.

But in Taylor v. State, 22 Tex. App. 530, 58 Am. Rep. 656, the court held it to be erroneous to admit a girl eighteen years old to testify after she had been once rejected and had then been taken to the office of the prosecuting attorney and instructed as to the nature and obligation of an oath and the punishment for its violation.

The fact that the child was held to be incompetent and excluded at the first trial will not prevent its testifying at the second trial of the same case if he then proves himself to be competent. Kelly v. State, 75 Ala. 21, 51 Am. Rep. 422.

And it is no objection that the instruction was received after the last adjournment if the child is found to be competent at the time she is so called. Com. v. Lynes, 142 Mass. 577, 56 Am. Rep. 709.

Whether or not the judge should instruct the child himself is not clear. Such a course has been held to be proper. Jenner's Case, 2 City Hall Rec. 147; Carter v. State, 63 Ala. 54, 35 Am. Rep. 4.

But it has also been held that it is not error for the court to refuse to instruct in such matters. Jones v. People, 6 Park. Crim. Rep. 128.

The fact that the child is to be put under oath or affirmation must be brought to his attention so as to determine whether or not he understands the bearing and effect of the proceeding. Hughes v. Detroit, G. H. & M. R. Co. 65 Mich. 10.

The evidence cannot be permitted to be obtained from such witnesses by monosyllabic answers to leading questions. Coon v. People, 99 Ill. 368, 39 Am. Rep. 28.

The judgment of the trial court as to the sufficiency of the proof to satisfy the court of the ability of the witness to understand the nature of an oath, and of the possession of sufficient intelligence to testify in the case, cannot be reviewed by the appellate court. Com. v. Mullins, 2 Allen, 296.

The competency of a witness as to age depends upon his reason, intelligence, judgment, capacity, and understanding, which are all matters of fact to be left to the discretion of the judge and jury. State v. Denis, 19 La. Ann. 120.

The appellate court will not interfere if the trial judge concludes that the child is competent, in the absence of a clear abuse of discretion. Washburn v. People, 10 Mich. 374; State v. Levy, 23 Minn. 108, 23 Am. Rep. 678; State v. Scanlan, 58 Mo. 206; State v. Doyle, 107 Mo. 36; Buck v. People's Street R. R. L. & P. Co. 46 Mo. App. 555; State v. Jefferson, 77 Mo. 138; Ridenhour v. Kansas City Cable R. Co. 102 Mo. 288; Brown v. State, 2 Tex. App. 115; Brown v. State, 6 Tex. App. 287; Burk v. State, 8 Tex. App. 341; Taylor v. State, 22 Tex. App. 544, 58 Am. Rep. 656; Hawkins v. State, 27 Tex. App. 285; State v. Edwards, 79 N. C. 650; State v. Manuel, 64 N. C. 601; Smith v. Com. 85 Va. 924; Van Pelt v. Van Pelt, 3 N. J. L. 202; Anonymous, 3 N. J. L. 487; Johnson v. State, 61 Ga. 35; Freeny v. Freeny, 80 Md. 408.

The appellate court will presume in favor of the action of the trial court in admitting the evidence. Blackwell v. State, 11 Ind. 196.

A finding of the trial court that a child is a competent witness, made upon competent and sufficient evidence, is not revisable in the appellate court. State v. Sawtelle (N. H.) 32 Atl. Rep. 831.

Under the New York Code of Civil Procedure it was held that the trial court did not abuse its discretion in permitting a child seven years old to be sworn and give testimony in the case. People v. Smith, 86 Hun, 485.

Under a statutory provision that children under ten years of age should not be competent witnesses unless it appears that they understand the nature and obligation of an oath, it is not such an abuse of discretion as to require a reversal for the court to refuse to permit a child to testify who states that he does not know what a falsehood is and that he did not know what it meant when he held up his right hand and was sworn to tell the truth. Taylor v. McGrath (Ind.) 36 N. E. Rep. 163.

Where the child has been examined to test its competency and pronounced competent, it must be a very flagrant case of error to authorize the appellate court to reverse on that ground. Peterson v. State, 47 Ga. 524.

It is not reversible error to admit the evidence of a boy twelve years old who appears to have the understanding and intelligence common to that age. State v. Severson, 78 Iowa, 654.

If a witness is admitted whose examination shows such lack of intelligence as to make her clearly incompetent the appellate court will reverse. Williams v. State, 12 Tex. App. 127.

In Johnson v. State, 76 Ga. 76, judgment was reversed for permitting a child six years old to testify where, after examination, it did not appear that she sufficiently understood the obligation of an oath or the punishment of the law imposed upon its violation, or that she had any conception of the future.

To enable the appellate court to review the admission of a witness all the pertinent testimony given by him upon which the decision was founded must be in the record. State v. Jackson, 9 Or. 459.

In New York, by the Code of Criminal Procedure, § 392, the evidence of a child under twelve years of age who does not understand the nature of an oath may be received, though not given under oath in any criminal proceedings, if, in the opinion of the court or magistrate, such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence.

This also is now, by statute, the rule in England. Act 48 & 49 Vict. chap. 69, § 4; Queen v. Wealand, L. R. 20 Q. B. Div. 827; Reg. v. Pruntey, 16 Cox, C. C. 344.

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response to a question as to what the clerk said to him, when he held up his hand, he answered, "Don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record, we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this 525]question rests primarily *with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In *Rex* v. *Brasier*, 1 Leach, C. C. 199, it is stated that the question was submitted to the twelve judges, and that they were unanimously of the opinion "that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court." See also 1 Greenl. Ev. § 367; 1 Whart. Ev. §§ 398-400; 1 Best, Ev. §§ 155, 156; *State* v. *Juneau*, 24 L. R. A. 857, 88 Wis. 180; *Ridenhour* v. *Kansas City Cable R. Co.* 102 Mo. 270; *McGuff* v. *State*, 88 Ala. 147; *State* v. *Levy*, 23 Minn. 104, 23 Am. Rep. 678; *Davidson* v. *State*, 39 Tex. 129; *Com.* v. *Mullins*, 2 Allen, 295; *Peterson* v. *State*, 47 Ga. 524; *State* v. *Edwards*, 79 N. C. 648; *State* v. *Jackson*, 9 Or. 457; *Blackwell* v. *State*, 11 Ind. 196.

These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as 526]in this case, the question *is one of life or death. On the other hand to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

We think that under the circumstances of this case the disclosures on the *voir dire* were sufficient to authorize the decision that the witness was competent, and therefore there was no error in admitting his testimony. These being the only questions in the record, the judgment must be affirmed.

WINONA & ST. PETER LAND COMPANY, *Plff. in Err.*, *v.* STATE OF MINNESOTA (No. 1).

(See S. C. Reporter's ed. 526-539.)

Exemption from taxation—Minnesota law—due process of law—mode of assessment—constitutional law.

1. The exemption from taxes of lands granted by Congress by the Act of 1857 to the territory, now state, of Minnesota, to aid in the building of railroads, created by the territorial act of 1857, continued only until the full equitable title was transferred by the railroad company, and such company could not thereafter, by neglecting to convey the legal title, postpone indefinitely the exemption.
2. A decree of a competent court that the full equitable title to lands granted by Congress to Minnesota to aid in building railroads had passed from the railroad company to others rendered such lands taxable under the Minnesota act of 1857.
3. The Minnesota statute for taxing property which has escaped taxation in prior years, having prescribed the court in which and the time at which the various collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend sufficiently answers the demand of due process of law.
4. The difference in the mode of assessment of property which has escaped taxation in prior years from the general mode of assessment of property, under the Minnesota statutes, does not deprive the property owner of any constitutional right.
5. That an act of the legislature for assessing back taxes on property cannot be enforced as to personal property does not render the act unconstitutional as to real property.

[No. 31.]

Argued Oct. 16, 1895. Decided Nov. 11, 1895.

Note.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to exemption from taxation whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

As to sale of lands for taxes; strict compliance with statute necessary,—see note to Williams v. Peyton, 4: 518.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

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IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court against certain lands for the taxes for six years immediately preceding the assessment, and that claims for taxes for prior years were barred by the statute of limitations, in a suit instituted by the Winona & St. Peter Land Company, against the state of Minnesota, to review the proceedings for the assessment and collection of the taxes. *Affirmed.*

See same case below, 40 Minn. 512.

Statement by *Mr. Justice* **Brewer:**

On March 3, 1857, Congress passed an act (11 Stat. at L. 195) granting lands to the territory, now state, of Minnesota, to aid in the building of railroads. On May 22, 1857, the 527] *territorial legislature granted a portion of these lands, including those in controversy, to the Transit Railroad Company. Minn. Laws 1857 (special session) p. 17. The fourth section of this act provided that "the lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company." The Transit Company failed to comply with the conditions of this act, and, thereafter, by an act passed March 10, 1862, all its rights, benefits, property, and franchises, including the exemption of the lands from taxation, were transferred to the Winona & St. Peter Railroad Company. Minn. Laws 1862, p. 243. The latter company accepted the transfer and grant, and proceeded to build the railroad, and, as built, the lands were, from time to time, certified to the state, and by the state deeded to the company, some of the lands being thus conveyed in 1869 and others in 1870 and 1871.

On October 31, 1867, the railroad company entered into a contract with D. N. Barney and others. This contract recited the adjustment and settlement of an indebtedness of the company to Barney and his associates for money theretofore advanced, and provided for payment thereof in bonds and lands. No particular description was made in this contract of the lands to be thus conveyed, but only a general reference to the lands as those included in this congressional and state grant. The plaintiff in error, having succeeded to the rights of Barney and his associates, sought to obtain title to the lands, but the railroad company refused to convey, whereupon in 1879 suit was instituted, which terminated March 7, 1887, in a final decree of the circuit court of the United States directing a conveyance.

In 1881 (Laws 1881, p. 24) the legislature of Minnesota passed an act providing generally for the assessment and taxation of any real or personal property which had been omitted from the tax roll of any preceding year or years. Under this statute, in 1886, the officers of Redwood county proceeded to assess and tax these lands for the taxes of past years. In the proceedings thus instituted the plaintiff in error appeared and defended on the ground that 528] the lands were, *by virtue of the fourth section of the act of May 22, 1857, exempt from taxation until after the decree of March 7, 1887, and also on the further ground that the act of 1881 was unconstitutional in failing to provide proper notice to the owners of the property sought to be assessed and taxed. The proceedings terminated adversely to the plaintiff in error, and it immediately sought a review thereof in the supreme court of the state. That court directed judgment to be entered against the land for the taxes for the six years immediately preceding the assessment, holding that all claims for taxes for prior years were barred by the statute of limitations. 40 Minn. 512. To reverse this judgment plaintiff in error sued out this writ of error.

Mr. **James A. Tawney** for plaintiff in error.

Messrs. **H. W. Childs,** Attorney General of Minnesota, and *George B. Edgerton,* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

Two questions are presented: First, Has the state of Minnesota, in disregard of section 10 of article 1 of the Constitution of the United States, passed any law impairing the obligation of contracts? And, second, Were the tax proceedings in violation of that clause of the 14th Amendment, which prohibits a state from depriving any person of property without due process of law?

With respect to the first question, it may be noticed that since the grant in 1862 to the Winona & St. Peter Railroad Company the legislature of the state has passed no statute in terms referring to the lands, or attempting to repudiate or break the contract of exemption. The act of 1881 is one making general provision for putting upon the tax roll all lands that have escaped taxation in prior years. Of the validity *of a statute of that character—[529 that is, one providing generally for subjecting to taxation lands that have improperly escaped taxation in prior years—there can be no serious doubt; so that the real contention is that the taxing officers applied this valid statute to lands which ought not to have been subjected to its operation by reason of a prior contract between the state and its grantee. Does this bring the case within the constitutional inhibition against a state's passing a law impairing the obligation of a contract? *Mississippi & M. R. Co.* v. *Rock,* 71 U. S. 4 Wall. 177 [18: 381]; *St. Paul, M. & M. R. Co.* v. *Todd County,* 142 U. S. 282 [35: 1014]; *Mobile & O. R. Co.* v. *Tennessee,* 153 U. S. 486 [38: 793]; *Central Land Co.* v. *Laidley, ante,* 91.

Assuming, but not deciding, that this law of 1881, enacted subsequently to the contract created by the acts of 1857 and 1862, as practically applied by the officers of the state to the taxation of these lands, presents the question of a violation of the constitutional inhibition,—and the contention of plaintiff in error is that it does, and that the question was distinctly presented to the state court and by it decided,—we are of opinion that the judgment of that court was correct, and that it must be affirmed. The contract of exemption was by the terms of the act to continue until the lands were "sold and conveyed." Plaintiff in error insists that these words extend the exemption until the legal title is conveyed, which was not done until the decree of 1887. The state court held that the exemption was continued only until the full equitable title was trans-

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ferred, and that the railroad company could not thereafter, by neglecting to convey the legal title, postpone indefinitely the exemption. This question was first presented to that court in *State* v. *Winona & St. P. R. Co.* 21 Minn. 472, and the decision in the present case was simply an affirmance of the prior ruling. See also *Brown County* v. *Winona & St. P. Land Co.* 38 Minn. 397, 39 Minn. 380.

It is familiar law that statutes exempting property from taxation are to be strictly construed. *Bank of Commerce* v. *Tennessee*, 104 U. S. 493 [26: 810]; *Vicksburg, S. & P. R. Co.* v. [530] *Dennis*, 116 U. S. 665 [29: 770]; * *Yazoo & M. V. R. Co.* v. *Thomas*, 132 U. S. 174 [33: 302]; *People* v. *Cook*, 148 U. S. 397 [37: 498].

Section 4 of the Act of 1857, after providing that the lands should be exempted from taxation until "sold and conveyed," added that in consideration of the grant of land and other franchises, the railroad company should pay into the treasury of the territory or state three per cent upon all the gross earnings, and that this three per cent, when paid, should be in lieu of all taxes whatever. Construing the entire section, the supreme court of the state held that the manifest object was to apply the full value of the land to the construction of the road; that when that object was secured, the purpose of the exemption ceased; that it could not have been the contemplation of the legislature to have created an exemption dependent wholly upon the will of the grantee and entirely irrespective of the complete accomplishment of the object for which the lands were granted; that it was not to be expected that a sale could be made of the entire body of lands at once; that sales would progress slowly and from time to time as purchasers could be found, and that it would obviously detract from the value of the grant if, while holding these lands only for purposes of sale, the company was compelled to pay taxes thereon, but that when the company had received full payment for the lands, its interest in the matter ceased, and the purpose of the grant was accomplished. It could not be supposed that the legislature purposed to bestow an exemption upon purchasers from the railroad company. The company, and not its grantees, was the intended beneficiary. The matter of exemption was between it and the state. It was to pay three per cent of its gross earnings, and this in lieu of all other taxes, including those upon these lands. No such equivalent was suggested as between the purchasers and the state. No contract of any kind was expressed as between them. Reference was made in the opinion to *Carroll* v. *Safford*, 44 U. S. 3 How. 441 [11: 671], and *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 [18: 339], in which this court held, as to lands purchased from the United States, that after the full equitable title had passed and the government simply held the naked legal title as trustee for the purchaser, they became subject to state taxation.

[531] * We concur in these views. A permanent exemption of land from taxation, or an exemption dependent upon the will of an individual, is something not to be adjudged unless the language creating such exemption clearly compels such construction; and when a statute creates an exemption with the evident design of aiding in accomplishing a particular result, the exemption should be expected to cease when that result has been accomplished, and the statute should be read in the light of such expectation. While it may be that the word "conveyed" generally implies the passing of the legal title, it is not inaptly or incorrectly used to describe a transfer of title, legal or equitable, and whether used with a narrow and technical meaning, or in a broad and general sense, is to be determined by the context, and the circumstances under which the entire instrument or document in which it was found was framed. "There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject matter of the contract, and the circumstances under which it was signed." *Chicago, R. I. & P. R. Co.* v. *Denver & R. G. R. Co.* 143 U. S. 596, 609 [36: 277, 281]. Read in the light of these rules of construction the words "sold and conveyed," as found in the exempting section, are satisfied when the railroad company has received full payment for the lands, and executed an instrument by which all its equitable and substantial interest in them is transferred. It has then not contracted to sell, but has sold; it has not contracted to convey, but has conveyed. It has parted with all its interest, and is thereafter only a barren trustee of a naked legal title held for the benefit of the true owner.

It is now earnestly contended by plaintiff in error that the Barney contract did not operate to transfer the full equitable title. Two propositions are relied upon: First, it is said that the contract contained dependent covenants, and that the covenant to convey the lands depended upon the performance of certain conditions by the contractors; and, second, that the *lands were not particularly described. [532] With reference to these contentions, it may be remarked that the only part of the record in the case of *Barney* v. *Railroad Company*, which is before us, is the decree which recites no performance of conditions precedent, but simply adjudges a conveyance. Can we assume, therefore, that it was based upon the performance by the plaintiff of conditions precedent? Must it not rather be held that it adjudicated rights created solely by the original contract and enforced a conveyance stipulated in it? Turning to the contract itself, we find that it recites the advancement of large sums of money by Barney and associates theretofore made for the construction and equipment of 105 miles of railroad, a liquidation of the indebtedness thereby created, and part payment thereof, and then contains an agreement to issue certain bonds in further part payment, and for the residue of said indebtedness promises to convey all the granted lands earned by the construction of the 105 miles of railroad. It is also true that there is no description of the lands by sections, towns, and ranges, and that the contract stipulates that the conveyance shall be when the railroad company shall obtain the title, but the description by reference to the acts of Congress and the territorial and state legislatures is sufficient, and the right to a con-

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veyance is established by the contract, and is given as final payment of an indebtedness already existing. Subsequent to these stipulations there is a further promise that the contractors will fully pay and discharge certain floating debts of the company, amounting to the sum of $49,000, which is undoubtedly part of the consideration on the part of the contractors. But such promise seems to stand as an independent covenant, and it would be doing violence to the language to hold that performance of this promise was a condition precedent to the right to receive payment in bonds and lands. Not only that, the contractors in terms agreed to "receive and accept the property and things hereinbefore agreed to be transferred to them in full payment, satisfaction, and discharge of all indebtedness" of the railroad company to them. It is also true that the contract contemplated the possibility of an ex-[533]tension of the road, and *that such extension, if made by Barney and his associates, was to be paid for by an additional issue of bonds and the conveyance of the lands within the limits of the grant to be earned by such further construction. But there is nothing in the record to show that such construction was in fact undertaken by Barney and his associates, or that any of these lands passed by virtue thereof.

But a conclusive answer to the contention is this: The proceedings in the district court were commenced to enforce the payment of taxes delinquent and unpaid on the first Monday of January, 1888, and the final decision of the supreme court limited the right to recover such delinquent taxes to the period of six years prior thereto. The decree in the circuit court of the United States was entered on March 7, 1887. The findings of fact show that the suit in which this decree was entered was commenced in 1879. The decree relates back to the time of the commencement of the suit, and adjudicates the rights of the parties as of that date. It was therefore an adjudication that in 1879 Barney and his associates held the full equitable title to these lands; but the lands were held subject to no taxes prior to those of 1880. It is therefore unnecessary to enter into any elaborate discussion of the terms and stipulations of the contract, or to seek to determine what are or are not dependent covenants. It is enough to rest upon the fact that by a conclusive decree of a competent court it is established that the full equitable title had passed to the plaintiff in error prior to the time at which the lands were adjudged taxable. The case, therefore, in this direction is narrowed to the single question, as to the scope and meaning of the exempting statute of May 22, 1857; and, for the reasons stated, we agree with the supreme court of the state in its construction thereof.

The other contention of plaintiff in error is that in these tax proceedings there was a lack of due process of law. That they were in substantial conformity with the provisions of the Minnesota statutes, and that there is nothing in those statutes in conflict with the state Constitution, is settled for this court adversely to the plaintiff in error by the decision of the supreme [534]court of the *state. *Taylor* v. *Secor* ("*State R. Tax Cases*"), 92 U. S. 575-618 [23: 663-675]; *Palmer* v. *McMahon*, 133 U. S. 660 [33: 772]; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 [38: 1031].

We pass, therefore, to consider the claim that the Minnesota statutes, so far as they attempt to provide for the subjection of property which has escaped taxation in prior years, to the taxes of those years, violate that clause of the 14th Amendment to the United States Constitution which forbids a state to deprive one of property without due process of law. What are the provisions of those statutes? The general tax law of the state is found in the statutes of 1878, commencing at page 210. Section 113 contemplated the collection of unpaid back taxes. This section was amended in 1881 (Laws 1881, page 24), so as to read as follows:

"If any real or personal property shall be omitted in the assessment of any year or years and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearage of taxes properly accruing against such property with seven (7) per cent interest thereon, from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax list for the current year."

This, being an amendatory statute, places the amended section as part of the general tax law, and it is to be construed accordingly. The section provides that if any property shall have been omitted from the assessment of any year it shall, upon discovery of that fact, be entered upon the assessment and tax books for that year, that all taxes for that year be charged thereon against it, with interest, and then extended against it on the tax list for the current year. In other words, for the purposes of collection, it stands on the tax list for the current year the same as any other property, and all taxes thereon are to be collected in the same manner. The amount of the tax for the omitted year is the same as that which was enenforced against all other properties for that year, so that the only difference is in the mode of assessment and the charge of interest.

*We must therefore inquire, in the first [535] place, whether under the general tax law there is sufficient provision for notice to the owner of property before it is subjected to sale for nonpayment of taxes; in the second place, whether the difference in the mode of assessment deprives the property owner of any constitutional right; and, in the third place, whether there is in section 113 any other matter which vitiates it.

With reference to the collection of taxes it may be remarked generally that the Minnesota statute authorizes such collection by suit in court. By section 70 the county auditor is required, between June 1 and 15, to file in the office of the clerk of the district court of the county a list of the delinquent taxes upon real estate, which shall contain a description of the land, the name of the owner if known, and if unknown so stated, and the amount of the delinquent tax for each year, which list shall be verified by his affidavit; and the filing of this list to be considered as the filing of a complaint by the county against each piece or parcel of land therein described to enforce pay-

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ment of the taxes and penalties appearing against it. Publication is then to be made of this list, together with a notice in the form prescribed by statute, for at least two weeks, in some newspaper of general circulation in the county. §§ 71, 72. Upon the final publication of this notice the jurisdiction of the court over the property attaches. § 73. Within twenty days after the last publication any person having an estate, right, title, or interest in, or lien upon, any parcel of land described in such list may file in the office of the clerk of the court an answer setting forth his defense or objection to the tax or penalty, which shall describe the piece or parcel of land and state the facts constituting his defense or objection to such tax or penalty, and thereupon the court is to hear and determine the questions raised by this complaint and answer, as it hears and determines any other action. § 75. It is a full defense that the taxes have been paid or that the property is not subject to taxation. § 79. The list is prima facie evidence of compliance with all provisions of law in relation to the assessment and levy of taxes. No omis-[536]sion of any of the things *required by law in relation to such assessment and levy "shall be a defense or objection to the taxes appearing upon any piece or parcel of land, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that the taxes against such piece or parcel of land have been partially, unfairly, or unequally assessed; and in such case but in no other, the court may reduce the amount of taxes upon such piece or parcel, and give judgment accordingly." § 79.

We think this opens to the property owner full opportunity for defense, and that he can raise every objection to which in law he is entitled. If he has paid his taxes, or if the land is not subject to taxation, the property is wholly discharged. If there has been any irregularity in the proceedings which worked to his prejudice he can show such irregularity, and so far as it has injured him, secure a reduction in the amount. In reference to this matter we quote from the opinion of the supreme court of the state in this case, which shows fully the extent to which a party can, under the statutes of the state of Minnesota, make defenses to these tax proceedings:

"Within twenty days after the last publication of the delinquent list any person may, by answer, interpose any defense or objection he may have to the tax. He may set up as a defense that the tax is void for want of authority to levy it, or that it was partially, unfairly, or unequally assessed. *St. Louis County Comrs.* v. *Nettleton*, 22 Minn. 356. He may set up as a defense *pro tanto* that a part of a tax has not been remitted, as required by some statutes. *Houston County Comrs.* v. *Jessup*, 22 Minn. 552. That the land is exempt, or that the tax has been paid. *Chicago County* v. *St. Paul & D. R. Co.* 27 Minn. 109. That there was no authority to levy the tax, or that the special facts authorizing the insertion of taxes for past years in the list did not exist, or any omissions in the proceedings prior to filing the list, resulting to his prejudice. *Olmsted County* v. *Barber*, 31 Minn. 256. The filing of the list is the institution of an action against each tract of land described in it, for the recovery of the taxes appearing in the list against such tract, and tenders *an issue on every fact necessary[537] to the validity of such taxes. *Chauncey* v. *Wass*, 35 Minn. 1. The only limitation or restriction upon the defenses or objections which may be interposed is that contained in section 79, to the effect that, if a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax, or of anything required by any officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly, or unequally assessed. This relates, not to want of authority to levy the tax, but to some omission to do or irregularity in doing the things required to be done in assessing or levying a tax otherwise valid. *St. Louis County Comrs.* v. *Nettleton, supra.* And certainly, in justice or reason, a party cannot complain that, when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced."

All the privileges which are secured to the property owner in respect to the taxes of the current year are also secured to him in reference to those imposed under amended section 113. He is therefore notified and given an opportunity to be heard before his property is taken from him. Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. *McMillen* v. *Anderson*, 95 U. S. 37 [24: 335]; *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616]; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 [28: 569]; *Spencer* v. *Merchant*, 125 U. S. 345 [31: 763]; *Palmer* v. *McMahon*, 133 U. S. 660 [33: 772]; *Lent* v. *Tillson*, 140 U. S. 316 [35: 419]; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 [38: 1031]. That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the *court [538] in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law. *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575, 609 [23: 663, 672]; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 710 [28: 569, 572]; *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 [29: 414]; *Lent* v. *Tillson*, 140 U. S. 316, 328 [35: 419, 425]; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 [38: 1031]. It cannot be doubted under these various authorities that in respect to the collection of these taxes ample provision is made for notice, and therefore that it cannot be adjudged that the owner is, for want thereof, deprived of his property without due process of law.

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With respect to the next inquiry, it is true there is a difference in the mode of assessment. Section 113 authorizes the county auditor to make the assessment, while as to property generally the assessment is made by the county assessor. The latter also acts upon actual view (§ 33), while there is in section 113 no such direction to the county auditor. The assessment made by the assessor comes before a town board of review (§ 39), and subsequently before a county board of equalization. § 44. Neither of these provisions is found in section 113. So that the difference between the two modes of assessment may be stated thus: In the one case there is an assessment by one officer, with a right to review his action; in the other, there is an assessment by a different officer, and no provision for a review except as the matter comes before the court in the proceedings for the collection of taxes. But there is nothing in this difference to affect the constitutional rights of a party. The legislature may authorize different modes of assessment for different properties, providing the rule of assessment is the same. *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321, 337 [29: 414, 419]; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 [38: 1031].

One other suggestion is made by counsel for the plaintiff in error. Section 113 contemplates the assessment and taxation of both real and personal property. It is claimed that the taxation of personal property is manifestly void because, even under the general tax law, there is no pro-
539] vision for notice to *the owner of the property before the charge is fixed upon him, and that it cannot be assumed that the legislature would attempt to provide for the taxing of real property which had escaped taxation in prior years without also providing for a like taxation of personal property, and hence that the whole section must fail. The supreme court of the state was of opinion that even if the tax on personal property was not collectible under the general provisions of the tax law for the reason claimed, yet there was, at least, a valid tax which, in the absence of any law providing another method, might be enforced by any ordinary personal action. It seems to us, also, that the assumption that it cannot be believed that the legislature would never seek to provide for the collection of back taxes on real property without at the same time including therein a like provision for collecting back taxes on personal property, cannot be sustained. The case is different from that of an ordinary tax law in which there may be some foundation for the claim that the legislature is expected to make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without also making provision for collection of taxes on all other property equally subject to taxation. For this statute rests on the assumption that, generally speaking, all property subject to taxation has been reached, and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature in view of the probabilities of changes in the title or situs of personal property might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the supreme court of the state.

These being the only matters presented, and in them appearing no error, the judgment of the supreme court of the state will be affirmed.

WINONA & ST. PETER LAND COMPANY, *Plff. in Err.*, v. STATE OF MINNESOTA (No. 2). [540

(See S. C. Reporter's ed. 540, 541.)

Jurisdiction of Supreme Court.

Where the Federal questions sought to be raised in this court were not seasonably presented in the state court, the failure to do so prevents this court from acquiring jurisdiction.

[No. 38.]

Argued Oct. 16, 1895. Decided Nov. 11. 1895.

IN ERROR to the Supreme Court of the State of Minnesota to review the judgment of that court in regard to the taxation of certain lands. *Dismissed for want of jurisdiction.*

The facts are stated in the opinion.

Mr. **James A. Tawney** for plaintiff in error.

Messrs **H. W. Childs,** Attorney General of Minnesota, and *George B. Edgerton*, for defendant in error.

Mr. **John Lind,** for defendant in error, filed a brief on behalf of Brown county.

Mr. Justice **Brewer** delivered the opinion of the court:

This case is similar to the one between the same parties just decided, in that the questions presented to the state courts involved the taxability of lands included in the legislative grants of May 22, 1857, and March 10, 1862, the Barney contract of October 31, 1867, and the decree in the United States circuit court of March 7, 1887. The tax proceedings were under the law of 1881, but were had in the county of Brown instead of the county of Redwood. The case, however, differs from the preceding, in that the Federal questions sought to be raised in this court were not seasonably

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NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,—see notes to Martin v. Hunter, 4: 97; Mathews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

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presented in the state courts. The alleged immunity from taxation and lack of due process of law were not "specially set up or claimed" prior to the decision in the Supreme Court. The failure so to do prevents this court, as has been frequently held, from acquiring jurisdiction. *Ex parte Spies*, 123 U. S. 131, 181 [31:80, 91]; 541]*Brooks* v. *Missouri*, 124 U. S. 394 [31:454]; *Chappell* v. *Bradshaw*, 128 U. S. 132 [32:369]; *Brown* v. *Massachusetts*, 144 U. S. 573 [36:546]; *Schuyler Nat. Bank* v. *Bollong*, 150 U. S. 85 [37:1008]; *Powell* v. *Brunswick County Supre.* 150 U. S. 433 [37:1134]; *Miller* v. *Texas*, 153 U. S. 535 [38:812]; *Morrison* v. *Watson*, 154 U. S. 111 [38:927]; *Sayward* v. *Denny*, 158 U. S. 180 [39:941].

The writ of error must therefore be dismissed for want of jurisdiction.

CHARLES A. WEEKS, *Plff. in Err.*, *v.* COLEMAN BRIDGMAN.

(See S. C. Reporter's ed. 541-548).

Land grant to Minnesota—right of pre-emptor—certificate of land department—objections to pre-emption claim.

1. Under the grant by Congress to Minnesota, of 1857, of lands to aid in the construction of railroads, lands to which pre-emption rights had attached when the line of the railroad was definitely fixed, were excepted therefrom; and this is so as to applications for pre-emption rejected by the local land office and pending on appeal in the land department at the time of definite location.
2. When a pre-emptor has the right to make entry, and applies to the local land officers, and they refuse to recognise his right, it will be deemed to date from the time of his application.
3. Where land is not included in a railroad grant or subject to disposition as part of the public domain, the action of the land department in including it within the lists of lands certified as granted to a state for railroad purposes is ineffectual.
4. Objections to a pre-emption claim which involve questions between the claimant and the government which it has determined in his favor, cannot be raised by a railroad company or its grantees, in a suit as to the title of the lands.

[No. 44.]

Argued Oct. 17, 1895. Decided Nov. 11, 1895.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court affirming the judgment of the District Court for the Seventh Judicial District of Minnesota in favor of defendant in an action brought by Charles A. Weeks, plaintiff, against Coleman Bridgman, defendant, to determine adverse claims to land. *Affirmed.*

See same case below, 41 Minn. 352, 46 Minn. 390.

NOTE.—*As to land grants to railroads*, see note to Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to pre-emption rights, see note to United States v. Fitzgerald, 10: 785.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsay, 5: 423.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought by Charles A. Weeks against Coleman Bridgman in the district court for the seventh judicial district of Minnesota under a statute of that state to determine adverse claims to vacant and unoccupied real estate. Judgment having been rendered for plaintiff, the cause was taken to the supreme court of Minnesota on appeal, the judgment reversed, and the cause remanded. 41 Minn. 352. The cause was again tried in the district court by the court, a jury having been expressly waived, and judgment entered for defendant, which, on a second appeal, was affirmed. *46 Minn. 390. To this judgment the pending writ of error was allowed. [542

The facts were in substance as follows:

By Act of Congress of March 3, 1857 (11 Stat. at L. 195), there was granted "to the territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood river, with a branch *via* Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said territory may determine; . . . every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said road and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the governor of said territory or future state, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid; which lands (thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the territory or future state of Minnesota for the use and purpose aforesaid."

The Minnesota & Pacific Railroad Company was organized as a railroad corporation under and pursuant to an act of the legislature of the territory, now state, of Minnesota, approved May 22, 1857. The St. Paul & Pacific Railroad Company was organized in conformity to an act of the legislature of the state, approved March 10, 1862, and, under and by virtue of that act, became the owner of all the lines of *railroad formerly owned by the Minnesota & Pacific Railroad Company, and also of the lands granted to the territory, now state, of Minnesota, to aid in the construction of the branch line of railroad from St. Anthony northward to St. Cloud, under the Act of Congress of March 3, 1857. On February 6, 1864, the First Division of the St. Paul & Pacific railroad was organized for railroad purposes, which organization was confirmed by act of [543

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the legislature of the state, approved February 6, 1866, and said First Division succeeded to all the rights, privileges, and lands possessed or granted to the Minnesota & Pacific Railroad Company or to the St. Paul & Pacific Railroad Company, as its successor, in any way pertaining to the branch line.

The line of the branch railroad was definitely fixed, and a map thereof filed with the Secretary of the Interior, December 30, 1857, and the land in controversy is part of an odd section within six miles of said branch line, being section 13, township 124 N., range 28 W. This section was certified to the state of Minnesota by the Secretary of the Interior, October 25, 1864, as a part of the land granted by the Act of Congress of March 3, 1857. The branch line of railroad was constructed from St. Anthony to St. Cloud, opposite the land in controversy, during September, 1866, and plaintiff in error had acquired all the right and title to the land described in the complaint that was ever possessed by the territory or state of Minnesota, or the First Division of the St. Paul & Pacific Railroad Company.

George F. Brott on September 9, 1855, entered into a contract with the United States to carry the mail from Minneapolis to supply the offices at St. Cloud, Monticello, and Dayton. This route was about sixty-five miles in length, and the contract said: "The route from Minneapolis by Dayton to Monticello and St. Cloud aforesaid is to be deemed and considered a post road during the continuance of this contract."

By Act of Congress of March 3, 1855 (10 Stat. at L. 683, 684), it was provided that "each contractor engaged, or to be engaged in carrying mails through any of the territories 544] *west of the Mississippi shall have the privilege of occupying stations at the rate of not more than one for every twenty miles of the route on which he carries the mail, and shall have a pre-emptive right therein, when the same shall be brought into market, to the extent of six hundred and forty acres to be taken contiguously, and to include his improvement." As mail contractor, Brott, in 1855, selected for and built and established his mail station upon section 13, which station consisted of stable and building for the use of his teams and carriages, and maintained the same throughout the term of his mail contract. Brott's route terminated at St. Cloud, and no mail was carried west from there under the United States government until the latter part of the year 1856, or some time in 1857.

August 7, 1857, Brott made application to the United States land office at St. Cloud to file a pre-emptory declaratory statement for the southwest quarter of the northwest quarter of said section 13, township 124, range 28, which embraced the land in controversy, with other lands, claiming the right to pre empt the same, as a mail contractor, under the Act of March 3, 1855. This application was by the decision of the local land officers rejected, and from such decision Brott appealed to the Commissioner of the General Land Office, by whom the decision of the local land officers was sustained. Brott thereupon appealed to the Secretary of the Interior, who reversed the Commissioner's decision, on August 30, 1861, and held that Brott should be permitted to enter the tracts mentioned in his application upon the production of proof of the performance of his mail contract and of the occupation of the stations, and upon compliance with the laws and regulations in other respects applicable to the case. On May 26, 1860, Congress passed an act entitled "An Act for the Relief of George F. Brott," providing (12 Stat. at L. 843): "That George F. Brott be, and he is hereby, authorized to enter the following described lands, to wit: [omitting description which includes that in dispute] in the district of lands subject to sale at the land office at St. Cloud, Minnesota; said tracts containing five hundred and sixty-two and twenty-hundredths *acres, upon the payment by the said [545 Brott of the usual minimum of one dollar and twenty-five cents per acre therefor: *Provided*, That said entry shall in nowise interfere with or embrace any land to which there is a valid subsisting claim under the pre-emption laws of the United States; and the Commissioner of the General Land Office is directed to issue a patent on said entry."

No further effort was made by Brott to enter the land simply as such mail contractor, but the entry of the same was thereafter made by him under and in pursuance of the Act of Congress passed for his relief, he paying for the land the sum specified.

In July, 1871, a patent for the land issued from the United States to Brott in the usual form, except that it was stated therein that the land had been certified to the state of Minnesota for railroad purposes by mistake. The defendant at the time of the commencement of the action had and was seised of all the right and title to the lots in controversy that Brott ever had or possessed under his patent, and claimed his right to such title under and by virtue of mesne conveyances duly made, executed, and delivered by and through Brott and his grantees and duly recorded.

Mr. **M. D. Grover** for plaintiff in error.
No counsel for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The line of the road was definitely fixed December 30, 1857; the lands within the place limits then subject to the grant were thereby segregated from the public domain; and the grant took effect thereon. But under the granting act, lands to which pre-emption rights had attached, when the line was definitely fixed, were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for pre-emption rejected *by the local land office and pending an [546 appeal in the land department at the time of definite location since the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant. *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 [28: 1122]; *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357 [33: 363]; *Bardon* v. *Northern P. R. Co.* 145 U. S. 535 [36: 806]; *Ard* v. *Brandon*, 156 U. S. 537 [39: 524]; *Whitney* v. *Taylor*, 158 U. S. 85 [39: 906].

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Brott selected certain lands, including this in dispute, for and built and established his mail stations thereon in 1855 and maintained the same during the term of his mail contract; and filed his application to enter these lands, as a mail contractor under the Act of March 3, 1855, in the local land office August 11, 1857. The application was rejected by the local land officers, and Brott appealed to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, who reversed the rulings of the land officers and of the Commissioner, and held Brott entitled to pre-empt the stations occupied. He was indeed required to produce proof of the performance of his mail contract and of the occupation of the lands as stations, and he actually entered them in pursuance of the Act of Congress for his relief, but in *Ard* v. *Brandon, supra*, it was held that when a pre-emptor has the right to make entry, and applies to the local land officers and they refuse to recognize his right, it will be deemed to date from the time of his application, and this notwithstanding he proceeds to obtain title in some other way. The conclusion follows that Brott's pre-emption claim must be regarded as having attached prior to the definite location, December 30, 1857, and that the title did not pass under the congressional grant to the state.

But it is contended that as on October 25, 1864, the Secretary of the Interior included section 18 in the list of lands certified to the state of Minnesota under the Act of August 3, 1854 (10 Stat. at L. 346), as a part of the lands granted by the Act of March 3, 1857, that certification was an adjudication that the land in question had not been previously disposed of, and that no pre-emption right had attached [547] thereto, and passed the *legal title, whatever Brott's equitable right might be; and that while the certification might be voidable, it was not absolutely void. The act of August 3, 1854, provided that where lands had been or should be thereafter granted to the several states and territories, and the law did not convey the fee-simple title of such lands or require patents to be issued therefor, the lists of such lands which had been or might thereafter be certified, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said list, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

As we have seen, this particular land was not included in the grant, and the Secretary of the Interior had so decided on August 30, 1861, when he determined that the pre-emption right had attached. And since it was not so included nor subject to disposition as part of the public domain, on October 25, 1864, the action of the land department in including it within the lists certified on that day was ineffectual. *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 174 [37: 123, 126].

The distinction between void and voidable acts need not be discussed. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed. 8 Bac. Abr. *Void and Voidable; Ewell* v. *Daggs*, 108 U. S. 143 [27: 682]; *Ex parte Lange*, 85 U. S. 18 Wall. 163 [21: 872]; *State* v. *Richmond*, 26 N. H. 232; *Anderson* v. *Roberts*, 18 Johns. 513, 9 Am. Dec. 235; *Pearsoll* v. *Chapin*, 44 Pa. 9.

As against Brott the certification had no operative effect.

It is also objected that Brott was not a qualified claimant under the act of 1855, because that act only applied to a contractor engaged in carrying the mail through any of the [548] *territories west of the Mississippi, and because it does not appear that his declaratory statement was ever accepted or recognized, or that he made proof of his occupation of the land as a mail station, but these and other like objections involve questions between Brott and the government, already determined in his favor, and which the railroad company and its grantees are not in a position to raise upon this record.

Judgment affirmed.

UNITED STATES of America, *Complainant* and *Appellant*,

v.

AMERICAN BELL TELEPHONE COMPANY and EMILE BERLINER.

(See S. C. Reporter's ed. 548-555).

Jurisdiction of the United States Supreme Court —construction of statute.

1. The Supreme Court of the United States has jurisdiction, on appeal from the circuit court of appeals, of a suit by the United States to cancel a patent for an invention; it is not a case "arising under the patent laws" in which the judgment or decree of the circuit court of appeals is final under the Act of March 3, 1891.
2. The operation of a statute claimed to restrict appellate jurisdiction must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it.

[No. 745.]

Submitted Oct. 23, 1895. Decided Nov. 11, 1895.

APPEAL from a decree of the United States Circuit Court of Appeals for the First Circuit reversing a decree of the circuit court and dismissing a suit brought by the United

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NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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States to cancel a patent for an invention granted to the American Bell Telephone Company as assignee of the inventor, Emile Berliner. *On motion to dismiss. Motion denied.*

See same case below, 65 Fed. Rep. 86, 68 Fed Rep. 542.

The facts are stated in the opinion.

Messrs. **James J. Storrow** and **Frederick P. Fish** for appellees, in favor of motion to dismiss.

Messrs. **Richard N. Olney,** Attorney General, **Causten Browne,** and **R. S. Taylor** for appellant, in opposition to motion.

549] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

This is a suit by the United States to cancel a patent for an invention granted to the American Bell Telephone Company as assignee of the inventor, Emile Berliner. On a hearing in the circuit court there was a finding and decree for the complainant. 65 Fed. Rep. 86. The cause having been taken to the Circuit Court of Appeals for the First Circuit, the decree of the circuit court was reversed, and it was ordered that the bill be dismissed. 68 Fed. Rep. 542. From this decree an appeal was taken by the United States to this court, which appellees now move to dismiss "for want of jurisdiction in this court to entertain in under the Circuit Court of Appeals Act of March 3, 1891, chap. 517 (26 Stat. at L. 828) for the reason that the case is a case arising under the patent laws."

The Supreme Court has appellate jurisdiction, under the Constitution, in all cases to which the judicial power extends (other than those in respect of which it has original jurisdiction), "with such exceptions and under such regulations as the Congress shall make." It was early held that in the passage of the Judiciary Act of 1789, Congress was executing the power of making exceptions to the exercise of appellate jurisdiction, and that the affirmative description of the cases to which the appellate power extended was to be understood as implying a negative on the exercise of such appellate power as was not comprehended within it, but that as this restriction rested on implication founded on the manifest intent of the legislature, it could be sustained only when that manifest intent appeared. *Durousseau* v. *United States*, 10 U. S. 6 Cranch, 307 [3: 232].

Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any statute claimed to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve, and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower 550]limits than its words *import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it. *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644, 650 [35: 1144, 1146]; *Brewer* v. *Blougher*, 39 U. S. 14 Pet. 178 [10: 408]; *Reiche* v. *Smythe*, 80 U. S. 13 Wall. 162, 164 [20: 566, 567]; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112 [25: 782].

We inquire then whether the appellate jurisdiction of this court over controversies to which the United States are parties has been circumscribed by Congress in respect to the right of appeal.

By section 629 of the Revised Statutes, original jurisdiction was conferred upon the circuit courts (with a limitation as to the value of the matter in dispute) of all suits in equity and all suits at common law where the United States are petitioners or plaintiffs; all suits at law or in equity, arising under any Act providing for revenue from imports or tonnage; all causes arising under any law providing internal revenue; all causes arising under the postal laws; and all suits at law or in equity arising under the patent or copyright laws of the United States. By the fifth paragraph of section 711, the jurisdiction of the courts of the United States of all cases "arising under the patent right or copyright laws of the United States" was declared to be exclusive.

By the Act of March 3, 1875 (18 Stat. at L. 470), it was provided: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners;" and this was repeated in substance, the differences being immaterial here, in the acts of March 3, 1887 (24 Stat. at L. 552) and August 13, 1888 (25 Stat. at L. 433).

And this court had appellate jurisdiction over all final judgments and decrees of any circuit court or of any district court acting as a circuit court, in civil actions *where [551 the matter in dispute exceeded the sum or value of five thousand dollars. Rev. Stat. §§ 690-692; 18 Stat. at L. 315.

The primary object of the Act of March 3, 1891, chap 517, as stated in *American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 382 [37: 486, 490], "well known as a matter of public history, manifest on the face of the Act, and judicially declared in the leading cases under it, was to relieve this court of the over burden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the Act, the entire appellate jurisdiction from the circuit and district courts of the United States."

By section five of this Act, appeals or writs of error may be taken from the circuit court directly to this court in six specified classes of cases: where the jurisdiction of the court below is in issue; in prize causes; in cases of convictions of capital or otherwise infamous crimes; in cases involving the construction or application of the Constitution of the United States; in cases in which the constitutionality of any law of the United States, or the validity

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or construction of any treaty made under its authority, is drawn in question; in cases where the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Cases in which the United States are plaintiffs or petitioners are not enumerated as falling within either of these classes, nor are cases involving merely the construction of a law of the United States, those ordinarily arising under the heads of jurisdiction in respect of subject-matter treated of in the sixth section.

By the sixth section, it is provided that the circuit courts of appeals shall have appellate jurisdiction "in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law." The courts of appeals, therefore, have appellate jurisdiction [552] of all cases in which *original jurisdiction is conferred on the circuit courts by reason of the United States being plaintiffs or petitioners. It is further provided by that section that "the judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases." And the last paragraph of the section provides that "in all cases not hereinbefore, in this section made final, there shall be, of right, an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." Judgments or decrees in cases in which the ground of jurisdiction of the circuit court is that the United States are plaintiffs or petitioners are not made final in terms, and such cases would fall within the last paragraph, unless restricted by the previous enumeration. And the contention is that the words "cases arising under the patent laws," must be held to operate as such restriction, and to render the judgments and decrees of the circuit courts of appeals final, notwithstanding the existence of another distinct ground of jurisdiction in the circuit court, and that there would consequently be a right of appeal from a decree of a circuit court of appeals dismissing a bill by the United States to cancel a patent for land, but none where the bill is one to repeal an invention patent.

In *United States* v. *American Bell Teleph. Co.* 128 U. S. 315, 359 [32: 450, 459], we said: "In the present case the United States are plaintiffs, and the bill asserts that the suit is one of a civil nature, and of equitable cognizance; and manifestly, if it presents a good cause of action, it arises under the laws and Constitution of the United States. It is therefore within the language both of the Constitution and of the statute conferring jurisdiction on the circuit courts." Two grounds to support the jurisdiction were thus indicated, but the question there was whether the judicial power of the United States under the Constitution extended to a suit by the United States to [553] repeal a patent, and in that view *it was held that such a suit was a case arising under the laws of the United States, as had been previously adjudged many times by the court. In the language of appellee's counsel, "the judgments in the great contests reported in Cranch and Wheaton established that these words embraced, and therefore carried the judicial power to, every case wherein the existence or extent of a right purporting to be given by Federal authority and claimed by either party became an essential ingredient."

Nevertheless, in respect of removals of suits from the state courts to the circuit courts under the acts of March 3, 1887, and August 13, 1888, we held, upon what was deemed the true construction of the statutes, that the right of removal was limited to cases in which it appeared from the plaintiff's statement of his own claim that his cause of action was one arising under the Constitution or laws of the United States. *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 [38: 511]; *Chappell* v. *Waterworth*, 155 U. S. 102 [39: 85].

In *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138 [37: 1030], it was ruled that when the original jurisdiction of a circuit court is invoked upon the sole ground that the determination of the question depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character of which the circuit court could properly take cognizance at the time its jurisdiction was invoked; and that where the jurisdiction was invoked solely on the ground of diverse citizenship, the judgment of the circuit court of appeals was final, although another ground for jurisdiction in the circuit court might be developed in the course of subsequent proceedings in the case. How the case might be if the plaintiff had invoked jurisdiction on two distinct grounds, one of them being independent of diverse citizenship, was not determined. Nor is it necessary to pass upon that question in this instance, for the motion may be disposed of upon the inquiry whether it was manifestly the intention of Congress to include such a case as that before us in the words "arising under the patent laws." Now, actions at law for infringements, and suits in equity for infringement, for interference, and to obtain patents, *are suits which clearly arise under the [554] patent laws, being brought for the purpose of vindicating rights created by those laws, and coming strictly within the avowed purpose of the act, to relieve this court of that burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance. We are of opinion that it is reasonable to assume that the attention of Congress was directed to this class of cases, and that the language was used as applicable only to them; and that there is nothing in the objects sought to be attained and the mischiefs sought to be remedied by the Act which furnishes foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction of this court in a case such as this.

Moreover, in those cases, the subject-matter is everything in respect of jurisdiction, and the character of the parties nothing; while here, the character in which the plaintiffs sue and the nature of the case are inseparably blended.

In instituting this suit, the government ap-

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peared on behalf of the public, and, as it were, in the exercise of the beneficent function of superintending authority over the public interests, and the rule of construction in such cases is properly regarded as affected by considerations of public policy. It is upon the principle of public policy that the United States have been held not bound by statutes of limitation unless Congress has clearly manifested that they should be so bound (*United States* v. *Nashville, C. & St. L. R. Co.* 118 U.S. 120, 125 [30: 81, 83]; *Stanley* v. *Schwalby*, 147 U. S. 508 [37: 259]), and the same rule is applicable to the exercise of *parens patriæ* inherent in the supreme power of every state, in respect of which it was observed by *Mr. Justice* Strong in *Dollar Sav. Bank* v. *United States*, 86 U. S. 19 Wall. 227, 287 [22: 80, 81], that so much of the royal prerogative as belonged to the King in his position as universal trustee enters as much into the principles of our state as it does into the principles of the British government. Hence it was held in *United States* v. *Beebe*, 127 U. S. 338 [32: 121], that the United States are not bound by any statute of limitations, nor barred by laches of their officers, in a suit brought by them, as sovereign, to enforce a public right or to assert a public interest.

555]* In *United States* v. *American Bell Teleph. Co.* 128 U.S. 315 [32: 450], it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake, or by accident, a suit by the United States against the patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative but where patents for land and inventions are issued by the authority of the government, and by officers appointed for that purpose who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee.

We cannot impute to Congress the intention of narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such, deeply concerning the public interests, and not falling within the reason of the limitations of the Act.

Motion denied.

Mr. Justice **Gray** took no part in the consideration and disposition of this motion.

DANIEL MAGONE, Collector of the Port of New York, *Plff. in Err.*,

v.

PETER WIEDERER ET AL.

(See S. C. Reporter's ed. 555-562.)

Tariff classification.

Where use becomes the criterion, the chief use, and not the exclusive use, of an article, determines its tariff classification.

[No. 23.]

Argued Jan. 25, 1895. Decided Nov. 18, 1895.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of Peter Wiederer *et al.*, plaintiffs, against Daniel Magone, collector of the port of New York, for the recovery of duties illegally exacted upon certain importations. *Affirmed.*

Statement by *Mr. Justice* **White:**

This was an action brought in the circuit court of the United States for the southern district of New York, by the defendants in error, who were partners in business under the name of P. Wiederer & Bros., against a former collector of the port of New York, to recover alleged overpayments exacted as duties upon certain importations made in 1887 and 1888. Due protests were made against the duties charged by the collector, and from his decision timely appeals were taken to the Secretary of the Treasury. The articles in question were imported from Bremen and Hamburg, and consisted of pieces of glass, square, oblong, or round, with ground or beveled edges, the invoices describing them as "glass unsilbert," giving their respective dimensions. All the packages except four lots were also described in the invoices as "parts of watches." The [557 collector assessed the glass as dutiable as "articles of glass, cut," under paragraph 135 of the tariff act of March 3, 1883 (22 Stat. at L. 496), which imposed a duty of forty-five per centum ad valorem upon "articles of glass, cut, engraved, painted, colored, printed, stained, silvered, or gilt, not including plate glass silvered, or looking-glass plates." The importer claimed that they were dutiable either as "parts of watches," under paragraph 494 of said act (22 Stat. at L. 514), which imposed a duty of twenty-five per centum ad valorem upon "watches, watch cases, watch movements, parts of watches, and watch materials, not specially enumerated or provided for in this act;" or, as "parts of clocks," under paragraph 414 (22 Stat. at. L. 511), which laid a duty of thirty per centum ad valorem upon "clocks and parts of clocks." On the trial of the case, the claim that the glass was dutiable as "parts of watches" was abandoned by the importers, who insisted that they should have been assessed as "parts of clocks."

There was testimony tending to show that the glass had been ordered from a factory in Germany, some for the Ansonia Clock Company and some for the New Haven Clock Company; that the pieces had been cut and manufactured to sizes suitable for clocks; and that the edges had been ground and bevelled so as to cause the glass to be ready for fitting into the dials and frames of the clocks for which the glass had been in advance prepared—in other words, that the glass was a finished product, ready for use in clocks without any further labor or preparation whatever. There was also evidence tending to show that the particular importations in question were made in consequence of a regular course of business between

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to *Greely* v. Thompson, 13: 397.

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the clock companies and the importer, by which the latter had regularly, during a considerable period of time, received from the clock makers the description and measurements of the glass required for fitting into the clocks, and ordered them manufactured in accordance therewith. There was also evidence tending to show that the glass of which the pieces were made was French window glass of a good quality, and that pieces of glass like those in question were chiefly and generally used as parts of clocks. On behalf of the collector, there was evidence tending to show that pieces of glass like those imported were sometimes used by the manufacturers of hand mirrors, by carriage manufacturers, by photographers, by perfumers, by makers of lamps, and for other objects. The evidence tended to show, not that the exact sizes of glass covered by the invoices were used for the purposes named, but that pieces of glass of the general [558] form of *those imported were thus used when cut to the sizes required for other purposes. There was conflict in the testimony as to whether pieces made from window glass were ever used other than for clocks; some of the witnesses saying that the glass used for such other purposes was plate glass and not window glass, whilst others testified that both pieces made of plate and window glass were used for the other purposes above indicated. The court below, after instructing the jury that the burden was upon the plaintiff to establish by a preponderance of evidence that the articles were parts of clocks, laid down the following rule by which they were to determine whether the glass was to be so considered:

"In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute. . . .' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant."

*The defendant excepted to so much of [559 the charge as stated that "the principal or chief use of the articles would determine their tariff classification." He, moreover, excepted to the refusal of the court to give five separate charges by him presented. The first, fourth, and fifth of these charges substantially asked that the jury be instructed to find in favor of the defendant, unless the proof showed that the pieces of glass in controversy were used absolutely and exclusively for clocks, and for no other purpose. The second and third requests asked for an instruction in favor of the defendant, unless the proof showed that the articles imported were used in trade exclusively as parts of clocks or parts of watches, or were used in trade and commerce solely as parts of clocks.

Mr. **Edward B. Whitney,** Assistant Attorney General, for plaintiff in error.

Messrs. **Edward Hartley** and *Walter H. Coleman* for defendants in error.

Mr. Justice **White** delivered the opinion of the court:

The instructions which were refused asked the court to rule that exclusive use was the correct criterion to determine the classification. The error of this contention seems obvious from the most casual consideration. If exclusive use were made the test, then an exception would destroy the rule; for however general and universal the use of a particular article might be, if exceptionally used for another purpose, such use would destroy the effect of the general and common use, and make the exception the controlling factor. It is urged that if exclusive use is not made the criterion, it will be impossible to assess duties, because of the difficulty of ascertaining the chief or general and common use; but it is manifest that this argument of inconvenience is a mistaken one, and that, on the contrary, it would be impossible to resort to use as a criterion of *classification if exclusive use must be [560 ascertained in so doing, for that which is generally and commonly done may be known, but that which is so universally done as to be without any exception is difficult, if not impossible, of ascertainment.

The strength of this reasoning has caused counsel, in the discussion at bar, to admit that the correct standard is not exclusive use, which was presented in the first, fourth, and fifth requests to charge, but that such test is to be found in the exclusive commercial use which was embraced in the second and third requests. The proposition involves a distinction without a difference. How the line can be drawn between exclusive use and exclusive commercial use, in trade or commerce, is impossible of statement. Indeed, this difficulty is likewise so apparent that in defending the proposition of exclusive commercial use it is defined in the argument to be "known in commerce," but known in commerce is a matter of commercial designation, not of commercial use. Thus, it is impossible to state the proposition of exclusive use without being driven by

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the reason of things to abandon it and seek refuge in the theory of exclusive commercial use, or exclusively used in trade or commerce. It is equally impossible to state this last contention without resolving it into a question of commercial designation. The decisions of this court abundantly support the refusal to give the charges asked. *Hartranft* v. *Langfeld*, 125 U. S. 128 [31: 672]; *Robertson* v. *Edelhoff*, 132 U. S. 614 [33: 477]; *Cadwalader* v. *Wanamaker*, 149 U. S. 532 [37: 837]; *Walker* v. *Seeberger*, 149 U. S. 541 [37: 840]; *Hartranft* v. *Meyer*, 149 U. S. 544 [37: 841]; *Magone* v. *Heller*, 150 U. S. 70 [37: 1001]; *Sonn* v. *Magone*, *ante*, 203. It is urged that *Worthington* v. *Robbins*, 139 U. S. 337 [35: 181], and *Magone* v. *Heller*, *supra*, are in conflict with the other cases above quoted, and therefore such other cases by implication are overruled. The contention is without foundation. It proceeds upon the hypothesis that this court overruled, in 139 U. S. 337 [35: 181], *Hartranft* v. *Langfeld* and *Robertson* v. *Edelhoff*, when, in 149 U. S. 532, 541, 544 [37: 837, 840, 841], in *Cadwalader* v. *Wanamaker*, *Walker* v. *Seeberger*, and in *Hartranft* v. *Meyer*, it affirmed those cases, and held itself bound by the doctrine of chief use which was there announced. So, also, it presupposes that this court, in *Ma-*
561] *gone* v. **Heller*, in 150 U. S. 70 [37: 1001], reversed the doctrine established in a line of carefully considered cases without even making reference to them. It is apparent that the matters decided in *Worthington* v. *Robbins* and *Magone* v. **Heller* do not conflict with the adjudications of this court, as to the chief or predominant use which began with the case of *Maillard* v. *Lawrence*, 57 U. S. 16 How. 261 [14: 930], and has found fuller expression in the line of cases above referred to.

Worthington v. *Robbins* involved the rate of duty on a certain class of enamel, which it was claimed by the importer was dutiable as watch materials. The court found that the enamel was a raw material, not necessarily material for a watch at all, and not susceptible of being used as such without undergoing a process of manufacture. It was upon this ground the case was decided. *Magone* v. *Heller* involved the duty on an article invoiced as "manure salts," which the collector claimed was dutiable as sulphate of potash at 20 per cent ad valorem, and which the importer asserted was free of duty as a substance "expressly used for manure." The proof showed that salts like those in question were used for making fertilizers, that they were sometimes sold to farmers for fertilizing purposes, and that they were also used for making alum, nitrate of potash, and bichromate of potash. In this state of proof the defendant, collector, requested, under the theory of exclusive use, a verdict in his favor, which the court refused, but on the request of the plaintiff instructed a verdict in his behalf. We held that the court rightly refused the instruction for the defendant, which was necessarily an adhesion to the settled doctrine that where use becomes the criterion, exclusive use was not the proper test to apply. We held, also, that there was error in instructing for the plaintiff, because the question of whether there was chief or predominant use of the imported article as a substance "expressly used for manure," should have been left to the jury, and the case was remanded for that reason. In reviewing the contention we said: "If the only common use of a substance is to be made into manure, or to be itself spread upon the land as manure, the fact that occasionally or by way of experiment it is used for a different *purpose [562 will not take it out of the exception. But if it is commonly, practically, and profitably used for a different purpose, it cannot be considered as used expressly for manure, even if, in the majority of instances, it is so used." It follows that whilst *Magone* v. *Heller* adhered to the settled rule of chief use, a guide was there announced by which to discover whether the facts established such chief use. Chief use, in itself, is a vague and uncertain term. *Magone* v. *Heller*, therefore, held that chief use was to be ascertained by that which was commonly, practically, and generally done, and was not to be overthrown by an occasional exception for practical or experimental purposes. Thus, we repeat, *Magone* v. *Heller*, whilst enforcing and applying the rule of chief use, furnished the instrument for determining and measuring its operation and giving certainty to its application. It is for this reason in the recent case of *Sonn* v. *Magone*, *ante*, 203, *Magone* v. *Heller* was cited as authority for and in elucidation of the correct test by which use, as a measure of classification, was to be controlled. The charge given by the court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this court in *Magone* v. *Heller*. *Affirmed.*

LOUIS DE JONGE ET AL., *Plfs. in Err.*,
v.
DANIEL MAGONE, Collector of the Port of New York.

(See S. C. Reporter's ed. 562-569).

Duties on paper—commercial designation.

1. Papers coated, colored, and embossed, to imitate leather, or coated with flock to imitate velvet, known to commerce and trade at the passage of the tariff act of 1883 as fancy papers, embossed paper, or morocco paper, or imitation of velvet paper, are dutiable under that act at twenty-five per centum ad valorem, and not, as manufactures of papers, at fifteen per centum ad valorem.
2. Where a word had a well-known signification in trade and commerce at the time of the passage of a tariff act, that meaning controls in assessing duties.

[No. 56.]

Argued November 1, 1895. Decided November 18, 1895.

IN ERROR to the Circuit Court of the United States for the Southern District of

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 13: 397.

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New York to review a judgment for the defendant, Daniel Magone, collector of the port of New York, in an action brought by Louis De Jonge *et al.* to recover duties illegally exacted upon imported goods. *Affirmed.*

See same case below, 41 Fed. Rep. 432.

Statement by *Mr. Justice* **White**:

The action below was brought to recover the amount of alleged excessive exactions imposed by the defendant, while collector of the port of New York, as duties upon two importations into the port of New York made by the plaintiffs in 1888, of two kinds of paper, the one coated, colored, and embossed to imitate leather; the other coated with flock to imitate velvet; which importations were classified by the collector as dutiable under schedule M of the tariff act of 1883 (22 Stat. at L. 510) which reads as follows:

"Paper hangings and paper for screens or fireboards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note, and all other paper not specially enumerated or provided for in this act: twenty-five per centum ad valorem.

The goods were described in the invoices as "manufactures of paper," and in their protest the importers claimed that they were dutiable at only fifteen per cent ad valorem, under a paragraph of the same schedule of the act referred to, which reads as follows:

"Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act: fifteen per centum ad valorem."

A member of the plaintiff firm testified, and the evidence generally tended to show, that the articles in question were embraced in a class of surface coated papers, known to commerce and trade at the time of the passage of the tariff act of 1883 as "fancy papers," and were specifically designated and known to the trade at that time, the imitation of leather paper as "embossed paper" or "morocco paper," and the other as "imitation of velvet paper."

The process by which fancy papers of the character referred to are produced, while requiring different machinery, the employment of workmen not accustomed to making ordinary paper, or the completed paper which is used in this manufacture, yet is substantially the same method as is used in the manufacture of wall paper. Indeed, the unquestioned proof [564]*was that paper, as completed in mills, in order to make wall paper, is subjected to further treatment to fit it for the new use. As to the imitation of leather paper, there are no ingredients contained in it not found in ordinary paper, though the sizing and coloring are different.

In the production of these fancy papers, printing paper or sized paper, white and manilla paper, as completed in the paper mills, is used. In the case of imitation of velvet paper, the process consists in first putting a strong sizing on the paper, then sifting the different colored flocks in the wet sizing, and then drying the product; and, in the case of the paper coated, colored, and embossed to imitate leather, color is first laid upon the paper, it is then dried, sized, and finally passed through engraved steel rollers, which emboss its surface. It was in evidence that the embossed or morocco paper was used to cover books, for covering paper boxes, for album covers, fancy boxes, or sample cards, for pocketbooks, for pamphlets, and for a great many other purposes to imitate leather; and the imitation of velvet paper was used for mats to contain photographs, to frame photographs, for fancy boxes to imitate velvet, and also for wall decoration. A witness for the defendant testified that imitation velvet or flock paper had been used to put upon walls for more than forty years, and that the product when intended for use as wall papers was put up in rolls. In the catalogue issued by plaintiffs to the trade, put in evidence, and in which, as testified to by one of the plaintiffs, the imitation of velvet paper was embraced under the designation of "Leather Papers," the following appears:

"LEATHER PAPERS.

"Our own manufacture.

"$20.00 per ream of 500 sheets, 20x25.

"$2.00 per roll of 25 inches by 25 yards.

"Prices subject to the fluctuations of the market.

"These goods come in nine colors, as follows: Russia red, Turkey red, leather color, light brown, dark brown, light blue, navy blue, dark green, and black, and can be had in plain or smooth, seal grain, alligator, bamboo, and other *patterns; are waterproof finished on the best 40-pound rope manilla stock." [565

At the close of the evidence each party moved for a peremptory direction to the jury, and exceptions were duly taken and noted to the overruling thereof.

The following requests to charge were submitted on behalf of the plaintiffs, and a separate exception taken to each refusal so to instruct the jury:

"If the articles in suit are made by the addition of foreign substances to paper not covered by the popular definition nor the dictionary definition of paper, they cannot be classified as paper for purposes of duty.

"6. Unless you find that trade and commerce in 1883 and theretofore in this country had affixed a different meaning to the word 'paper' from the ordinary meaning, the articles here in suit, not being within the latter, are not to be assessed as paper."

"8. The general words of section 392 of the tariff must be construed as though they read 'and all other papers of that class (designated by the nine preceding words) not specially enumerated or provided for in this act,' and unless you find that the articles in suit belong to that class they cannot be considered as provided for in section 392, unless by the words 'paper hangings and paper for screens and fireboards.'"

The plaintiff also excepted to the following portion of the charge of the court:

"Was this article in the trade and commerce of this country, when Congress legislated in 1883, a variety of paper? In other words, if the committee of Congress that framed this act and reported it to Congress had turned to the trade and commerce of this country of 1883 and had asked that trade for a comprehensive list of all kinds of paper known to them and dealt in commercially as

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such, would paper like this have been included in such list? If the commerce of the country had furnished to the committee of Congress, in answer to such a request, a list of all the kinds of paper known to that trade, and if such list enumerated articles like these, then they are covered by the phrase 'all other papers' in 566] paragraph 893. *The collector was right, and the defendant is entitled to a verdict. If, on the other hand, an article such as this would not have been included in that list at that time, then the plaintiff, having established by the proof that they are manufactures of paper, is entitled to your verdict."

The full charge to the jury is contained in 41 Fed. Rep. 432.

Mr. **Albert Comstock** for plaintiff in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The paragraph of the tariff act of 1883 (22 Stat. at L. 510), under which the classification complained of was made, is contained in the statement of facts. It is contended by counsel for plaintiffs in error that it should be construed so as to read as follows:

"Paper hangings and paper for screens or fireboards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note, and all other paper (*of the class of paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, and note*) not specially enumerated or provided for in this act: twenty-five per centum ad valorem."

This contention is based upon the claims that—

a. The products in question are *manufactures* of paper as contradistinguished from paper, because completed paper, as produced in paper mills, is but one of the tangible ingredients, the other products, sizing of a particular description, water-color paints, wool flock, and the like, being materials entirely foreign to the art of the paper maker, and that complete merchantable paper is employed simply as the material, and is subjected to elaborate mechanical processes involving the employment of machinery entirely unknown to the paper-maker's art, and operated by workmen who are not paper makers; and,

567] *b. That paper hangings and paper for screens and fireboards are a group of products manufactured from an inferior grade of paper stock, and standing equivocally between paper and manufactures of paper, and that as the other nine articles enumerated in the paragraph under which the classification of plaintiff's importations was made, *viz.*, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, and note paper, are of the writing and drawing class of papers, a high grade of paper stock, and solely the products of paper mills, nothing is paper within the meaning of the term, as it is employed in the expression, "and all other paper not specially enumerated or provided for in this act," which is not of the class of papers last enumerated.

But it is established by the evidence beyond dispute that at the time of the passage of the tariff act of 1883 "fancy papers" were largely dealt in in commerce and were well known in the commerce and trade of this country; that there was a great variety of fancy papers, and that such designation covered both the importations out of which this controversy arose. It is not reasonable to suppose that Congress assumed that the manipulation or treatment of particular paper in the completed condition in which produced at a paper mill, by mere surface coating, a process which did not change its form, but only increased the uses to which such paper might be put, had the result to cause the article to cease to be paper and to become a manufacture of paper, especially in view of the continued commercial designation of the article as a variety of paper and its sale and purchase in commerce as paper.

Congress must be presumed to have known that the paper employed in paper hangings and paper for screens or fireboards was printing paper, sized in the paper mill, and subjected to treatment elsewhere, by which the value of the article as paper was greatly enhanced, and the association of those products with the writing and drawing class of papers in the paragraph in question is convincing evidence that paper hangings and paper subjected to similar processes by which paper hangings were produced was regarded as paper *and not [568 as manufactures of paper. Not alone to avoid doubt and confusion, would such products as paper hangings likely be provided for separately, rather than in association with writing and drawing papers, if deemed to be "manufactures" of paper, but as an article clearly a manufacture of paper, to wit, "paper envelopes," was assessed at a duty of twenty-five per cent ad valorem, opportunity existed to place paper hangings in the same paragraph, and such would likely have been done if paper hangings had been deemed "manufactures of" and not "paper."

Nor is it at all probable that Congress would specifically impose a duty of twenty-five per centum upon paper hangings, and intend that an importation of velvet paper of a similar class to wall paper and used for wall decorations should be assessed as a manufacture of paper at a rate of fifteen per centum ad valorem.

While, directly speaking, the products in question might be termed manufactures of the particular variety of paper stock employed as their basis, yet the resultant product of such manufacture was a higher and better grade of *paper*. There was no such change of form as in the case of paper screens, paper boxes, paper envelopes, and other like manufactures of paper. The case is analogous in its main features to *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615, [30: 1012, 1014], where it was held that shells cleaned by acid, and then ground on an emery wheel, and afterwards etched by acid, and intended to be sold for ornaments, as shells, remained shells, and that they had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell.

In the schedule of the tariff act of 1883 under consideration, Congress attempted a classification of paper generally. A duty of twenty per cent was laid upon "paper sized or

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glued, suitable only for printing paper;" a duty of fifteen per cent was laid upon "printing paper, unsized, used for books and newspapers exclusively;" a duty of ten per cent was laid upon "sheathing paper;" and all other paper was embraced in the paragraph under which the paper in question was classified and made dutiable at twenty-five per centum ad valorem. 569] *As cheaper grades of paper than the writing and drawing paper enumerated in the paragraph last referred to were elsewhere referred to in the act, it is obvious that the expression "and all other paper not specifically enumerated or provided for in this act" meant precisely what was expressed, and embraced paper *of any grade*, not elsewhere enumerated in the act. "Other paper not elsewhere provided for," would embrace "tissue" paper (*Lawrence* v. *Meritt*, 127 U. S. 113 [32: 91]), and that term would also seem to include the various grades of brown and other wrapping paper, and the rope manilla paper out of which the "leather goods" of plaintiffs in error were produced, even though not of the high grade of paper known as writing and drawing papers.

It follows from what has been stated that the court rightly refused the charges requested by plaintiffs in error. It equally follows that if the word "paper" had a well-known signification in trade and commerce in 1883, which embraced these products, that meaning would control. *Cadwalder* v. *Zeh*, 151 U. S. 171 [38: 115], and cases cited p. 176 [117]. This principle clearly authorizes the court to submit to the jury the question: "Was this article in the trade and commerce of this country, when Congress legislated, in 1883, a variety of paper?" and to instruct them, in the event they answered the question in the affirmative, to find in favor of the collector. *Affirmed.*

HENRY T. COWLEY, *Appt.*, *v.* NORTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 569-583.)

Proceeding to vacate a judgment—Washington Code—equity jurisdiction—removal.

1. If a special proceeding under Washington Code, § 436, to vacate a judgment for fraud, be removed to a Federal court, the petitioner loses no right that he would have had, had it not been removed.
2. Averring a case of fraud within the fourth subdivision of section 436 of the Washington Code is sufficient to give the court jurisdiction, and such jurisdiction will not be defeated by proof that no fraud was actually committed.
3. Federal courts may enforce, on their equity side, new rights or privileges established by state or territorial statutes, precisely as they may enforce a new right of action given by statute on their common-law side.
4. One who removes a case to the United States circuit court cannot claim that such court had no jurisdiction, unless the court from which it was removed had no jurisdiction.

[No. 67.]

Argued and Submitted October 22, 1895. Decided November 18, 1895.

APPEAL from a decree of the Circuit Court of the United States for the District of Washington dismissing a proceeding to set aside a judgment instituted by Henry T. Cowley, plaintiff, against the Northern Pacific Railroad Company. *Reversed and case remanded for further proceedings.*

See same case below, 46 Fed. Rep. 325.

Statement by *Mr. Justice* **Brown:**

This was a proceeding originally instituted in the district court of the fourth judicial district of Washington territory, under a territorial statute, to set aside a certain judgment rendered in a case brought by the railroad company against the appellant, Cowley, in the same court.

The facts of the case were substantially as follows: In 1886, the railroad company began an action against the appellant to recover possession of 120 acres of land within the limits of Spokane Falls. In answer to the complaint in that action, Cowley set up a contract of purchase of the land between himself and the railroad company, alleging that he had complied or was ready to comply with the terms of his contract, had gone into possession of the land pursuant thereto, and had made valuable improvements thereon to the amount of $1,500, and demanded a specific performance. This answer or counterclaim was denied by the railroad company in its reply, and the case being thus at issue, was referred to a referee to take testimony. The case was set for a hearing by the referee on May 10, 1888, and was afterwards adjourned to May 11.

*On the day originally set for the hear- [571 ing, the land agent of the railroad company made an oral offer to appellant's attorneys who were to receive one quarter of the proceeds of the action, to compromise the suit by the payment to appellant of $8,000 in cash, and the conveyance of seven and one half acres of the land in question, the company to retain the remainder of the land. This offer the appellant's attorneys, Messrs. Ganahl & Hagan, advised him to accept. There was some dispute as to whether it was actually accepted or not, but the court found that it was. The allegation of the petition in this connection is "that after full and

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NOTE.—*As to removal of causes, under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies,—see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 23: 524; and Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes when denied,—see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers, U. S. Rev. Stat. § 643, see note to Davis v. South Carolina, 27: 574.

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mature consideration of said proposition, said Cowley decided to reject the same, and so notified his attorneys, Messrs. Ganahl & Hagan, and being very anxious about having said cause prosecuted to a final and successful issue in the courts, and being desirous of having his case tried by attorneys having confidence in the merits thereof, he determined to associate other counsel with said Ganahl & Hagan in the defense of said cause, and so notified them, asking that such other counsel should take an equal share with said Ganahl & Hagan in the conduct and defense of said cause."

If the proposition was accepted, as claimed by the railroad company, and found by the court, there is no doubt that it was subsequently repudiated by Cowley, who informed his attorneys that he was dissatisfied with it, and desired to employ other counsel with them, to which they refused to consent, except upon payment of their fees. There is no doubt that appellant also telegraphed the general land agent of the railroad company that he must have additional time to consider the proposition of a compromise, to which the land agent replied that there was nothing to consider, the settlement having been made and the papers and money sent. The president of the First National Bank of Spokane Falls, to whom the money and papers were sent by the railroad company on May 16, took them to the office of the appellant's attorneys and informed them that, on the execution of a quitclaim deed by appellant and his wife, the money would be paid over. But it seems the appellant refused to execute the deed, and has 572]*ever since refused, and the money has ever since been in the hands of the president of the bank ready to be turned over.

On the following day, May 17, appellant wrote to the attorney of the railroad company and to its general land agent, that the offer was not accepted; that Ganahl & Hagan were no longer his attorneys; and that all further communications should be made through his attorneys, Messrs. Blake & Ridpath. These letters were received about May 18, and were answered to the effect that until other attorneys were regularly substituted by an order of court, Messrs. Ganahl & Hagan would still be recognized by the company as appellant's attorneys. On the same day on which appellant wrote these letters, he also wrote Ganahl & Hagan stating that he discharged them as his attorneys, and that he had employed other counsel, to which they made reply that they demanded $4,000 for their fee, and would take nothing less, and that they had, on motion, set the case down to take testimony on Monday, May 21. On May 18, the refereee set down the case to take testimony on May 21, and notified the attorneys for the respective parties. Appellant telegraphed the attorney of the railroad company that he could not go on upon that day, as he had employed new counsel, to which the attorney replied that he had made no arrangements for taking testimony, having supposed it would be unnecessary, and that at any rate he could not go on until the general land agent of the company was able to attend.

On May 21, which was the first day of the May term of the court, the attorney for the railroad company, and Ganahl & Hagan as attorneys for Cowley, entered into a stipulation to the effect that the case had been settled and compromised on the terms above mentioned, and that judgment should be entered for the plaintiff, the said railroad company, for the restitution of the premises demanded in the complaint; denying the relief prayed in defendant's answer, with costs against the plaintiff. Ganahl & Hagan also executed a receipt for the papers and money then in the First National Bank, though, in fact, they never received the money, which is still in the bank on deposit. Upon this stipulation and receipt, judgment *was accordingly entered[573 that the plaintiff railroad company recover of the defendant the possession of the premises described in the complaint; that a writ of restitution issue; that the relief prayed in defendant's answer be denied; and that plaintiff pay the costs. Defendant did not know that the stipulation had been made, or the receipt given, or judgment entered, until it had been done, and upon hearing of it, he protested against it.

Thereafter, and without taking any further proceeding in the original suit, appellant instituted this proceeding to set aside the judgment in the former case, upon the ground of fraud and collusion between Ganahl & Hagan and the attorney for the railroad company, and as being entered without authority. The proceeding was begun in the district court of the territory, and was afterwards proceeded with in the superior court of Spokane county, in the state of Washington. It was then removed into the circuit court of the United States, which rendered a decree dismissing the bill, from which decree Cowley took this appeal. The opinion of the circuit court is reported in 46 Fed. Rep. 825.

Messrs. **R. B. Blake,** *W. M. Ridpath, Frank Graves, George Turner,* and *Lewis Abraham* for appellant.

Messrs. **A. H. Garland** and **William J. Curtis** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The referee to whom this case was referred by the district territorial court found, as matter of fact, that Cowley did not directly authorize Ganahl & Hagan to enter into the stipulation and to consent to judgment, but that the stipulation and judgment were only incidental to the contract of *settlement and substantially[576 embodied in the same terms, and that by reason of such settlement, and the general powers of attorney therein, and the power of attorney executed and given to Hagan, and their general powers as attorneys in the case, they were authorized to act in the manner they did, notwithstanding their agency was revoked and notice given to the railroad company. He also found, as conclusions of law, that the plaintiff was not entitled to the relief asked, and that the order and decree in the original case should be declared to stand and remain in force.

On August 6, 1889, motion was made by Cowley to set aside this report, defendant making a counter motion to confirm it, except as to certain findings of fact. Washington was ad-

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mitted as a state by proclamation made November 11, 1889. The case was transferred to the superior court of Spokane county upon the admission of the state, and on January 6, 1890, was removed, upon the petition of the railroad company, to the circuit court of the United States for the district of Washington, in which court it appears to have been docketed as a case in equity. The motion to set aside the report of the referee coming on to be heard before the circuit court, that court struck out the paragraph of the referee's finding above cited, and found that the agreement for a compromise was "only an understanding between the parties as to the terms upon which the contract would be concluded, and that there was not a contract actually made and concluded." It further found that this agreement, even if it were binding in law and equity upon Mr. Cowley, had never been executed or carried into effect; that it had never been performed on defendant's part so as to entitle it to any judgment in the district court in the original case; that the stipulation signed by Ganahl & Hagan, as attorneys for Cowley, was not only not authorized, but was made in defiance of his known wishes in the matter, and hence that the judgment upon such stipulation was improperly rendered, and was unjust.

It was found, however, that the proceeding was in equity, and that it was not fit, according to equity practice, to decree that a judgment be vacated or annulled, or to act directly upon the 577] *case in which an unjust or void judgment has been rendered. That the plaintiff should have applied by petition or motion, in the original case, and that, his remedy at law being adequate, the suit must be dismissed.

At the time this proceeding was instituted, the following provisions of the territorial Code of Washington were in effect:

"Section 436. The district court in which a judgment has been rendered, or by which, or the judge of which, a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order:

"1. By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the sections relating to new trials.

"2. By a new trial granted in proceedings against defendant served by publication only as prescribed in section sixty-seven.

"3. For mistakes, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.

"4. For fraud practised by the successful party in obtaining the judgment or order," etc.

Section 437 provides that "when the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action." This manifestly refers to applications under the first and second subdivisions of section 436.

Section 438 requires that "the proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion," etc. This evidently refers to the third subdivision of section 436.

Section 439 requires that "the proceedings to obtain the benefit of subdivision four . . . shall be by petition, *verified by affidavit, set-[578 ting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defense to the action, if the party applying was a defendant; and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability."

The judgment in the original case was entered upon May 21, 1888, and the petition in this case was filed on June 26 of the same year. It does not appear, however, whether it was at the same or a subsequent term of the district court.

Section 440 provides that "in such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, and the pleadings shall be governed by the principles and the issues be made up by the same form, and all the proceedings conducted in the same way as near as can be, as in an original action by ordinary proceedings, except that the defendant shall introduce no new cause, and the cause of the petition shall alone be tried."

Other sections provide that the judgment shall not be vacated until it is found that there was a valid defense or a valid cause of action in the original suit, and that all liens and securities obtained under it shall be preserved to the modified judgment. That the court may first try and decide upon the grounds to vacate or modify the judgment before deciding upon the validity of the defense or cause of action. That an injunction may issue suspending proceedings and prescribing the form of judgment to be finally entered.

The petition was in the form of an independent complaint by Cowley against the Northern Pacific Railroad Company, setting forth certain facts which he alleged made it a fraud upon his rights for his attorneys to agree to the judgment which was entered up in the original case against himself, and praying that the decree in that case be set aside, that he be allowed to defend the action, and that he have judgment for costs. The complaint appears to be drawn in *substantial conformity with [579 the territorial statute, although it is not entitled in the original cause, but has an independent entitling of its own. The defendant appeared in answer to a summons issued under section 440, demurred to the complaint, and, upon the demurrer being overruled, filed an answer, to which plaintiff relied as in an original action. The difficulty in the case seems to have arisen from the fact that after the removal of the case to the circuit court of the United States it was treated as a suit in equity, subject to all the limitations attaching to the equitable jurisdiction of the Federal courts, instead of a special proceeding to obtain the benefit of the statute, the court holding that the assistance of equity could not be invoked so long as the remedy by motion existed. The court declined to con-

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sider it as a proceeding under the Code, saying that the rights of the parties and the limitations of their rights, in such a statutory proceeding, were quite different from the rights and limitations and the rules which must govern the decision in a suit in equity, and that the effect of a decision or judgment was entirely different.

It would appear, however, in view of section 440 of the territorial Code, providing that the parties shall be brought into court in the same way, on the same notice, as to time, mode of service, and mode of return, that the pleadings should be governed by the principles, and the issues made up in the form, and all the proceedings conducted, as in an original action by ordinary proceedings,—that there was no impropriety in filing this petition or complaint as an original proceeding, or conducting the case in the ordinary method.

In the case of *Gaines* v. *Fuentes*, 92 U. S. 10 [23: 524], which was an action to annul an alleged will, brought under the laws of Louisiana, in the district court of the parish of Orleans, and removed to the circuit court of the United States, it was held that the suit was in effect an action between parties, and that the Federal court had jurisdiction. It was said that if the suit could be maintained in a state court, it might also be maintained by original process in a Federal court, where the requisite diversity of citizenship existed.

In the subsequent case of *Barrow* v. *Hunton*, 580]99 U. S. 80 [25: 407], a *petition was filed in the same state court of Louisiana, praying for a decree of nullity of a judgment recovered against the petitioner, setting forth as his grounds for such relief that the judgment complained of was void, because it was founded on a default taken, and no lawful service of the petition and citation in the suit had ever been made upon the petitioner. This case was also removed to the circuit court, where plaintiff, by leave of the court, amended his petition to conform to the equity practice, converting it into a bill in equity containing substantially the same averments and praying the same relief. It was said by *Mr. Justice* Bradley, in delivering the opinion of the court, that the question presented was whether the proceeding was a separate suit, or a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. "If the proceeding is merely tantamount to the common-law process of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case." "On the other hand," said he, "if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines* v. *Fuentes* the case might be within the cognizance of the Federal courts. . . . In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts, and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof." As the judgment complained of was sought to be impeached simply because the defendant had never been lawfully summoned, and the decree was taken by default against him, it was held that the proceeding was one that affected the mere regularity of the judgment. "In the common-law practice it would have been a motion to set aside the judgment for irregularity, or a writ of error coram nobis." It was further *said that, although the fact that the [581 action of nullity can only be brought in the court that rendered the judgment, as in the present case, was entitled to some weight in determining the question, the court was not disposed to allow this consideration to operate so far as to make it an invariable criterion of the want of jurisdiction in the courts of the United States. "If the state legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal courts of all jurisdiction, they might seriously interfere with the right of a citizen to resort to those courts. The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it. The classification of the causes of nullity in the Louisiana Code into causes relative to form and those relative to the merits is nearly coincident with the classification above suggested, of cases which are and cases which are not cognizable in the courts of the United States. Causes of nullity relating to form would fall in that class of cases which could not be brought in these courts or be removed thereto. The present case is one of that character."

The distinction between the two cases above cited is, that in the latter case the judgment was impeached for a matter of form, and in the former case for the falsity and insufficiency of the testimony upon which the will was admitted to probate—in other words, for a fraud connected with the probating of the will. The case under consideration, being for an alleged fraudulent practice on the part of the attorneys, falls obviously within the class of cases of which *Gaines* v. *Fuentes*, rather than *Barrow* v. *Hunton*, is an example. So far as the right of the court to deal with this petition is concerned, it makes no difference that the court found that there was no fraudulent conduct on the part of the attorneys, since the petition averred a case of fraud within the fourth subdivision of section 436. This was sufficient to give the court jurisdiction to act, and such jurisdiction would not be defeated by proof that no fraud was actually committed; and the plaintiff *would still be entitled to recover, if [582 he were able to show that he never assented to the compromise, or repudiated it and revoked the authority of his attorneys. In this particular, the case resembles one wherein the plaintiff claims an amount sufficient to give the circuit court jurisdiction, but fails to prove such amount. If the claim be made in good faith, the court does not lose jurisdiction, but may proceed and enter judgment for the amount actually due.

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But while, after the removal of the case to the circuit court of the United States, it might properly be docketed and tried by the court as an equity suit, it still remained, so far as the rights of the plaintiff were concerned, a special proceeding under the territorial statute; and the powers of the court in dealing with it were gauged, not merely by its general equity jurisdiction, but by the special authority vested in its own courts by the statutes of the territory. Had the case never been removed to the circuit court, it would have proceeded in the state court as a special proceeding under the territorial statute, and we are of opinion that, upon its removal to the circuit court, petitioner lost no right to which he would have been entitled had the case not been removed. Even if it were treated as in form a bill in equity, the right of the complainant would be gauged as well by the statute under which the bill was filed, as by the general rules of equity jurisprudence. If any action or proceeding in a state court were subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a Federal court, no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal. While the Federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, with the original rights of the parties unchanged.

Although the statute of a state or territory may not restrict or limit the equitable jurisdiction of the Federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal courts 583 may *enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common-law side. Thus, in *Ex parte McNiel*, 80 U. S. 13 Wall. 236 [20: 624], a statute of the state of New York giving to the pilot who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the district court. See also the cases of *Kieley* v. *McGlynn* ("*Re Broderick's Will*") 88 U. S. 21 Wall. 503, 520 [22: 599, 605], and *Clark* v. *Smith*, 38 U. S. 13 Pet. 195, 203 [10: 123, 127]. So, in *Reynolds* v. *First Nat. Bank of Crawfordsville*, 112 U. S. 405 [28: 733], a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the circuit court of the United States in that district, to quiet the title of the complainant as against such deed, although courts of equity had generally adopted the rule that a deed void upon its face does not cast a cloud upon the title, which a court of equity will undertake to remove. It was also said in *Davis* v. *Gray*, 83 U. S. 16 Wall. 223, 231 [21: 454, 456], that "a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals." Other cases to the same effect are, *Holland* v. *Challen*, 110 U. S. 15 [28: 52]; *Marshall* v. *Holmes*, 141 U. S. 589 [35: 870]; *Johnson* v. *Waters*, 111 U. S. 640 [28: 547]; *Arrowsmith* v. *Gleason*, 129 U. S. 86 [32: 630].

The case having been removed to the circuit court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction.

As the merits of the case, though appearing upon the record, were not argued by counsel, the decree will be reversed and the case remanded for further proceedings in conformity with this opinion.

WILLIAM W. DUNHAM, Adminis- [584
trator, *Appt.*,
v.
JAMES E. JONES ET AL.

(See S. C. Reporter's ed. "Hilton's Admr. v. Jones," 584-589.)

Res judicata—effect of decree.

1. A decree that the plaintiff holds the legal title to two thirds of the lands in question in trust, and that he is the owner in fee of the other one third thereof, is *res judicata* as to the original owner of the land, who was a party defendant in the case and disclaimed all right, title, or interest in the lands.
2. The unsworn statement of the complainant in his bill in equity, that an attorney who appeared for him in a former case and gave a disclaimer was not his authorized attorney, is insufficient as against the decree in the former case, which must necessarily have found that the attorney was authorized.

[No. 1.]

Submitted Oct. 28, 1895. Decided Nov. 18, 1895.

APPEAL from a decree of the Circuit Court of the United States for the District of Nebraska dismissing a suit in equity brought by George H. Hilton to cancel certain deeds and to establish his title to land in Nebraska. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a bill in equity, filed by George H. Hilton, appellant's intestate, to cancel certain deeds, and to establish the title of the complainant to an undivided one third of about 1,900 acres of land, the greater portion of which is situated in Lancaster county, Nebraska, and near to the city of Lincoln.

The litigation originally consisted of two suits, which were heard together in the lower court. The other suit, in which the two surviving sons of the appellant's intestate here were complainants, was appealed to this court, but was dismissed by reason of the appellant's failing to print the record. In that suit the appellants claimed a beneficial interest in two thirds of the lands. In this suit appellant claims an undivided one third of the same lands.

The facts of the case are substantially as follows:

1. On October 26, 1861, complainant's intestate, George H. *Hilton, being the owner [585

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of the lands described in the bill, conveyed the same for a nominal consideration to his brother, "John Hilton, his heirs and assigns forever," in trust for the benefit of his sons, George L., James F., and Joseph B. Hilton, "in equal portion, said trustee having authority to sell and convey all or any portion at any time or in any way at his discretion, for their benefit, the following described real estate," etc., "to have and to hold the same to the only proper use of said John Hilton, in trust as aforesaid, his heirs and assigns forever." This trust was accepted.

2. On September 16, 1863, said John Hilton as trustee, by warranty deed, absolute in terms, and for the expressed consideration of $1,000, conveyed all the said lands to Alice B. Hilton, now Alice B. Ducharme, a sister of the three *cestuis que trust*. It appeared upon the face of the deed that Hilton conveyed as trustee for the three sons of complainant, George H. Hilton.

3. On November 22, 1865, Alice B. Hilton, upon the eve of her marriage, conveyed the same premises to Augusta Hilton, her sister, a girl of eighteen years, by an absolute deed, without mentioning the trust.

4. On May 18, 1866, George H. Hilton, the original complainant, and his wife, Honora, also executed to their daughter, Augusta, a deed of the same land with the following clause: "This deed is made to perfect the title in Augusta Hilton, as it appears that the deed made by the above grantors dated 26th October, 1861, through which title to said lands vested in her, has not been recorded and has been mislaid or lost;" concluding with the following clause: "To have and to hold the same to the said Augusta Hilton, her heirs and assigns forever," with a short covenant of warranty and of seisin.

5. On August 25, 1871, George L. Hilton having attained his majority, Augusta Hilton conveyed to him in fee an undivided one third part of all said lands with the usual covenants of warranty. It seems, too, that on the same day, Augusta Hilton also conveyed to her brother George the remaining undivided two thirds of the property, in trust for his two brothers. This deed, however, does not ap-
586] pear in the *record of this case, and is immaterial so far as the undivided one third in controversy is concerned.

6. On September 11, 1872, said George L. Hilton conveyed an undivided one third of 180 acres of said lands in fee by deed to Smith B. Galey, for a consideration of $3,500, and on September 16, 1872, by a second deed to Galey, for a consideration of $5,000, his entire interest in all the lands.

7. On September 18, 1873, the said Galey, together with said George L. Hilton, conveyed to William C. Lincoln an undivided one third of the same lands, with a covenant against their own acts. The other defendants took their titles from Lincoln.

There were allegations in the bill that these conveyances from George H. Hilton to Galey, and from Galey to Lincoln, were for an inadequate consideration, and were procured by fraud, and that Lincoln's title was defective, unauthorized, illegal, and void.

On December 13, 1873, a petition was filed in the district court of the county of Lancaster by William C. Lincoln, as plaintiff, against James F. Hilton, Joseph B. Hilton, infants under the age of twenty-one years; *George H. Hilton*, the appellant's intestate; Alice B. Ducharme, Augusta Hilton, George L. Hilton, and Nora M. Lincoln, setting forth that the plaintiff held in trust for James F. and Joseph B. Hilton, the two infants, a two-thirds interest in the lands in question; that the lands were wild and uncultivated, yielding no revenue; that the infants had no other property; that the unpaid taxes amounted to over $1,500; that, owing to the mismanagement of John Hilton, the financial embarrassment of George H. Hilton, and to several unlawful conveyances of such lands, they became the subject of long and expensive litigation, and the plaintiff was obliged to expend large sums of money in maintaining the rights of said infants; that although the various conveyances of the property terminating in the deed to himself, conveyed the legal title, it had been questioned whether it was not necessary to have a decree of the court, confirming the equitable title in the plaintiff, that he might be able to procure the full value of the lands in case the court should deem it best to dispose
*of the same. The plaintiff further al- [587
leged that *he was the owner in fee of the remaining one third of the land* above described; that it would be necessary to sell or mortgage one half of the lands to pay off the indebtedness and to provide a sufficient revenue for the support of the infants, and that he was willing to join in a deed or mortgage for the purpose of paying off the debts. He therefore asked for a decree authorizing him to sell or mortgage one half of the lands, and to declare the equitable, as well as the legal, title to be in the plaintiff, as trustee for said infants.

To this petition was annexed, as an exhibit, a supplementary petition, signed by the appellant's intestate, *George H. Hilton*, his three sons and three daughters, certifying to the integrity, fidelity, and financial ability of the petitioner, William C. Lincoln, husband of one of the daughters, and praying the court to appoint him trustee for the two minor sons, under the original trust deed from George H. Hilton to his brother, John Hilton, with power to sell and mortgage the premises, etc. A summons was issued upon this complaint, which was served upon the defendants, with the exception of George H. Hilton, Alice B. Ducharme, and Augusta Hilton, and on January 21, 1874, the defendants *George H. Hilton*, Alice B. Ducharme, Augusta Hilton, and Norah M. Lincoln, by their attorney, Seth Robinson, entered a disclaimer of all right, title, or interest in the lands described in the petition. Upon the same day a decree was entered, reciting the appearance of the parties, the filing of the disclaimer, finding that the plaintiff held the legal title to an undivided two thirds in trust for the infants, and that *he was the owner in fee of the other undivided one third* of the same, and authorizing the sale of one half of the property described.

This decree was never appealed from, and no attempt was ever made to impeach it.

Upon the hearing of the case upon pleadings and proofs, the bill was dismissed, and complainant appealed to this court.

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Messrs. **S. S. Gregory, James S. Harlan,** and **William M. Booth** for appellant.

Messrs. **N. S. Harwood, John H. Ames,** and **C. O. Whedon** for appellees.

Mr Justice **Brown** delivered the opinion of the court:

This bill was brought by the original owner of the land, George H. Hilton, against John Hilton, his trustee; Alice B. Ducharme, the grantee of John Hilton; Augusta Hilton, grantee of her sister Alice; Smith B. Galey, grantee of George L. Hilton, one of the *cestuis que trust*, to whom his sister Augusta had conveyed the land upon his attaining his majority; William C. Lincoln, grantee of Galey, and certain other parties who derive their title either as grantees or mortgagees of the undivided one-third interest conveyed by George L. Hilton to Galey and Lincoln. The bill deals particularly with the third interest conveyed to John Hilton for the benefit of George L. Hilton, who died September 16, 1877. Complainant now claims his interest either by descent, or, if his intestate's son was only seised of a life estate, then as owner of the reversion.

We think it entirely clear that the proceeding taken by Lincoln to obtain a sale of one half the property operates to estop the complainant from maintaining this suit. The petition in that case stated that Lincoln, the plaintiff, held two thirds of the property in trust for James F. and Joseph B. Hilton, and the remaining one third he claimed to own in fee. In accordance with these allegations the district court found that he did hold the two thirds in trust for the infants, and that he was the owner in fee of the other undivided one third, and authorized him to sell one half the entire property. This decree contains every element of a *res judicata*. The plaintiff in that proceeding is one of the defendants in this. George H. Hilton, the original complainant in this proceeding, was one of the defendants in that. He certified to the ability and integrity of Lincoln, disclaimed all interest in the property, allowed the decree to be taken against him, and took no steps to have it set aside, appealed, or modified.

589] *The principal criticism made of it is that Robinson was not the authorized attorney of the defendant in that case, and that his disclaimer of any interest of the complainant in the lands described in the petition was, therefore, not binding upon him. There is no evidence of this, however, except the unsworn statement of the complainant in his amended bill, which is not even signed by him in person. Of course this cannot be considered as against the decree of the district court, which must necessarily have found that Robinson was authorized to make the disclaimer. There was certainly evidence from which the court might reasonably have adjudged, as it did, that Lincoln was the owner of an undivided one third of the property in question. Not only does a statute of the state declare that "the term 'heirs' or other technical words of inheritance shall not be necessary to create or convey an estate in fee simple," and that "every conveyance of real estate shall convey all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used," but on May 18, 1866, George H. Hilton and his wife conveyed the lands in question to Augusta Hilton, who then held the title from her sister Alice, with the declaration that the deed was made to perfect the title in Augusta, "as it appears that the deed made to above grantors, dated 26th October, 1861, through which the said land vested in her, has not been recorded and has been mislaid or lost." Without expressing an opinion whether Lincoln did in fact hold the title to one third, there was certainly evidence tending to show that the court might have made in perfect good faith the finding that it did.

In addition to this we have the opinion of the supreme court of Nebraska in a case brought by Hilton against one Bachman (24 Neb. 490), holding that complainant was bound by that judgment. In delivering the opinion the court observed: "All presumptions are in favor of the regularity of that proceeding. We must presume that the district court which rendered the decree did so upon ample proofs of title, and that the decree being still in full force, is binding, and settles the question of title."

The decree of the court below was clear- [590
ly correct and is therefore affirmed.

W. H. CLUNE ET AL., *Plffs. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 590-595.)

Conspiracy to obstruct the mails—circumstantial evidence—acts and declarations of coconspirators—verdict against evidence—instructions—insufficient exception—punishment—completed act.

1. To establish a conspiracy to obstruct the mails, telegrams on the subject, if identified and brought home to defendants, are admissible in evidence.
2. Where a case rests upon circumstantial evidence much discretion is left to the trial court, and its rulings admitting such evidence will be sustained if the evidence admitted tends even remotely to establish the ultimate fact.
3. The acts and declarations of coconspirators in execution of the conspiracy are evidence against others of their number.
4. The claim that the verdict is against evidence cannot be sustained where all the testimony, or all upon some essential fact, is not presented.
5. Instructions do not become part of the record

NOTE.—*That where an illegal combination is proved, declarations of one about the enterprise are evidence against co-conspirators*, see note to Lincoln v. Claflin, 19: 106.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, —see note to Parks v. Turner, 18: 883.

As to exception, when must be taken, to be available on review, see note to Phelps v. Mayer, 14: 648.

As to what particularity in exceptions is necessary in order to a review in appellate court, see note to Moore v. Bank of Metropolis, 10: 172.

As to obstructing the mail; what constitutes the offense,—see note to United States v. Kirby, 19: 278.

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unless incorporated in the bill of exceptions and thus authenticated by the signature of the judge.

6. Where a jury, not having agreed, are brought into court, and the court reads to them written instructions, a general exception to all of this is not sufficient.

7. Congress has power to punish a conspiracy to commit an offense more severely than the offense itself.

8. Where all the testimony is not presented, this court cannot hold that the conspiracy was merged in the completed act.

[No. 517.]

Argued Oct. 30, 1895. Decided Nov. 18, 1895.

IN ERROR to the District Court of the United States for the Southern District of California, to review a judgment convicting W. H. Clune *et al.* for a conspiracy to obstruct the United States mails. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On July 3, 1894, the plaintiffs in error, together with one A. T. Johnson, were indicted under section 5440, U. S. Rev. Stat., in the district court for the southern district of California, for a conspiracy to obstruct the passage of **591**]the United States *mails. On November 17 a jury was impaneled and a trial begun, which resulted, on November 21, in a verdict of guilty. Motions for a new trial and in arrest of judgment having been overruled, the defendants were, on December 6, each sentenced to pay a fine of one dollar and to be imprisoned in the county jail of Los Angeles county for the period of eighteen months. The defendant Johnson, at the time of sentence, withdrew his motions for a new trial and in arrest of judgment. The other defendants, the present plaintiffs in error, have brought the case to this court.

Messrs. **Robert Christy,** *Johnstone Jones, W. T. Williams,* and *Geo. M. Holton* for plaintiffs in error.

Mr. **Judson Harmon,** Attorney General, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

It is doubtful whether the record is in such condition as to present for review the matters complained of in the brief or argument of counsel. There is only one bill of exceptions, which was signed and filed on December 24, and is authenticated in these words: "The defendants claiming that they are entitled to a bill of exceptions to review the ruling upon their motion for a new trial and having presented the foregoing as such bill, the same is hereby allowed and settled as a correct statement of the proceedings had on the trial as far as it goes." It preserves no portion of the charge, does not purport to contain all the evidence, but does state that on the trial certain testimony was offered and admitted over the objections of defendants, and exceptions taken. If this bill of exceptions was prepared simply for the purposes of a review of the ruling of the motion for a new trial, as seems to be suggested by the words of the authentication, then we are confronted with the proposition so often announced that the action of the court in overruling a motion for a new trial is not assignable as error. *Moore* v. *United States,* 150 U. S. 57 [37: 996]; *Holder* v. *United States,* 150 U. S. 91 [37: 1010]; *Blitz* v. *United States,* 153 U. S. 308 [38: 725]; *Wheeler* v. *United States, ante,* 244. If no error can be affirmed in overruling a motion, it would seem unnecessary to examine the record of that which was presented on the hearing of such motion.

But passing that, and assuming that we are at liberty to examine for any purpose the bill of exceptions, the contentions of counsel in the brief are practically three in number: First, that there was on the trial error in the admission of *testimony; second, that [**592** the verdict was against the evidence; and, third, that the court erred in the instructions.

With reference to the first it may be remarked that the offense charged against the defendants took place during and was a part of the great strike, which was brought to the attention of this court in *Re Debs,* 158 U. S. 564 [39: 1092]. One series of objections under this head is to the introduction of telegrams, some signed by defendants, some by Debs, and others by still other parties, all of which upon their face have more or less direct reference to the stopping of railroad trains. The following are samples of these telegrams:

"Exhibit No. 19.

"Los Angeles, Cal.,—— 29, 1894.

"To Barrett, Bakersfield:

"Have stopped trains at Mojave, come to Los Angeles with engine and caboose.

"Phillip Stanwood."

"Exhibit No. 20.

"L. A., 7, 10, 1894.

"To L. B. Hays:

"No. Nineteen and one freight train left here this morning—everybody on train are 'scabs.' Hold them there. Sure to win.

"W. H. Clune, Sec't'y."

"Exhibit No. 21.

"June 26, 1894.

"Chicago, Ills., —— 26.

"W. H. Clune,

"1844 Naud St., Los Angeles, Calif.

"Boycott against Pullman cars in effect at noon to-day by order of convention.

"E. V. Debs."

Although all the evidence does not appear to have been preserved in this bill of exceptions, enough is disclosed to show that the government was seeking to establish a conspiracy by circumstantial testimony, and telegrams of this character, if identified and brought home to the defendants, were obviously circumstances tending to show such conspiracy. It is familiar law that where a case rests upon that character *of evidence much discretion is left[**593** to the trial court, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact. *Alexander* v. *United States,* 138 U. S. 353 [34: 954]; *Holmes* v. *Goldsmith,* 147 U. S. 150 [37: 118]; *Moore* v. *United States,* 150 U. S. 57 [37: 996]; *Thiede* v. *Utah, ante,* 237. There was no error in admitting these telegrams.

Another series of objections is to the admission of the declarations and acts of parties other than the defendants, to wit, Gallagher and Buchanan, on the ground that they were

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not parties to the record. The indictment charged the defendants with conspiring and combining together, and with other persons. Now, if Gallagher and Buchanan were conspirators with defendants, evidence of their acts and declarations in carrying or attempting to carry into effect the conspiracy was competent, and we must assume in the silence of the record that it was shown that they were engaged in the conspiracy, and that their acts and declarations were in execution thereof.

Again, it is insisted that the verdict was against the evidence. It is enough to say that such a contention cannot be sustained unless all the testimony, or all upon some essential fact, is presented.

Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or the sufficiency of exceptions. An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it. There are, for instance, 594] in *some states statutes directing that all instructions must be reduced to writing, marked by the judge "refused" or "given," and attested by his signature, and that when so attested and filed in the clerk's office they become a part of the record. But in the absence of that or some other statutory provision a bill of exceptions has been recognized as the only appropriate method of bringing on to the record the instructions given or refused. *Struthers* v. *Drexel*, 122 U. S. 487, 491 [30: 1216, 1217]; Supreme Court Rules No. 4, U. S. Sup. Ct. Rep. 30 L. ed. 901; *Phœnix Mut. L. Ins. Co.* v. *Raddin*, 120 U. S. 183, 193 [30: 644, 647]; *McArthur* v. *Mitchell*, 7 Kan. 178; *Moore* v. *Wade*, 8 Kan. 380; *Kshinka* v. *Cawker*, 16 Kan. 63; *Lockhart* v. *Brown*, 31 Ohio St. 431; *Pettett* v. *Van Fleet*, 31 Ohio St. 536.

Even if we were to ignore this lack of due authentication we should be met with the want of any proper exceptions. To the charge as apparently given on November 20, when the case was submitted to the jury, there is no pretense of any exception whatever. The journal entry of November 21 shows that the jury were brought into court and announced that they had not agreed upon a verdict. Then follows this statement: "Thereupon the court further instructs the jury by reading written instructions to them, all of which is excepted to by the defendants' attorneys," and this is the only exception having any reference to instructions to be found in the transcript. Exactly what was intended by it is not clear. If the objection was simply to the time and manner of giving instructions, the propriety of such action has been sustained in *Allis* v. *United States*, 155 U. S. 117, 123 [39: 91, 93]; if to what was contained in those instructions, then, in addition to the fact that they have not been preserved in any bill of exceptions, arises the further difficulty that no particular proposition is called to the attention of the court.

These are all the matters pointed out by counsel in the brief. At the argument in this court other counsel than those whose names are on the brief appeared, and in addition presented this further objection: By section 3995, U. S. Rev. Stat., the offense of obstructing the passage of the mails is made punishable by a fine of not more than $100. Under section 5440, U. *S. Rev. Stat., a conspiracy to comm it [595 any offense against the United States is punishable by a fine of not less than $1,000 nor more than $10,000, and by imprisonment for not more than two years. Upon this he contended that a conspiracy to commit an offense cannot be punished more severely than the offense itself, and also that when the principal offense is, in fact, committed, the mere conspiracy is merged in it. The language of the sections is plain and not open to doubt. A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan* v. *Wilson*, 127 U. S. 540-555 [32: 223, 228]. The power exists to separate the conspiracy from the act itself, and to affix distinct and independent penalties to each. With regard to the suggestion that the conspiracy was merged in the completed act, it is enough that we cannot, upon the record, hold that the mails were obstructed. All the testimony not being preserved, it may be that the testimony satisfied the jury that there was, in fact, no obstruction of the mails, but only as charged a conspiracy to obstruct. If so, the suggestion of a merger falls to the ground.

These are the only matters called to our attention. In them we perceive no error, and the judgment is affirmed.

A. F. McDOWELL, *Plff. in Err.*, [596

v.

UNITED STATES.

(See S. C. Reporter's ed. 596-602.)

Power of Congress—judge of district court—de facto judge—orders of, when valid.

1. District courts are solely the creation of statute, and the place in which a judge thereof may exercise jurisdiction is subject absolutely to the control of Congress.
2. A person indicted, convicted, and sentenced at a regular term of a United States district court held by a district judge of another district appointed to hold the same by a circuit judge of a circuit which includes both districts under United States Revised Statutes, section 596, is so

NOTE.—*As to jurisdiction of United States district courts*, see note to Glass v. The Betsey, 1: 485.

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indicted, convicted, and sentenced at a lawful term of said district court.

3. A judge of the United States district court for one district, holding a term of the United States district court in another district, by virtue of a regular appointment by a United States circuit judge, is a judge *de facto* if not *de jure*, and his actions as such, so far as they affect third persons, are not open to question.

4. Orders of continuance from day to day of a term of the United States district court, made by a *de facto* judge of that court, are valid orders.

[No. 552.]

Submitted October 15, 1895. Decided November 18, 1895.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit certifying certain questions arising in the trial of an indictment in the district court against A. F. McDowell. *First question answered in the affirmative.*

Statement by *Mr. Justice* **Brewer:**

This case comes to this court on questions certified by the court of appeals of the fourth circuit. The facts, as stated, are that a vacancy existed in the office of district judge of the United States for the district of South Carolina, from January 1, 1894, to February 12, 1894. The regular terms of the district court for the western district were fixed by law to be held at Greenville on the first Mondays of February and August (26 Stat. at L. 71), and the first Monday of February, 1894, fell on the fifth day of the month. On January 30, 1894, the following order, made by Hon. Charles H. Simonton, one of the circuit judges of the circuit, was duly filed in the clerk's office:

597] *"It appearing to me, by the certificate of the clerk, under the seal of the court, this day filed, that there is such an accumulation of business and urgency for the transaction thereof in the district court for the western district of this state, and that the public interests require the designation and appointment of a district judge within this circuit to hold the regular term of this court beginning on the first Monday of February, 1894, at Greenville, South Carolina:

"Now, therefore, in consideration of the premises, and on motion of the United States attorney, I do hereby designate and appoint the Honorable Augustus S. Seymour, judge of the district court of the United States for the eastern district of North Carolina, the same being in the fourth circuit, to hold and preside over the same term of court, and to have and to exercise within the western district of South Carolina the same powers that are vested in the judge of the said district."

In pursuance of this order, Judge Seymour held and presided over the regular term of the district court for that district, from February 5 to February 12, on which day Hon. William H. Brawley, appointed and duly commissioned as district judge, qualified and entered upon the discharge of his official duties, and held and presided at the term from that day until the conclusion of the proceedings in this case. On February 16 an indictment was returned into the court against A. F. McDowell, the plaintiff in error. Upon this indictment McDowell was tried February 21 and 22, and a verdict of guilty returned. A motion for a new trial was overruled February 23. Thereupon, and before sentence, McDowell made a motion in arrest of judgment, on the ground that the indictment had been found, and the subsequent proceedings had thereon, at what was an unlawful term of court, and that such indictment and subsequent proceedings were consequently void. This motion was overruled and sentence pronounced upon the verdict. The making of the motion in arrest and its disposition appear in the record in a bill of exceptions, which refers to the indictment as found by "the grand jury impaneled at the special February term of said *court, at Greenville, at the district[598 aforesaid," and the statement of the matter upon which the motion in arrest was founded commences: "At the opening of the special February term, 1894, of said court, that being the term at which said indictment was found," but the record nowhere discloses the calling of any special term as such. Upon these facts the court of appeals certified these questions:

"1. Whether plaintiff in error was indicted, convicted, and sentenced at a lawful term of the district court for the district of South Carolina and the western district thereof, sitting at Greenville, as set forth in this certificate?

"2. Whether the question as to the validity of the indictment and proceedings against plaintiff in error was open to consideration on the motion in arrest of judgment?"

Mr. **J. Altheus Johnson** for plaintiff in error.

Mr. **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The contentions of counsel for plaintiff in error are that the power of a circuit judge or justice to call one district judge from his own into another district does not extend to cases in which there is a vacancy in the office of judge of the latter district; that the order of the circuit judge designating and appointing Judge Seymour to hold the February term was void; that the term lapsed; that, no special term having been called, Judge Brawley was attempting to hold the district court at a time unauthorized by law, and that therefore all proceedings before him were *coram non judice* and void.

This obviously presents a mere matter of statutory construction, for the power of Congress to provide that one district judge may temporarily discharge the duties of that office in another district cannot be doubted. It involves no trespass upon the executive power of appointment. There is no constitutional provision restricting the authority of a district judge to any particular territorial limits. District courts *are solely the creation of [599 statute, and the place in which a judge thereof may exercise jurisdiction is subject absolutely to the control of Congress.

At first there was no authority for the temporary transfer of one judge to another dis-

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trict. The judiciary act of 1789, § 6 (1 Stat. at L. 76), simply provided that a district judge, if unable to attend at the day appointed for the holding of any term, might, by his written order, continue it to any designated time, and that, in case of a vacancy, all matters pending in the court should be continued as of course until the first regular term after the filling of the vacancy.

Since then there has been repeated legislation, each successive statute seemingly intended to make larger provision for the regular and continued transaction of the business of the district court. Thus, in 1850 (9 Stat. at L. 442; Rev. Stat. § 591), an act was passed providing that when any district judge was prevented by any disability from holding any term, and that fact was made to appear by the certificate of the clerk under the seal of the court to the circuit judge, such judge might, if in his judgment the public interests so required, designate and appoint the judge of any other district in the circuit to hold such term and to discharge all the judicial duties of the judge so disabled during such disability. This, it will be noticed, applied only in case of disability on the part of the regular district judge. Two years thereafter in an act (10 Stat. at L. 5; carried into the Revised Statutes as § 592) like authority was given to call in the judge of some other district when, as shown by the certificate of the clerk, from the accumulation or urgency of business in any district court the public interests so required. This statute contemplated the doubling of the judicial force, and authorized both judges, the regular and the appointed judge, to act separately in the discharge of all duties. Finally, in 1871, an act was passed (16 Stat. at L. 494; Rev. Stat. § 596) which reads as follows:

"It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section 591, the district judge of any judicial district within **600**] his circuit *to hold a district or circuit court in the place or in aid of any other district judge within the same circuit; and it shall be the duty of the district judge, so designated and appointed, to hold the district or circuit [court] as aforesaid, without any other compensation than his regular salary as established by law, except in the case provided in the next section."

This gives full power to the circuit judge to act without reference to any certificate from the clerk, whenever in his judgment the public interests require. It is contended that the words "in the place or in aid of" limit the power of designation and appointment to those cases in which there is an existing district judge. This construction, it is claimed, finds support in section 602, Rev. Stat., which in substance re-enacts the latter part of section 6 of the judiciary act of 1789, to the effect that in case of a vacancy in the office of district judge all matters pending before the court shall be continued, of course, until the next stated term after the appointment and qualification of his successor. While "in aid of" naturally imply some existing judge to be aided, the words "in the place of" do not necessarily carry the same implication. *Com.* v. *King*, 8 Gray, 501. They may, without doing violence to language, be construed to mean that the designated judge is to take temporarily the place which is or has been filled by a regular judge.

Section 602 throws little light on the question. It does not purport to abolish the term. The existence of a term does not depend on the fact that any business is transacted thereat, nor does any general order of continuance of itself close the term. A simple illustration will demonstrate this. Suppose at the commencement of any regular term of this court a general order should be entered continuing all matters to the succeeding term, no one would contend that such an order, of itself, adjourned the term or prevented the court from adjourning from day to day until such time as it saw fit to order a final adjournment. The officers attending after the continuance of the cases and until the final order of adjournment would unquestionably receive their per diems for attendance upon a term of the court. The declaration that the process, etc., *shall [**601** be "continued, of course," means simply continued without any special order, and was obviously designed to prevent that failure of right which in many cases might otherwise result from the absence of a judge. It is familiar that process is often made returnable at a term, and notices are given of applications for orders at a term. In these and similar cases rights are created which may depend for their continued existence upon some action of the court at the term. Clearly, the statute does not destroy or even temporarily suspend the jurisdiction of the regular judge when appointed over matters pending in his court.

But whatever doubts may exist, whether the order of designation by the circuit judge was within his power, there is another consideration which is decisive of this case. Judge Seymour must be held to have been a judge *de facto*, if not a judge *de jure*, and his actions as such, so far as they affect third persons, are not open to question. *Ball* v. *United States*, 140 U. S. 118, 129 [35: 377, 382]; *Norton* v. *Shelby County*, 118 U. S. 425 [30: 178]; *Hunter* v. *Ferguson*, 13 Kan. 462. The time and place of a regular term of the district court were fixed by law at Greenville, on the first Monday in February. Judge Seymour was a judge of the United States district court, having all the powers attached to such office. He appeared at the time and place fixed by law for the regular term, and actually held that term. The circuit judge had, generally speaking, the power of designating the judge of some other district to do the work of the district judge in this district. The order of designation was regular in form, and there was nothing on its face to suggest that there was any vacancy in the office of district judge for the district of South Carolina. Any defect in the order, if defect there was, is shown only by matters *dehors* the record. While this may not be conclusive, it strongly sustains the contention of the government that Judge Seymour was, while holding that term, at least a judge *de facto*. Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment

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602]regular on its face, and the rule is *well settled that where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public. Of course, if he was judge *de facto*, his orders of the continuance of the term from day to day until February 12, when the regular judge took his place upon the bench, were orders which cannot be questioned, and the term was kept alive by such orders until Judge Brawley arrived. The record shows that the indictment was not found until after the latter was on the bench. Whether the grand jury was in fact impaneled or called before Judge Brawley took his seat, does not appear from the record. While section 817, U. S. Rev. Stat., provides that, ordinarily, jurors shall, for this district, be drawn at a preceding term, yet such provision does not conflict with the power granted in section 810 to all circuit and district courts, as follows: "And either of the said courts may in term order a grand jury to be summoned at such time, and to serve such time, as it may direct, whenever, in its judgment, it may be proper to do so." Under this provision the judge may, at any term, regular or special, and at any time in the term, summon a grand jury.

Indeed, we may assume that all the proceedings in respect to this case were held before the regular judge of that court, and that the only orders which Judge Seymour made bearing upon this case are the daily orders of continuance of the court and the keeping alive of the term from February 5 to February 12, and these were orders made by a *de facto* judge of that court, and are, as we have stated, not open to challenge. The fact that in the recital of the proceedings the term is spoken of as a special term, is immaterial in the face of the statement that the regular term was opened on February 5 and continued from day to day until after the proceedings complained of had taken place. It follows from these considerations that the first question certified to this court must be answered in the affirmative. In view of this answer it is unnecessary to consider the second question.

The case will therefore be sent back to the court of appeals, with an answer to the first question, as above set forth.

603] BALTIMORE & OHIO RAILROAD COMPANY, *Plf. in Err.*, *v.* EMMA GRIFFITH.

(See S. C. Reporter's ed. 603-611.)

Party not appealing—dismissal of case—negligence—contributory negligence, when for the jury.

1. When the circuit court improperly allowed interest on a verdict and thereby increased the judgment to the amount necessary to give this court jurisdiction, on writ of error brought by defendant, plaintiff, who brought no writ of error, cannot have the case dismissed for want of jurisdiction, by reason of such error.
2. Where the judgment actually rendered was for an amount which gives this court jurisdiction, it will not dismiss the writ of error on the ground that it should have been for less.
3. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.
4. Where a person approached a railroad crossing, driving slowly, with a safe horse, and stopped and looked and listened at a low place where a train could be seen, and neither saw nor heard anything, and stopped again and listened forty or fifty yards from the track, and then drove on, listening all the time and heard nothing, and was struck just as he got to the railroad cut by a train behind time coming around a curve, and injured, the question of his contributory negligence is for the jury.

[No. 53.]

Argued Oct. 18, 1895. Decided Nov. 18, 1895.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio to review a judgment in favor of plaintiff, Emma Griffith, in an action brought by her against the Baltimore & Ohio Railroad Company for injuries received by collision of the train of that company with the vehicle in which she was riding. *Affirmed.*

See same case below, 44 Fed. Rep. 574, 582.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought by Emma Griffith in the court of common pleas of Licking county, Ohio, against the Baltimore & Ohio Railroad Company, to recover for injuries received on August 1, 1888, by the collision of a train of that company with the vehicle in which plaintiff was then being conveyed. The cause was removed on the petition of the company into the circuit court of the United States for the southern district of Ohio, where it was tried, and resulted in *a verdict in favor of the[604 plaintiff for five thousand dollars. A motion for a new trial was made and overruled and judgment entered on the verdict, with interest added, to review which this writ of error was sued out. The charge to the jury by Sage, *J.*, and his opinion on the motion for new trial are reported, 44 Fed. Rep. 574, 582.

The following errors assigned were relied on in the brief for plaintiff in error: "Sixth: The said court erred in refusing to give the ninth charge asked by the plaintiff in error. Seventh. The court erred in refusing to give the tenth charge asked by the plaintiff in error. Tenth. The court erred in overruling the motion of the plaintiff in error for a new trial. Eleventh. Upon the whole record, judgment should have been rendered in said cause in favor of the plaintiff in error and against the de-

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NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of the United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see note to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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fendant in error, instead of the judgment which was rendered."

The instructions thus referred to were as follows: "9. The testimony in this case shows that the plaintiff was guilty of negligence contributing to her injury. Such being the fact, she is not entitled to recover and your verdict must be for the defendant.

"10. It was the duty of the plaintiff to stop before driving on this railroad track and allow the train to pass before she attempted to cross, and if she failed so to do and was thereby injured she cannot recover in this case.

Messrs. **John K. Cowen** and *Hugh L. Bond, Jr.*, for plaintiff in error:

Before the plaintiff can recover because the signals were not given, he must cause it to appear that this failure of duty brought about the disaster; for, if his own imprudence was the moving cause, he cannot maintain his action, although the company may not have observed the provisions of the statute.

Cleveland, C. C. & I. R. Co. v. *Elliott*, 28 Ohio St. 346; *Baltimore & O. R. Co.* v. *Whitacre*, 35 Ohio St. 627, 630; *Schuylkill & D. Imp. & R. Co.* v. *Munson*, 81 U. S. 14 Wall. 448 (20: 872); *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 120 (22: 782); *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29: 224).

The fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court.

North Pennsylvania R. Co. v. *Heileman*, 49 Pa. 60, 88 Am. Dec. 482; *Rhoades* v. *Chicago & G. T. R. Co.* 58 Mich. 263; *Turner* v. *Hannibal & St. J. R. Co.* 74 Mo. 602; *Gorton* v. *Erie R. Co.* 45 N. Y. 660; *Delaware, L. & W. R. Co.* v. *Toffey*, 38 N. J. L. 525; *Southern Pac. Co.* v. *Seley*, 152 U. S. 145 (38: 391); *Schaefert* v. *Chicago, M. & St. P. R. Co.* 62 Iowa, 624.

Mr. **Samuel M. Hunter**, for defendant in error:

The jury was well warranted in finding that no warning was given of the approach of the train, although it was going to and over the crossing at 66 feet a second.

If two men of equal opportunities are observing a train and one says he heard the bell ring and the other that he did not, he is as positive as the other.

Scott v. *Pennsylvania R. Co.* 30 N.Y. S. R. 843; *Perkins* v. *Buffalo, R. & P. R. Co.* 32 N. Y. S. R. 41; *Urbanek* v. *Chicago, M. & St. P. R. Co.* 47 Wis. 59; *Beckwith* v. *New York C. & H. R. R. Co.* 54 Hun, 446; *Menard* v. *Boston & M. R. Co.* 150 Mass. 386.

If the bell had been rung, as the statute requires, there is no doubt but Mrs. Griffith would have acted upon the warning and would have been saved. This was a question for the jury.

Cleveland, C. & C. R. Co. v. *Crawford*, 24 Ohio St. 635.

If from a train of cars approaching a crossing no signal is given, either by ringing the bell or sounding the whistle, the defendant's railroad company is chargeable with negligence.

Renwick v. *New York C. R. Co.* 36 N. Y. 132; *O'Mara* v. *Hudson River R. Co.* 38 N. Y. 445, 98 Am. Dec. 61; *Gorton* v. *Erie R. Co.* 45 N. Y. 662.

It is not enough, in all cases, that the statutory signals have been given, to absolve the corporation from the charge of negligence; other precautions may be required under some circumstances.

Dyer v. *Erie R. Co.* 71 N. Y. 228.

The jury was justified in finding that negligence caused the injury.

Continental Imp. Co. v. *Stead*, 95 U. S. 166 (24: 406); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408–418 (36: 485–489); *Jones* v. *East Tennessee, V. & G. R. Co.* 128 U. S. 445 (32: 479); *Chicago, M. & St. P. R. Co.* v. *Lowell*, 151 U. S. 209 (38: 181).

This court will not review the action of the trial court in overruling a motion for a new trial. Neither will this court review the action of the trial court in refusing to direct a verdict for the defendant, if there be any evidence to support the plaintiff's claim.

Grand Trunk R. Co. v. *Walker*, 154 U. S. 653 APPX. (25: 977); *Metropolitan R. Co.* v. *Moore*, 121 U. S. 558–573 (30: 1022–1026).

It is the province of the jury to pass upon the credibility of the witnesses and upon the consideration and weight which will be given to the testimony.

Pool v. *Chicago, M. & St. P. R. Co.* 56 Wis. 238; *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43 (37: 642); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408 (36: 485); *Richardson* v. *Boston*, 60 U. S. 19 How. 263 (15: 639); *Pennsylvania R. Co.* v. *Horst*, 110 Pa. 226; *Carver* v. *Detroit & S. Pl. Road Co.* 61 Mich. 584; *Beckwith* v. *New York C. & H. R. R. Co.* 54 Hun, 446, 125 N. Y. 759; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21:745); *Kane* v. *Northern C. R. Co.* 128 U. S. 91 (32: 339); *Jones* v. *East Tennessee, V. & G. R. Co.* 128 U. S. 443 (32: 478); *Van Stone* v. *Stillwell & B. Mfg. Co.* 142 U. S. 128 (35: 961).

The law presumes the injured party was in the exercise of due care. The burden of proving her negligence rests upon the company.

Washington & G. R. Co. v. *Gladmon*, 82 U. S. 15 Wall. 407 (21: 114); *Baltimore & O. R. Co.* v. *Whitacre*, 35 Ohio St. 627; *Hays* v. *Gallagher*, 72 Pa. 140; *Robinson* v. *Gary*, 28 Ohio St. 241; *Street R. Co.* v. *Nolthenius*, 40 Ohio St. 376, 380.

Mrs. Griffith had a right to rely upon the company to exercise due care in all respects, and especially to give the warning required by statute. And if she acted on such reliance, she is without fault, because she had a right to presume the company would not be negligent.

Meek v. *Pennsylvania Co.* 38 Ohio St. 632; *Newson* v. *New York C. R. Co.* 29 N. Y. 383; *Liddy* v. *St. Louis R. Co.* 40 Mo. 507; *Langhoff* v. *Milwaukee & P. du C. R. Co.* 19 Wis. 515; *Hegan* v. *Eighth Ave. R. Co.* 15 N. Y.

As to contributory negligence; imputed negligence; negligence of parent or child or husband or driver; intoxication,—see note to Union P. R. Co. v. Botsford, 35: 734.

As to care and precaution necessary in crossing a railroad track, see note to Continental Imp. Co. v. Stead, 24: 403.

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383; *Pennsylvania R. Co.* v. *Ogier*, 35 Pa. 60-72; *Thomas* v. *Delaware, L. & W. R. Co.* 8 Fed. Rep. 729; *Correll* v. *Burlington, C. R. & M. R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Jetter* v. *New York & H. R. Co.* 2 Keyes, 154; *Baker* v. *Pendergast*, 32 Ohio St. 494, 30 Am. Rep. 620; *Cleveland, C. C. & I. R. Co.* v. *Schneider*, 45 Ohio St. 678; *Continental Imp. Co.* v. *Stead*, 95 U. S. 163 (24: 405); *Renwick* v. *New York C. R. Co.* 36 N. Y 132; *Jones* v. *East Tennessee, V. & G. R. Co.* 128 U. S. 445 (32: 479); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408 (36: 485); *Chicago, M. & St. P. R. Co.* v. *Lowell*, 151 U. S. 209 (38: 131); *Dublin, W. & W. R. Co.* v. *Slattery*, L. R. 3 App. Cas. 1155; *Marietta & C. R. Co.* v. *Picksley*, 24 Ohio St. 668; *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *French* v. *Taunton Branch R. Co.* 116 Mass. 537; *Craig* v. *New York, N. H. & H. R. Co.* 118 Mass. 431; *Butler* v. *Milwaukee & St. P. R. Co.* 28 Wis. 487; *Bower* v. *Chicago, M. & St. P. R. Co.* 61 Wis. 457; *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The verdict was returned June 11, and the motion for a new trial was overruled and judgment entered on the verdict December 12, 1890. The circuit court gave interest on the verdict and rendered judgment for $5,154.17 and costs. Plaintiff's counsel excepted to the allowance of interest and also to the refusal of the court to permit a remittitur. Conceding that it is ordinarily within the discretion of the court below to permit or to deny a remittitur (*Pacific Postal Teleg. Cable Co.* v. *O'Connor*, 128 U. S. 394 [32: 488], and cases cited), it is argued here that interest was not allowable on verdicts under the local law; that in view of section 966 of the Revised Statutes, the judgment was improperly increased by the inclusion thereof (*Massachusetts Ben. Asso.* v. *Miles*, 137 U. S. 689 [34: 834]), and that therefore the writ of error should be dismissed for want of jurisdiction. But if the circuit court committed error in this regard, plaintiff below brought no writ of error to correct it, and the question is not open to examination on this record. As the judgment actually rendered was for an amount which gives us jurisdiction, we cannot dismiss the writ on the ground that it should have been for less.

The contention of plaintiff in error is that, on the undisputed evidence in the case, defendant in error was guilty of contributory negligence in law, and that the court erred in refusing to direct a verdict accordingly.

This renders it necessary to make a brief reference to the evidence.

The plaintiff was riding with her mother in a phaeton buggy from their home in the country **606**] to Newark, Ohio, the *mother driving. About four miles south from Newark it was necessary to cross the track of the railroad at a place called Locust Grove Crossing, and it was there that the injury was inflicted. The railroad ran nearly north and south in a cut through a small hill, and the highway crossed it at right angles, approaching the crossing through the same hill. The track from the south came to the crossing on a curve of four degrees through the cut, which was from twelve to eighteen feet deep, and the slope of the cut was about forty-five degrees. The bottom of the railroad cut was fifteen feet wide, and the highway as it came down to the track was about sixteen feet wide, though there was some conflict of evidence in regard to it. The train was coming from the south and the buggy was coming from the west. The field on the west of the track and on the south of the highway for a considerable number of feet and up to the crossing was covered with growing corn over ten feet high, so that by reason of the cut and the corn there was no view of the track by a person coming from the west on the highway until he got down into the railway cut. A stream called Hog Run flowed westerly under the track at the bridge of the railroad, 2,430 feet south of the crossing, and, after making a curve northerly, passed under a county bridge on the highway in question. The highway from the county bridge ran easterly until about three hundred feet from the crossing, and thence due east to the crossing, and after leaving that bridge went by a low place from which the train could be seen coming from the south, until it ran into the cut, which commenced about six hundred feet south of the crossing and on a curve to it. The highway proceeding towards the crossing, passed up the hill into the cut, and then there was no view of the railroad whatever to the south on account of the highway being cut down and the growing corn on that side. The highway was graded down, leaving a bank on both sides, the descent being gradual, and the highway cut deepening until it reached the place where it crossed at the railroad level at the bottom of the cut. Just as the horse and buggy reached the west rail, a passenger train, going at the rate of forty to forty-five miles an hour, and giving, as alleged, no signals *of its approach to the crossing, struck [**607** the horse in the neck, wrecked the buggy, knocked the plaintiff about forty feet, and inflicted permanent injuries, the mother, just before the stroke, doing all she could to pull the horse to the left, across the highway, to get it out of the way.

It seems to be conceded, and properly, that the jury were justified in finding that the railroad company was guilty of negligence. The case stated in the complaint was on the common-law liability of defendant for failure to give signals, but the statutes of Ohio may be referred to as showing what constituted negligence in that regard. And they provided:

"Sec. 3336. Every company shall have attached to each locomotive engine passing upon its road a bell of the ordinary size in use on such engines, and a steam whistle; and the engineer or person in charge of an engine in motion, and approaching a turnpike, highway, or town crossing, upon the same level therewith, and in like manner when the road crosses any other traveled place, by bridge or otherwise, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from the place of such crossing; and ring such bell continuously until the engine passes such road crossing; but the provisions of this section shall not interfere with the proper observance of any ordinance passed by any city or village council regulating the management of railroad locomotives and steam whistles

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thereon, within the limits of such city or village.

"Sec. 3337. Every engineer or person in charge of any such engine who fails to comply with the provisions of the preceding section shall be personally liable to a penalty of not less than fifty nor more than one hundred dollars, to be recovered by civil action, at the suit of the state, in the court of common pleas of any county wherein any such crossing is; and the company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to any person or company injured in person or property by such neglect or act of such engineer or person." 1 Ohio Rev. Stat. 960.

There was evidence that no bell was rung, 608] and that the *engine whistled, if at all, at the railroad bridge, almost half a mile from the crossing.

The jury were warranted in finding that no sufficient warning was given of the approach of the train, which was running at the speed of fifty-eight to sixty-six feet a second, and that the collision was caused by the negligence of those in charge of the train. *Cleveland, C. & C. R. Co.* v. *Crawford*, 24 Ohio St. 631, 15 Am. Rep. 638.

It was held in *Cleveland, C. C. & I. R. Co.* v. *Elliott*, 28 Ohio St. 340, that the omission to ring the bell or sound the whistle at public crossings is not of itself sufficient ground to authorize a recovery, if the injured party might, notwithstanding such omission, by the exercise of ordinary care, have avoided the accident. And in *Pennsylvania Co.* v. *Rathgeb*, 32 Ohio St. 66, that if all the material facts touching alleged negligence of the plaintiff be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of contributory negligence becomes a matter of law merely, and the court should so charge the jury. But these were cases in which the court was of opinion that the omission to give the ordinary signals by bell or whistle, as in itself it did not absolve the plaintiff from the necessity of exercising ordinary care, did not furnish sufficient ground for recovery, because by due diligence in the use of ordinary precautions by the person injured, the consequence of the defendant's negligence might have been avoided.

In *Continental Imp. Co.* v *Stead*, 95 U. S. 161 [24: 408], which was a case of collision between a train of passenger cars of the plaintiff in error and the wagon of the defendant in error, *Mr. Justice* Bradley, speaking for the court, stated the duties and obligations resting upon travelers and railroad companies thus:

"If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other rela- 609] tive rights subsisting *between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of the whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which are required of them, such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. . . .

"For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative *duties. The right of precedence referred [610 to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of its approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. . . .

"The mistake of the defendant's counsel consists in seeking to impose on the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railroad companies have to run trains on the railroads." And see *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 472 [35: 213, 215].

Tested by these principles, we think the circuit court did not err in leaving the case to the jury.

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There was evidence tending to show that these women were driving slowly and with a safe horse; that the train was several minutes behind time; and that, as they approached the low place at which a train could be seen if one were there, they stopped to look and listen, but neither saw nor heard anything; that after stopping they started, driving slowly up the hill to a point at the top between forty and fifty yards from the track, where the slope commenced, and there they stopped again and listened, but heard nothing; they then drove slowly down the hill, both listening all the time, without talking, and heard nothing; and that just as they got to the cut and the horse had his feet on the nearest rail, the train came around the curve and the collision occurred.

Since the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of persons to take care of themselves and to keep out of difficulty may properly be taken into consideration [611](*Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 401 [21: 114]), it is impossible to hold in the light of this evidence, as matter of law, that the conduct of plaintiff was such as to defeat a recovery. The rule was thus expounded by *Mr. Justice* Lamar in *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 417 [36: 485, 489]: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may,' under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the courts."

Judgment affirmed.

GEORGE W. FOLSOM, *Plff. in Err.*,
v.
TOWNSHIP NINETY-SIX, in the County of Abbeville, State of South Carolina.

(See S. C. Reporter's ed. "Folsom v. Ninety-Six," 611-629.)

Validity of township bonds—corporate purpose—power of legislature—South Carolina statute.

1. The validity of township bonds in the hands of a bona fide purchaser will be determined by this court according to its own view of the law of the state, where at the time of their purchase there was no decision of the state court against the validity of the statute authorizing them, and there has been no settled course of state decision on the subject since the purchase.
2. To aid in the building of a railroad is a public purpose, and, being for the general welfare of municipal corporations through which the road is to pass, is a corporate purpose, within the meaning of a constitutional provision giving the legislature power to authorize such corporations to assess and collect taxes for corporate purposes.
3. The legislature may declare a township to be a corporation and confer upon it appropriate corporate powers for the benefit of its inhabitants, where it has no express grant of corporate powers and there is no restriction of the purposes for which it is created.
4. The South Carolina statute of 1885 authorizing townships to subscribe to capital stock of railroads and assess taxes to pay the subscription is a constitutional and valid act; and the township bonds issued thereunder, if in compliance therewith, or in the hands of bona fide holders for value, constitute valid indebtedness of the township issuing them.

[No. 354.]

Submitted Dec. 3, 1894. Decided Nov. 18, 1895.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit, certifying certain questions to this court for instructions, in an action brought by George W. Folsom against Township Ninety-Six, in the county of Abbeville, South Carolina, to recover the amount of coupons attached to bonds of that township issued in aid of the construction of a railroad, and to compel the levy of a tax to pay such coupons. *First question answered in the negative, and the second and third in the affirmative.*

See same case below, 59 Fed. Rep. 67.

Statement by *Mr. Justice* **Gray:**

This was an action brought in the circuit court of the United States for the district of South Carolina, by George W. Folsom, against Township Ninety-Six in the county of Abbeville and state of South Carolina, to recover the sum of $5,100, the amount of coupons attached to bonds issued in behalf of that township in aid of the construction of a railroad, and to compel the levy of a tax upon the property in the township to pay these coupons. The complaint contained the following allegations:

That the plaintiff was a citizen of the state of Tennessee; that the defendant was a corporation, duly chartered under and by virtue of an act of the general assembly of South Carolina of December 23, 1882, chartering the railroad company by the name of the Greenville & Port Royal Railroad Company, and of an act of December 24, 1885, amending its charter, and changing its name to the Atlantic, Greenville & Western Railroad Company; and that the defendant was a citizen and resident of the state of South Carolina.

"That the said acts authorized and empowered the counties and townships interested in the construction of said railroad to subscribe to the capital stock thereof and to issue bonds in aid thereof; and declared the boards of county

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commissioners of the several counties to be the 613]corporate agents of the townships *within their limits of said counties, respectively; and authorized and empowered said boards, respectively, to execute and issue bonds of said townships in aid of said railroad; as will more fully appear by reference to said acts, which are by their terms declared to be public acts."

That Township Ninety-Six lay in Abbeville county, in the state of South Carolina, along the line of said railroad; that, in pursuance of said acts, an election was duly held in the said township, and resulted in favor of a subscription to said railroad company to the amount of $20,800; and that, in pursuance of said acts, the board of county commissioners of Abbeville county on March 25, 1886, duly executed and issued bonds of the township, numbered on their face, and aggregating $20,800, as authorized by those acts, with interest coupons attached at the yearly rate of seven per cent, the bonds and coupons payable at the First National Bank of Charleston, S. C., and the bonds containing a recital that the township by virtue of those acts had subscribed for $20,800 of the common stock of the railroad company.

That the plaintiff, in 1886, relying upon the recitals contained in the bonds, and upon their being legal and valid obligations of the township, became the purchaser of certain of the bonds, with the coupons attached, and was now the legal owner and holder thereof.

"That at the time of the issue of said bonds, and of the purchase thereof by the plaintiff, the said bonds and coupons and other bonds and coupons issued as obligations of other townships under said acts and similar acts enacted in 1872 and 1875, when the bonds were also issued, were regarded and treated as valid securities by the corporate authorities of said township, by the public, the legal profession, and by the legislative, executive, and judicial departments of the state of South Carolina; and that they circulated freely in the market, and large sums of money were invested in them by citizens of South Carolina, as well as other states, believing them to be valid and valuable securities."

That by an act of the general assembly of South Carolina of December 19, 1887, the va-614]lidity of the bonds issued under *the former acts was distinctly recognized, and provision was made for their payment in the same manner as provided for coupons by the act of 1885.

That the plaintiff was now the owner and holder of unpaid coupons to the amount of $5,100 upon his bonds; and that the defendant had failed and refused to assess and collect taxes, or to place money in the First National Bank of Charleston for the payment of these coupons.

The defendant demurred to the complaint. The circuit court held the questions raised to be controlled by the case of *Floyd* v. *Perrin*, 30 S. C. 1, 2 L. R. A. 242, which the circuit court was bound to follow, and therefore sustained the demurrer, and dismissed the complaint. 59 Fed. Rep. 67.

The plaintiff took the case by writ of error to the circuit court of appeals for the fourth circuit, which, desiring the instructions of this court upon certain questions or propositions of law, certified them to this court as follows:

"First. Whether, upon the averments of the complaint, the circuit court was bound, in passing upon this case, by the decision of the supreme court of South Carolina in *Floyd* v. *Perrin*, 30 S. C. 1, 2 L. R. A. 242.

"Second. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of plaintiff in error in due course of trade, for valuable consideration and without notice, there having been at the time no decision of the supreme court of South Carolina adverse to these bonds, or identical bonds issued under similar statutes, the plaintiff in error was entitled to recover on the coupons mentioned in said complaint.

"Third. Whether the acts of December 23, 1882, and of December 24, 1885, were constitutional, and the township bonds issued thereunder, if in compliance with the acts, or in the hands of bona fide holders, for value, constituted valid indebtedness of the township issuing the same.

"Fourth. Whether the act of December 19, 1887, had the effect to validate the bonds and coupons in question, and make them binding upon the Township of Ninety-Six."

Messrs. **John K. Shields,** *H. J. Haynesworth, L. W. Parker,* and *James T. Shields,* for plaintiff in error:

Aiding the construction of a railroad was a corporate purpose of a township, and the bonds are to be sustained.

Pine Grove Twp v. *Talcott*, 86 U. S. 19 Wall. 677 (22: 233); *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359).

It is only in cases involving the construction of the Constitutions and statutes of the states which are at least to some extent peculiar to those states that the Federal courts feel constrained to follow the courts of last resort of such states.

Swift v. *Tyson*, 41 U. S. 16 Pet. 19 (10: 871).

The fact that the construction of a state statute is an element of the decision in such cases does not alter the rule.

Butz v. *Muscatine*, 75 U. S. 8 Wall. 584 (19: 494); *Anderson* v. *Santa Anna Twp.* 116 U. S. 362 (29: 635); *Oates* v. *First Nat. Bank*, 100 U. S. 246 (25: 583).

The Federal courts are courts of independent jurisdiction, and have always held that in questions of general law they will exercise their own judgment, and try and determine cases according to their own views of the rights of the parties.

Oates v. *First Nat. Bank*, 100 U. S. 246 (25: 583); *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1-18 (10: 865-871); *Venice* v. *Murdock*, 92 U. S. 501 (23: 585); *Olcott* v. *Fond du Lac County Suprs.* 83 U. S. 16 Wall. 689 (21: 386); *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 368 (21: 636); *Michigan C. R. Co.* v. *Myrick*, 107 U. S. 109 (27: 327); *Pana* v. *Bowler*, 107 U. S. 541 (27: 429); *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 372 (37: 775); *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 677 (22: 233).

When there was no judicial construction by the state courts of the particular clause of the

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Constitution or statute in question, when the rights of the parties accrued and became vested, the Federal courts will not follow subsequent decisions of the state courts construing the same, but will try and determine such questions according to their own judgment and the law as understood and administered by them.

Carroll County Supvrs. v. *Smith*, 111 U. S. 562, 568 (28: 519); *Anderson* v. *Santa Anna Twp.* 116 U. S. 362 (29: 635); *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91-99 (37: 93-96).

The Federal courts will not follow the decisions of state courts construing their own Constitutions and statutes, made after the rights sought to be enforced accrued and vested, when they are in conflict with the construction placed upon the same in the state before and at the time of the vestiture of the rights.

Douglass v. *Pike County*, 101 U. S. 677 (25: 968); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 206 (17: 525); *Taylor* v. *Ypsilanti*, 105 U. S. 69 (26: 1011); *Havemeyer* v. *Iowa County Supvrs.* 70 U. S. 3 Wall. 303 (18: 41); *United States* v. *Moore*, 95 U. S. 763 (24: 589); *United States* v. *Pugh*, 99 U. S. 269 (25: 323); *Pease* v. *Peck*, 59 U. S. 18 How. 596 (15: 519).

It is only well-settled and consistent decisions of the state courts that the Federal courts will follow; and, to be authoritative and controlling in any case, the construction placed upon the state Constitution or statute by the courts of the state must be settled and fixed so as to have incorporated itself with the statute and become a rule of the property.

Thompson v. *Perrine*, 103 U. S. 817 (26: 617); *Butz* v. *Muscatine*, 75 U. S. 8 Wall. 583 (19: 493); *Pease* v. *Peck*, 59 U. S. 18 How. 598 (15: 520).

When the bonds and coupons in question were issued, put in circulation, and came to the hands of the plaintiff in error in due course of trade, for valuable consideration and without notice, there having been at that time no decision of the supreme court of South Carolina adverse to these bonds or identical bonds issued under similar statutes, plaintiff in error was entitled to recover on the coupons mentioned in said complaint.

Jones v. *Tappling*, 12 C. B. N. S. 826; *Herndon* v. *Moore*, 18 S. C. 339; *Schumpert* v. *Smith*, 18 S. C. 358; *Bond Debt Cases*, 12 S. C. 283; *Whaley* v. *Gaillard*, 21 S. C. 573-576.

The statutes conferred upon and vested in the Township of Ninety-Six a well-defined corporate purpose—that of aiding in the construction of a railroad.

1 Desty, Taxn. 484; *Livingston County* v. *Darlington*, 101 U. S. 413 (25: 1018); *Weightman* v. *Clark*, 103 U. S. 256 (26: 392); *Taylor* v. *Thompson*, 42 Ill. 9; *Chicago, D. & V. R. Co.* v. *Smith*, 62 Ill. 268, 14 Am. Rep. 99; *United States* v. *Kirby*, 74 U. S. 7 Wall. 482 (19: 278); *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206 (6: 603); *United States* v. *Johnston*, 124 U. S. 253 (31: 396); *Attorney General* v. *Bank of Cape Fear*, 5 Ired. Eq. 71; Cooley, Const. Lim. 81.

The purpose conferred upon the township—that of aiding the construction of railroads—is a well-recognized and valid corporate purpose of townships.

State v. *Chester & L. Narrow Gage R. Co.* 13 S. C. 290; *Floyd* v. *Perrin*, 30 S. C. 1, 2 L. R. A. 242; *State* v. *Whiteside*, 30 S. C. 584, 3 L. R. A. 777; *Harter Twp.* v. *Kernochan*, 103 U. S. 562 (26: 411); *Anderson* v. *Santa Anna Twp.* 116 U. S. 363 (29: 635); *St. Joseph Twp.* v. *Rogers*, 83 U. S. 16 Wall. 662 (21: 337); *Olcott* v. *Fond du Lac County Supvrs.* 83 U. S. 16 Wall. 691 (21: 387); *Nichol* v. *Nashville*, 9 Humph. 252; 1 Dill. Mun. Corp. § 158.

Mr. **William C. Miller**, for defendant in error:

The question raised in these cases involves the meaning of "township" as used in the Constitution of South Carolina, the corporate purpose of the township under that Constitution, and the constitutional restrictions upon the power of the legislature of South Carolina to vest in such township the right of taxation.

The decisions of the state supreme court are not based upon general principles of law governing all commercial paper and applicable alike to all the states.

Claiborne County v. *Brooks*, 111 U. S. 410 (28: 474); *Norton* v. *Shelby County*, 118 U. S. 425 (30: 178); *Gormley* v. *Clark*, 134 U. S. 338 (33: 913).

The doctrine of estoppel is not applicable here. The invalidity of the bonds does not arise from any failure in the performance of conditions precedent, and it is not disputed that all such conditions were performed.

The unconstitutionality of the bonds has not been adjudged upon any question of fact about which the plaintiff may have been ignorant, but it rests upon a matter of law which is presumed to have been known to the plaintiff and all others.

Coloma v. *Eaves*, 92 U. S. 484 (23: 579); *Dixon County* v. *Field*, 111 U. S. 93 (28: 363); *Lake County Comrs.* v. *Graham*, 130 U. S. 660 (32: 1067).

It has been earnestly contended by the appellant in the argument before the lower courts, that his bonds were purchased before the decision in *Floyd* v. *Perrin*, 30 S. C. 1, 2 L. R. A. 242, or any other adverse decision was announced, and that for this reason it will not control this court. The second question proposed by the circuit court of appeals has been framed in response to this contention.

It is respectfully submitted that in no case which appellant has been able to cite has this fact alone determined the Federal courts in following or disregarding the state decisions.

Knox County v. *Ninth Nat. Bank*, 147 U. S. 91 (37: 93); *Cass County* v. *Johnston*, 95 U. S. 360 (24: 416); *Daviess County* v. *Huidekoper*, 96 U. S. 98 (25: 112); *Douglass* v. *Pike County*, 101 U. S. 677 (25: 968); *Carroll County Supvrs.* v. *Smith*, 111 U. S. 556 (28: 517); *Livingston County* v. *Darlington*, 101 U. S. 412 (25: 1017).

The corporation known as the "Township of Ninety-Six" is not a township within the meaning of the Constitution of South Carolina, nor is it otherwise such a municipal or political division of the state as that under the Constitution it may be vested with the power to tax.

Barton County v. *Walser*, 47 Mo. 189; *Maury County* v. *Lewis County*, 1 Swan, 286; *Laramie County Comrs.* v. *Albany County Comrs.* 92 U. S. 307 (23: 552); 15 Am. & Eng. Enc. Law, 955, citing a long list of authorities.

The Constitution explicitly enumerates the corporate bodies which may be vested with this

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power, viz: counties, school districts, cities, towns, and villages. If the corporation under consideration is not one of these, it cannot be so vested.

Pine Grove Twp. v. *Talcott*, 86 U. S. 19 Wall. 677 (22: 233).

Mr. Justice **Gray** delivered the opinion of the court:

By the Constitution of South Carolina of 1868, art. 9, § 8, "the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes." 2 Charters & Constitutions, 1659.

The situation arising out of the subsequent acts of the legislature and decisions of the courts of the state, with regard to bonds like those now in question, will be best understood by stating these acts and decisions in chronological order.

By the act of September 26, 1868, entitled "An Act to Organize Townships, and to Define Their Powers and Privileges," the inhabitants of every township were declared to be a body politic and corporate, with power to sue and be sued, to hold and convey real and personal estate, to make contracts, to hold meetings, to elect town officers, to vote money for schools, burial grounds, highways and bridges, and to lay taxes for the purpose of keeping highways and bridges in repair; the lines of the townships were to be perambulated, and the marks and bounds renewed once in every seven years forever; and the act was to take effect, as to each township, on the completion of the duties assigned to county commissioners under §§ 11, 12, of another act of the same date, by which the county commissioners were directed to divide the counties into townships, to establish their boundaries, and to designate the name of each, and the time and place of holding its first meeting. 14 S. C. Stat. pp. 128, 143-151.

By the act of January 19, 1870, the township act of 1868 was repealed, "except that portion of the same fixing the number, names and boundaries of the respective townships of the respective counties." 14 S. C. Stat. p. 318.

620] *The act of December 23, 1882, chartering the Greenville & Port Royal Railroad Company, as amended by the act of December 24, 1885 (both of which were declared to be public acts), contained the following provisions:

"Sec. 6. That, in addition to the provisions contained in the preceding section for private subscription, it shall and may be lawful for any city, town, county, or township, interested in the construction of said road, to subscribe to its capital stock such sum as a majority of their voters, voting at an election held for that purpose, may authorize the county commissioners or proper authorities of such city, town, county, or township to subscribe, which subscription shall be made in seven per cent coupon bonds payable in such instalments as the county commissioners or proper authorities of such city, town, county, or township may determine, and to be received by said company at par; said bonds to be made payable in sixteen, twenty, twenty-four and twenty-eight years after the date thereof, and to be of the denomination of one hundred dollars, five hundred dollars and one thousand dollars: Provided that a sufficient sum realized from such bonds shall be retained to complete the grading through the county or township in which it is subscribed: Provided that no election shall be held in any of the towns, cities, or townships in said counties unless one half of the owners of real estate situate and living in such town, city or township shall first petition for an election on the subject of subscribing to the capital stock, as hereinbefore provided; and no subscription shall be made by any of the towns, cities or townships until the conditions of this proviso shall have been complied with."

"Sec. 9. That, for the payment of the interest on such bonds as may be issued by said counties, cities, towns or townships, the county auditor or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of said city, town, county or township such per cent as may be necessary to pay such interest of said sum of money subscribed, which shall be known and described in the tax book as said railroad tax, which shall be collected by the treasurer *under the same regulations as are provid-[621 ed by law for the collection of taxes in any of the counties, cities, towns or townships so subscribing, and which shall be paid over by the said treasurer to the holders of said bonds, as the interest shall come due, on presentation of the coupons, which said coupons shall be reported to the county commissioners by said treasurer or the council of any city or town where there are coupons from the bonds of such city or town, and all such coupons shall be canceled by the county treasurer as soon as they are paid by them.

"That, for the purposes of this act, all the counties and townships in said counties, along the line of said railroad, or which are interested in the construction as herein provided for, shall be, and they are hereby declared to be, bodies politic and corporate and vested with the necessary powers to carry out the provisions of this act; and shall have all the rights and be subject to all the liabilities in respect to any rights or causes of action growing out of the provisions of this act.

"The county commissioners of the respective counties are declared to be the corporate agents of the counties or townships so incorporated and situate within the limits of said counties." 19 S. C. Stat. pp. 239-241.

The power of the legislature, under the Constitution of the state, to authorize townships to subscribe for stock, and to direct the issue of bonds in aid of the construction of railroads, appears to have been assumed as undoubted, by the supreme court of the state, April 15, 1885, in *Chambles* v. *Tribble*, 23 S. C. 70; and July 14, 1886, in *Carolina, C. G. & C. R. Co.* v. *Tribble*, 25 S. C. 260, 266.

By the act of December 19, 1887, the amending act of 1885 was further amended by adding a section providing "that, within ten years of the time when the bonds which may be subscribed to the capital stock of said corporation shall fall due, the money to pay the same shall be raised by taxation in the same manner, and paid out by the county treasurer, as provided

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for the payment of the annual interest on such bonds." 19 S. C. Stat. p. 921. The principal, if not the only, object of this act would seem [622] to have *been to extend to the principal sums of the bonds the provision of the earlier statute authorizing the assessment and collection of taxes "for the payment of the interest on said bonds."

On November 30, 1888, an action by taxpayers in Township Ninety-Six to recover back taxes paid by them, under protest, to meet the interest on bonds issued by the county commissioners in behalf of the township under the acts of 1882 and 1885, was sustained by the supreme court of South Carolina, by concurring opinions of Chief Justice Simpson and Justice McIver, upon the ground that by the act of 1870 repealing the act of 1868 townships were left as mere territorial divisions, with no corporate powers, privileges or purposes; that, as no duty was imposed on them, or right given them, by the acts of 1882 and 1885, except to subcribe to stock in this particular railroad and to assess taxes to pay the subscription, they were without any corporate purpose, and therefore those acts, as applied to them, were in violation of the provision of the Constitution. *Floyd* v. *Perrin*, 30 S. C. 1, 2 L. R. A. 242; *Whiteside*s v. *Neely*, 30 S. C. 31.

Justice McGowan dissented upon the grounds that the township "was certainly a corporation from the adoption of the Constitution (1868) until 1870, when its corporate powers were withdrawn by the legislature, leaving the territorial division, with its lines, boundaries, and name already fixed, like a lifeless body, ready, however, to have the new life of a corporation breathed into it;" that "no other power but the legislature could give it that new life;" that in 1885 the legislature passed the act chartering the railroad, in which it declared, for the purposes of this act, the counties and townships along the line of the road (of which this was one) to be corporations, with the necessary powers to carry out the provisions of the act, and with the rights and liabilities in respect to any causes of action growing out of its provisions; that "it may be thought by some to be rather a meagre corporation—scant in powers, authorities and officials as such; but it must not be overlooked that the legislature, which created it, had the undoubted right to give it such [623] shape and form as it thought *proper—with a single power or a dozen;" and that the power to aid in building a railroad, when given by act of the legislature to a township corporation, whether a corporation already existing or one created by the same act, was a corporate purpose, that is to say, a purpose benefiting the corporation. 30 S. C. 24-30, 2 L. R. A. 249-252.

On December 14, 1888, petitions for rehearing of those cases were denied. 30 S. C. 31, 33.

On December 22, 1888, an act entitled "An Act to Provide for the Payment of Township Bonds Issued in Aid of Railroads in This State," was passed, to take immediate effect, beginning as follows: "Whereas certain townships in this state have, by their vote, expressed their willingness to subject themselves to taxation for the purpose of paying bonds issued by them in aid of certain railroads; and whereas, by reason of a defect in the acts authorizing the issue of said bonds, they have been declared invalid: Now therefore, for the purpose of carrying into effect the expressed will of the people of said townships," it was enacted as follows:

Sec. 1. "The township bonds heretofore issued by county commissioners as the corporate agents of any township in this state, in aid of any railroad, by vote of the inhabitants of said township, are hereby declared to be debts of said township respectively having authorized the use of the same. And the interest and principal thereof shall be paid, according to the terms of said bonds or debt, by the assessment, levying and collection of an annual tax upon the taxable property in said townships, so far as may be necessary, in like manner and by the same county officials as the tax levied for county bonds in aid of railroads is assessed, levied and collected. Said tax to be known and styled in the tax books as the township railroad tax, and when collected shall be paid over by the treasurer of the county to the holders of said bonds as the interest thereon may become due, and according to the terms thereof. All dividends received by or for said townships, on stock in railroad companies which have been aided by the said township bonds or debt, shall be applied by the county commissioners of the county in which said townships *are respectively situated, primarily [624] towards the payment or retirement of said bonds or debt, and the surplus shall be expended in the improvement of the highways within the territorial limits of said township."

Sec. 2. "No tax shall be levied under the provisions of this act to pay the interest on any township bonds, until the railroad in aid of which they were subscribed shall be completed through such township and accepted by the railroad commissioners." 20 S. C. Stat. p. 12.

This statute is not mentioned in the questions certified, and, as it is not alleged or suggested that the railroad has been completed through this township, has no direct application to this case. We refer to it only as part of the history of legislation and decision in the state upon the subject.

On April 15, 1889, the supreme court of South Carolina held that, since, by its decision in *Floyd* v. *Perrin*, a township could not be authorized by the legislature to issue bonds in aid of the construction of a railroad, it followed that the act of 1888 could not be upheld as validating bonds issued by a township under the earlier acts, because the legislature could not ratify what it could not have authorized; but that the act of 1888 was an original exercise of the power of the legislature to authorize taxation for any public purpose, such as was the building of railroads in the state; and that the legislature, therefore, being satisfied of the consent of the township, had constitutionally fixed upon them the debt represented by the bonds previously issued without authority, and to be paid according to the provisions of the new act. *State* v. *Whiteside*s, 30 S. C. 579, 3 L. R. A. 777; *State* v. *Neely*, 30 S. C. 587, 3 L. R. A. 672.

The first question certified to this court by the circuit court of appeals is, "whether, upon the averments of the complaint, the circuit

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court was bound, in passing upon this case, by the decision of the supreme court of South Carolina in *Floyd* v. *Perrin*, 30 S. C. 1, 2 L. R. A. 242."

The general principles which must govern the decision of this question have been often affirmed by this court, and were stated by *Mr. Justice* Bradley in delivering judgment, after great consideration, in the leading case of *Burgess* v. *Seligman*, as follows:

625] *"The Federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of the two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state Constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretations of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies be-

626] tween *citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." 107 U. S. 20, 33, 34 [27: 359, 365].

In the case at bar, the statutes of the state of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township, and were purchased by the plaintiff, in 1886. It is alleged in the complaint, and admitted by the demurrer, that he purchased the bonds, relying upon their being legal and valid obligations of the township; and that, at the times of their issue and purchase, these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the legal profession, and by the legislative, executive and judicial departments of the state. And the decisions of the supreme court of the state, during the same period, appear to have assumed the validity of such bonds. *Chambles* v. *Tribble*, 28 S. C. 70, and *Carolina, C. G. & C. R. Co.* v. *Tribble*, 25 S. C. 260.

The decision in *Floyd* v. *Perrin*, holding such bonds to be invalid, was by two judges only, against a strong dissent, and was not made until November 30, 1888, and a rehearing was denied December 14, 1888. Eight days after, on December 22, 1888, the legislature passed an act, to take immediate effect, declaring the bonds previously issued in behalf of any township, to be debts of the township, and providing for their payment by taxation of the inhabitants. Five months later, on April 15, 1889, the supreme court of the state, in two labored opinions, the one by Chief Justice Simpson and the other by Justice McIver, declared that, it having been decided in *Floyd* v. *Perrin* that the legislature could not authorize the township to levy a tax to pay the bonds, it could not ratify proceedings of the township; but yet that the statute of 1888 was a constitutional exercise of the unlimited legislative power to authorize taxation for a public purpose, with the consent of the township. In each of the two cases, however, Justice *McGowan, who[627 had dissented from the judgment in *Floyd* v. *Perrin*, delivered a concurring opinion in these words: "I concur. The meaning of the opinion of the court being that there is no necessity for the issue of any new bonds; but 'the debt' fixed upon the several townships by the act of 1888 shall be represented by the bonds heretofore issued, to be paid according to the provisions of the act; and I am authorized to say that such is the view of the other members of the court." *State* v. *Whitesides*, 30 S. C. 586, 3 L. R. A. 777; *State* v. *Neely*, 30 S. C 606, 3 L. R. A. 672.

As the debt thus held to be imposed upon the township by the act of 1888 was the debt represented by the bonds issued under the act of 1885; as the tax for the payment of that debt under the new act was to be levied upon the property of the township by county officials in substantially the same manner as under the earlier statutes; and as the Constitution of the state did not authorize the legislature, with or without the consent of the township, to vest its corporate authorities with power to assess and collect taxes for any but corporate purposes, it is not easy to understand how the latter taxation could be held constitutional while the earlier was held unconstitutional; or how the result in *State* v. *Whitesides* and *State* v. *Neely* could be reached without practically overruling *Floyd* v. *Perrin*.

There not being shown to have been a single decision of the state court against the constitutionality of the act of 1885 before the plaintiff purchased his bonds, nor any settled course of

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decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its own view of the law of South Carolina.

This question, which is presented in different forms by the second and third questions certified, lies in narrow compass. The Constitution of South Carolina of 1868 authorized the legislature to vest the corporate authorities of townships or other municipal corporations with power to assess and collect taxes "for corporate purposes" By the act of 1870, townships were deprived of the corporate powers with which they had been vested by the legislature immediately after the adoption of the Constitution, but were still defined by their 628] names and *boundaries. By the act of 1882 as amended by the acts of 1885 and 1887, it was enacted that any city, town, county or township, interested in the construction of the railroad company named, might subscribe for stock and issue bonds in aid of the building of the railroad; and that, for the payment of the bonds and coupons, taxes might be assessed and levied upon the property of the township; and all the counties and townships along the line of the railroad, or interested in its construction, were declared to be bodies politic and corporate, for the purposes of this act, and to be invested with the necessary powers to carry out its provisions, and to have all the rights and be subject to all the liabilities in respect to any rights or causes of action growing out of its provisions.

To aid in the building of a railroad is a public purpose, and being for the general welfare of the ordinary municipal corporations, such as counties, cities and towns, through which the road is to pass, is a corporate purpose, within the meaning of a constitutional provision vesting in the legislature power to authorize municipal corporations to assess and collect taxes "for corporate purposes." *Livingston County* v. *Darlington*, 101 U. S. 407, 411, 413 [25: 1015, 1017, 1018]; *Harter Twp.* v. *Kernochan*, 103 U. S. 562, 571 [26: 411, 414]; *Anderson* v. *Santa Anna Twp.* 116 U. S. 356, 363 [29: 633, 635]; *Bolles* v. *Brimfield*, 120 U. S. 759 [30: 786]; *Johnson* v. *Stark County*, 24 Ill. 75, 88; *Chicago, D. & V. R. Co.* v. *Smith*, 62 Ill. 268, 276, 14 Am. Rep. 99; *Nichol* v. *Nashville*, 9 Humph. 252, 268; *Brown* v. *Hertford Comrs.* 100 N. C. 92

This is well settled as to counties, under the Constitution of South Carolina. It was assumed by the supreme court of the state in *State* v. *Chester & L. Narrow Gage R. Co.* 13 S. C. 290, 317, and in *Connor* v. *Green Pond, W. & B. R. Co.* 23 S. C. 427, 436; and it was admitted by all the judges in *Floyd* v. *Perrin*, 30 S. C. 1, 13, 19, 27, 2 L. R. A. 242. See also *State* v. *Whitesides*, 30 S. C. 579, 584, 3 L. R. A. 777, and *State* v. *Neely*, 30 S. C. 587, 604, 3 L. R. A. 672. It has also been affirmed, as to towns, by the circuit court of the United States for the district of South Carolina, and by the circuit court of appeals for the fourth circuit. *Atlantic Trust Co.* v. *Darlington*, 63 Fed. Rep. 76 and 68 Fed. Rep. 849.

629] *In *Floyd* v. *Perrin* it was also admitted that townships, having been declared by the legislature in the act of 1885, in express words, to be bodies politic and corporate, must be held to be corporations. 30 S. C. 12, 16, 25, 2 L. R. A. 242. But the ground on which the majority of the court in that case held that act to be unconstitutional was that the townships, having under the existing statutes no other corporate duty or right, except to subscribe to the railroad and to assess taxes to pay the subscription, were without any corporate purpose whatever, and therefore to authorize them to assess taxes to pay the subscription was in violation of the constitution.

We are unable to concur in that view, and are much better satisfied with the reason of the dissenting opinion. When a township has been created by law as a territorial division of the state, with no express grant of corporate powers, and with no definition or restriction of the purposes for which it is created, we are of opinion that it is within the power of the legislature, at any time, to declare it to be a corporation, and to confer upon it such and so many corporate powers, appropriate to be vested in a territorial corporation for the benefit of its inhabitants, as the legislature may think fit; and that the act of 1885 was therefore a constitutional and valid act, as far as regards all the kinds of municipal corporations named therein—cities, towns, counties and townships.

In *Weightman* v. *Clark*, 103 U. S. 256 [26: 392], the statute held to be unconstitutional purported to confer the power to issue bonds in aid of the construction of a railroad upon school districts, established and existing for educational purposes only. In *Lewis* v. *Pima County*, 155 U. S. 54 [39: 67], a territorial statute, purporting to confer upon a county the power to issue similar bonds, was held unconstitutional because the fundamental law limited obligations of any municipal corporation to such as should be "necessary for the administration of its internal affairs."

The result is that the first question certified must be answered in the negative, and the second and third questions in the affirmative, and the fourth question becomes immaterial.

Ordered accordingly.

RUTLAND RAILROAD COMPANY, [630
Plff. in Errr.,
v.
CENTRAL VERMONT RAILROAD COMPANY ET AL.

Same
v.
Same.

(See S. C. Reporter's ed. 630 642.)

Review of state decision—Federal question.

1. The decision of a state court that a state statute is unconstitutional cannot be questioned in this

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Con-

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court on writ of error, by the party in whose favor the decision was made.

2. Where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question.

[Nos. 51, 472.]

Argued April 19, 22, 1895. Decided Nov. 18, 1895.

IN ERROR to the Court of Chancery of Franklin County, Vermont, to review decrees denying, in accordance with the mandates of the Supreme Court of Vermont, the right of the Rutland Railroad Company, which had leased its railroad to the Central Vermont Railroad Company, to recover the amount of taxes assessed upon the gross earnings of that railroad and paid by the Central Vermont Railroad Company, and by it deducted from the rent due to the Rutland Railroad Company under the lease. On motion to dismiss for want of jurisdiction. *Dismissed.*

See same case below, 63 Vt. 1; 65 Vt. 366.

Statement by *Mr. Justice* **Gray:**

These were two writs of error to review decrees of the court of chancery for the county **631**]of Franklin and state of *Vermont, denying, in accordance with mandates of the supreme court of the state, the right of the Rutland Railroad Company, which had leased its railroad to the Central Vermont Railroad Company, to recover the amount of taxes assessed upon the gross earnings of that railroad under the laws of the state, and paid by the Central Vermont Railroad Company, and by it deducted from the rent due to the Rutland Railroad Company under the lease. The case appeared by the record to be as follows:

On December 30, 1870, the Rutland Railroad Company leased its road, including a branch known as the Addison Railroad, for twenty years, to the receivers of the Vermont Central and Vermont & Canada Railroad companies at a fixed rent, payable semi-annually. On June 21, 1873, the Central Vermont Railroad Company became the receiver of the Vermont Central and the Vermont & Canada Railroad Companies, and took possession of the Rutland Railroad under the lease. Disputes arose between the parties, and on February 23, 1876, they made an agreement in writing, modifying the lease, and by which the rent was made payable monthly, and was to be a certain proportion of the gross earnings, which the lessee guaranteed should be not less than $250,000 a year. Neither of the contracts contained any provision for the payment of taxes.

Under the statutes of Vermont of 1874 and 1876, railroads were taxed by the mile in the towns through which they passed; and the supreme court of Vermont, at January term, 1878, in Rutland county, in a case between these parties, not reported, but stated in the opinion of the court below in this case, held that the lessor, and not the lessee, was bound to pay such taxes. See 63 Vt. 12, 25, 26, 10 L. R. A. 562, 3 Inters. Com. Rep. 488.

On November 28, 1882, the legislature of Vermont passed a statute, entitled "An Act to Provide a Revenue for the Payment of State Expenses," which repealed all former statutes taxing the property of railroad companies, and required them to pay to the state a tax of a certain proportion of their gross earnings, and provided that the lessee of a railroad should pay this tax, and might deduct the amount from any payments *due to the lessor. The [**632** material provisions of this statute are copied in the margin.*

As required by this statute, blank returns of statements of gross earnings were sent in August, 1883, by the commissioner of state taxes, to the Central Vermont Railroad Company; and that company filled out the returns, and paid the taxes on such earnings under protest.

A large part of the gross earnings so returned and taxed accrued from the transportation of persons and property between other states and countries through Vermont, and between Vermont and other states and countries.

*The Central Vermont Railroad Com [**633** pany paid the rents when due, according to the agreement, until July 31, 1883; but afterwards delayed such payments, and deducted therefrom the sums paid for taxes on gross earnings.

On September 19, 1883, the treasurer of the

*Sec. 8. A corporation, company, person or persons, failing to pay the amount of any annual or semi-annual tax within the time required by this act, shall forfeit to the state the sum of one hundred dollars for each day's neglect to pay the same after the expiration of the time limited by law.

Sec. 11. Every corporation, person or persons, owning or operating a railroad in this state, whether as owner, lessee, receiver, trustee or otherwise, shall pay a tax to the state on the entire gross earnings of such railroad, if such railroad is situated wholly within the state. If such railroad is situated partly within and partly without the state, the tax shall be upon such proportion of the entire gross earnings of such railroad as the mileage of trains run in this state bears to the mileage of all the trains run on the entire main line of the road.

Sec. 12. The tax upon such earnings shall be rated according to the earnings per mile of road in this state, and is hereby assessed, at the rate of two per cent on the first two thousand dollars a mile, or total earnings if less than that sum; at the rate of three per cent on the first thousand or part thereof, above two thousand dollars a mile; at the rate of four per cent on the first thousand or part thereof, above three thousand dollars a mile; and when the earnings exceed four thousand dollars a mile, at the rate of five per cent on all earnings above that sum.

Sec. 13. Such tax shall be payable one half semi-annually in the months of February and August, and shall be based upon the gross earnings during the six months terminating with the last day of December or June next preceding.

Sec. 14. When a railroad is operated in this state by a corporation, person or persons, by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad, or holder of such contract, as the case may be; and the said tax shall be charged against and deducted from any payments due or to become due the lessor of such railroad, or person, persons or corporations granting such contract, as the case may be, on account of such lease or contract, unless in the provisions of such lease or contract it is stipulated otherwise.

stitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37: 267.

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Rutland Company, by direction of its officers, wrote a letter to the treasurer of the Central Vermont Railroad Company, claiming that the tax was invalid against the Rutland Company, and demanding payment of the rent in full, without deduction on account of the tax. The president of the Rutland Company afterwards, in conversation with the president of the Central Vermont Company, without intending to limit, or being understood to limit, the grounds of objection of the Rutland Company to the payment of the taxes, stated that it had no gross earnings, and therefore could not be liable for the taxes. No other reason for the denial of its liability for the taxes under the statute of 1882 was ever given to the Central Vermont Company.

By an order of court of January 19, 1884, the Central Vermont Railroad Company was discharged of the receivership, and ordered to transfer and make over all the property in its hands, including the lease of the Rutland Railroad, to the Consolidated Railroad Company of Vermont. On June 30, 1884, the transfer was made accordingly, and on the same day, the latter company leased all the railroads to the Central Vermont Railroad Company, which afterwards continued in possession and operation thereof.

On November 9, 1886, the Rutland Company filed in the court of chancery a petition praying that the Central Vermont Company and the Consolidated Railroad Company of Vermont be ordered to pay the rent due in full, with interest, and without deduction for taxes. The two defendant companies filed an answer denying their liability. The case was referred to a master, upon whose report, embodying the facts above stated, the court of chancery, on January 1, 1889, dismissed the petition.

The petitioner appealed to the supreme court of Vermont, which, at October term, 1890, de-[634] livered an opinion, copied in *the record, and reported in 63 Vt. 1, 10 L. R. A. 562, 3 Inters. Com. Rep. 488, allowing the claim for interest on rents, reversing the decree, and remanding the case to the court of chancery, with the following mandate:

"In the matter of the petition of the Rutland Railroad Company, it is considered, adjudged, and decreed as follows:

"The act of the legislature of Vermont, entitled 'An Act to Provide a Revenue for the Payment of State Expenses,' approved November 28, 1882, so far as it imposes a tax upon the gross earnings of railroads derived from interstate transportation of persons or property, is unconstitutional and void, as being in conflict with that clause of the Federal Constitution which confers upon Congress the exclusive power to regulate commerce among the states.

"That section 14 of said act, providing that taxes assessed under said act upon the earnings of railroads operated by lessees thereof shall be paid by such lessees, and charged against and deducted from the rents due to the lessor of such railroads, is constitutional and valid.

"That all taxes paid to the state by the respondent in accordance with the provisions of said act of 1882, notwithstanding its invalidity, as above held, were, as against the petitioner, valid payments, and so, *pro tanto*, payments in extinguishment of rents due the petitioner.

"That the petitioner is entitled to recover interest upon the deferred payments of monthly rent, mentioned in the master's report, from the last day of the month on which it is held such monthly instalments of rent respectively fell due under the lease and the modification thereof mentioned in said report.

"The decree of the court of chancery is reversed, and the cause remanded."

In August, 1891, the court of chancery entered a decree purporting to pursue the mandate, and allowed an appeal taken to the supreme court of the state by the respondents, claiming that the decree did not conform to the mandate. The petitioner on September 8, 1891, sued out a writ of error from this court to review that decree.

At October term, 1892, the supreme court of Vermont *affirmed that decree, and re-[635] manded the cause. 65 Vt. 366. The court of chancery in August, 1894, entered a final decree accordingly. The petitioner on October 9, 1894, sued out a writ of error from this court to review this decree.

The defendants in error moved to dismiss both writs of error for want of jurisdiction; the first because the decree which it sought to review was not a final one; and both, because no Federal question was involved.

Messrs. **C. A. Prouty** and **Geo. F. Edmunds**, for plaintiff in error:

The case shows that a large proportion of the receipts of the plaintiff upon which the tax was computed and paid were derived from interstate and foreign commerce, and such a tax is a tax upon transportation itself and void as a regulation of commerce.

Welton v. *Missouri*, 91 U.S. 275 (23: 347); *Robbins* v. *Shelby County Taxing Dist.* 210 U. S. 493 (30: 696), 1 Inters. Com. Rep. 45; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 (30: 244), 1 Inters. Com. Rep. 31; *Fargo* v. *Stevens*, 121 U. S. 230, 243 (30: 888, 893), 1 Inters. Com. Rep. 51; *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 342, 343 (30: 1200, 1204), 1 Inters. Com. Rep. 308; *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Freight Tax*") 82 U. S. 15 Wall. 232 (21: 146).

A state statute which levies a tax upon the gross receipts of railroads for the carriage of freight and passengers into, out of, or through, a state, is a tax upon commerce among the states and therefore void.

Leloup v. *Port of Mobile*, 127 U. S. 640 (32: 311), 2 Inters. Com. Rep. 134; *Leisy* v. *Hardin*, 135 U. S. 100 (34: 128), 3 Inters. Com. Rep. 36; *Lyng* v. *Michigan*, 135 U. S. 161 (34: 150), 3 Inters. Com. Rep. 143; *McCall* v. *California*, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181.

Upon the construction of this statute the decision of the Vermont court against its validity is controlling.

Murray v. *Gibson*, 56 U. S. 15 How. 421, 423 (14: 755, 756); *Pease* v. *Peck*, 59 U. S. 18 How. 595 (15: 518); *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 (17: 261).

The supreme court of Vermont decided that the act was unconstitutional, but that the defendant was, nevertheless, protected by it in making these payments to the state.

No man can be deprived of his property by

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force of an unconstitutional law, against his will.

Marbury v. *Madison*, 5 U. S. 1 Cranch, 177 (2: 73); *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 830 (6: 226); *Vanhorne* v. *Dorrance*, 2 U. S. 2 Dall. 308 (1: 393); *Sumner* v. *Beeler*, 50 Ind. 341.

A void law can afford no justification to any one who comes under it; and he who attempts to collect the tax under the illegal law will be a trespasser.

Woolsey v. *Dodge*, 6 McLean, 146; *Little Rock & Ft. S. R. Co.* v. *Worthen*, 120 U. S. 97 (30: 588); *Buffington* v. *Day*, 78 U. S. 11 Wall. 113 (20: 122); *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 297 (29: 195); *Dobbins* v. *Erie County Comrs.* 41 U. S. 16 Pet. 435 (10: 1022); *Hays* v. *Pacific Mail S. S. Co.* 58 U. S. 17 How. 597 (15: 254); *Fellows* v. *Denniston* ("*The New York Indians*") 72 U. S. 5 Wall. 761 (18: 708); *Cox* v. *Lott* ("*State Tonnage Tax Cases*") 79 U. S. 12 Wall. 204 (20: 370); *Low* v. *Austin*, 80 U. S. 13 Wall. 29 (20: 517); *Morgan* v. *Parham*, 83 U. S. 16 Wall. 471 (21: 303); *Keith* v. *Clark*, 97 U. S. 454 (24: 1071); *Albany County Suprs.* v. *Stanley*, 105 U. S. 305 (26: 1044).

It cannot be said that the plaintiff impliedly agreed that the state of Vermont might impose upon it an unconstitutional tax. If the decision of the Vermont court, that the act, although invalid as a regulation of commerce, would nevertheless protect the defendant, was erroneous, has this court jurisdiction to review that judgment? The statutes of the United States provide that judgments of a state court in which is drawn in question the validity of a state statute, or the authority exercised under a state statute, upon the ground that it is repugnant to the Constitution of the United States, may be reviewed by this court. It is both the statute and the authority exercised under it which is guarded against. The objective point is the protection of the citizen from the unlawful acts of the state. It is not the enactment of an unconstitutional law, but its enforcement, that infringes the rights of the citizens, and it is the invasion of those rights which it is the duty of this court to prevent.

If the state court can hold that this statute is unconstitutional and nevertheless binding as a statute, and if the citizen is thereby cut off from all redress in this court, the Federal Constitution becomes a nullity.

The remedy is an essential part of the obligation. It has been repeatedly held that the legislature cannot take away nor materially change the remedy existing when a contract is entered into without impairing its obligation. When this contract was made the plaintiff could enforce the payment of its stipulated rent. Under the decision of the Vermont court that right is absolutely taken away. That decision must be reviewable here.

Gunn v. *Barry*, 82 U. S. 15 Wall. 610 (21: 212); *White* v. *Hart*, 80 U. S. 13 Wall. 646 (20: 685); *United States* v. *Quincy*, 71 U. S. 4 Wall. 535 (18: 403); *Edwards* v. *Kearzey*, 96 U. S. 595 (24: 793); *Louisiana* v. *Pilsbury*, 105 U. S. 278 (26: 1090).

The state court cannot escape this power of review by resting its judgment upon some principle of general law, providing that judgment gives effect to the statute drawn in question.

Proprietors of Passaic & H. River Bridges v. *Hoboken Land & Imp. Co.* 68 U. S. 1 Wall. 116 (17: 571); *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 (17: 173); *Delmas* v. *Merchants' Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20: 757); *Northwestern University* v. *People*, 99 U. S. 309 (25: 387); *New Jersey* v. *Wright* ("*Given* v. *Wright*") 117 U. S. 648 (29: 1021).

The case at bar should be carefully distinguished from those in which the state court puts its decision upon an independent ground. By independent ground is meant some ground apart from the statute, upon which the case may have been decided without any reference to the statute. If the judgment of the state court necessarily gives effect to the statute, a Federal question is presented.

Lehigh Water Co. v. *Easton*, 121 U. S. 388 (30: 1059); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 579 (28: 1084, 1086); *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46, 51 (31: 683, 685).

Messrs. **E. J. Phelps** and *B. F. Fifield*, for defendant in error:

The case presents no Federal question.

Taxes on the property of the Rutland in the occupation of the Central as lessee belonged to the Rutland to pay, no provision to the contrary being contained in the lease. Such is the general rule of law.

Taylor, Landlord & Tenant, § 341.

Many cases have been cited by the plaintiff in error to prove that an unconstitutional law affords no assistance to those who seek to justify under it an act otherwise wrongful, or to enforce a claim having no other foundation. Authority in support of this axiom is unnecessary. Its truth is not denied.

But two conditions that attend every unconstitutional law are equally clear: (1) That it is void only as against those whose legal rights are affected by it and who alone are entitled to be heard against it. (2.) That if any party so affected chooses to waive the objection, it is lost, and the law becomes obligatory upon him.

Such a statute is therefore not void, as is sometimes loosely said, but voidable, and, like all other voidable obligations, is affirmed by the consent or acquiescence of the party who has the right to avoid it.

Re Wellington, 16 Pick. 96, 26 Am. Dec. 631.

A party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision of the Constitution designed for the protection of private property. The statute is assumed to be valid until some one complains whose rights it invades.

Cooley, Const. Lim. chap. 7, § 3. *104.

Money paid as taxes under an unconstitutional law cannot be recovered back, though paid in ignorance of the unconstitutionality.

Cooley, Taxn. 566, and cases cited.

A party is estopped from repudiating on any ground a course of dealing in which he has acquiesced,—especially if he has taken the benefit of it, although in the outset he might have been entitled to object. Silence where a party ought to speak is a waiver of the right that should have been made known.

Morgan v. *Chicago & A. R. Co.* 96 U. S. 716 (24: 743); *Kirk* v. *Hamilton*, 102 U. S. 79

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(26: 83); *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 344; *Dickerson* v. *Colgrove*, 100 U. S. 578 (25: 618); *Philadelphia, W. & B. R. Co.* v. *Dubois*, 79 U. S. 12 Wall. 64 (20: 269); *Leather Manufacturers' Nat. Bank* v. *Morgan*, 117 U. S. 96 (29: 811).

The Central as agent of the Rutland in paying the taxes in question was guilty of no breach of duty that would deprive it of the right to charge the payments to its principal, even assuming the taxes paid to have been illegal, and that the illegality had not been waived. Nor was the Central company guilty of any negligence in failing to discover the invalidity of the taxes, if they were invalid. As the law stood under the decisions of this court until after the taxes now in dispute were paid, their constitutionality was established by the final authority—the Supreme Court of the United States.

Philadelphia & R. R. Co. v. *Pennsylvania* ("*State Freight Tax*") 82 U. S. 15 Wall. 232 (21: 146); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 (21: 888).

It was not until the case of *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 (30: 1200), 1 Inters. Com. Rep. 308, decided in May, 1887, and reported some months later, overruling the decision to the contrary in the case of the *State Freight Tax*, that such taxes as these are now assumed to be were declared unconstitutional.

Had the Central brought a bill to enjoin the collection of this tax, it would have been dismissed at the threshold, upon that ground. The Rutland company alone could have raised the question.

Waite v. *Dowley*, 94 U. S. 527 (24: 181).

To give this court jurisdiction of a writ of error from a state court, it must affirmatively appear that the state court rested the judgment complained of wholly upon the decision of the Federal question, and that such a decision was necessary to the determination of the case.

Cook County v. *Calumet & C. Canal & D. Co.* 138 U. S. 635 (34: 1110); *Hammond* v. *Johnston*, 142 U. S. 73 (35: 941); *Beaupré* v. *Noyes*, 138 U. S. 401 (34: 992); *Eustis* v. *Bolles*, 150 U. S. 361 (37: 1111); *Moore* v. *Mississippi*, 88 U. S. 21 Wall. 636 (22: 653); *State* v. *Louisiana Board of Liquidation*, 98 U. S. 141 (25: 115); *New Orleans* v. *New Orleans Water Works Co.* 142 U. S. 84 (35: 944); *Brown* v. *Atwell*, 92 U. S. 327 (23: 511); *DeSaussure* v. *Gaillard*, 127 U. S. 216 (32: 125).

The state court correctly held that the rights of the parties in respect to the payments now in question are to be determined by the law as it stood when those payments were made, under the statute of Vermont and the previous decisions of this court on the subject, and that the taxes so paid are, as between these parties and for the purposes of this case, to be regarded as valid.

Gelpcke v. *Dubuque*, 68 U. S. 1 Wall. 175 (17: 520); *Havemeyer* v. *Iowa County Supra*. 70 U. S. 3 Wall. 294 (18: 38); *Douglass* v. *Pike County*, 101 U. S. 677 (25: 968); *Pleasant Twp.* v. *Ætna L. Ins. Co.* 138 U. S. 71 (34: 866); *Taylor* v *Ypsilanti*, 105 U. S. 60 (26: 1008); *Olcott* v *Fond du Lac County Supra*. 83 U. S. 16 Wall. 678 (21: 382).

If a contract when made was valid under the Constitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity.

Kenosha v. *Lamson*. 76 U. S. 9 Wall. 477 (19: 725); *Delmas* v. *Merchants' Mut Ins. Co.* 81 U. S. 14 Wall. 661 (20: 757); *Thompson* v. *Perrine*, 103 U. S. 806 (26: 612); *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359).

When the constitutionality of a statute is brought in question collaterally or incidentally, and not between the authority seeking to enforce the statute and the party whose rights are affected by it, the objection will not be considered.

Waite v. *Dowley*, 94 U. S. 527 (24: 181); *Com.* v. *Philadelphia*, 27 Pa. 497; *People* v. *Salomon*, 54 Ill. 46.

The decision of the supreme court of Vermont that the 14th section of the statute in question is valid was right, and, whether right or not, is immaterial here.

A state in the legitimate exercise of its taxing power may require its citizens who are lessees or custodians of property in the state belonging to other citizens, to withhold from the money derived from it and payable to its owners, the amount of the tax assessed upon it against the owners, and to pay the tax to the state.

First Nat. Bank v. *Kentucky*, 76 U. S. 9 Wall. 353 (19: 701); *Lionberger* v. *Rowse*, 76 U. S. 9 Wall. 468 (19: 721); *Bells' Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (33: 892); *Jennings* v. *Coal Ridge Imp. & C. Co.* 147 U. S. 147 (37: 116); *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 153 U. S. 628 (38: 846).

Such a law impairs no obligation of the contract between the owners and the lessees, because all contracts are subject to the taxing power of the state, and such is therefore their implied obligation.

Osborn v. *Nicholson*, 80 U. S. 13 Wall. 660 (20: 695); *New York* v. *Cook*, 148 U. S. 397 (37: 498); *West River Bridge Co.* v. *Dix*, 47 U. S. 6 How. 532 (12: 545); *Charles River Bridge Propr.* v. *Warren Bridge Propr.* 36 U. S. 11 Pet. 420 (9: 773).

If these taxes are found to be valid, and the decision of the supreme court of Vermont on this point to be therefore erroneous, the whole case of the plaintiff in error falls to the ground, and the judgment of the Vermont court being, in that view, unquestionably right, though based upon wrong reasons, will be affirmed.

Doe, Brobst, v. *Roe* ("*Brobst* v. *Brock*") 77 U. S. 10 Wall. 519 (19: 1002); *Barth* v. *Clise*, 79 U. S. 12 Wall. 400 (20: 393); *First Nat. Bank* v. *Home Sav. Bank*, 88 U. S. 21 Wall. 294 (22: 560).

Mr. Justice **Gray** delivered the opinion of the court:

It was hardly denied at the bar that the first writ of error was prematurely sued out before a final decree had been entered. But it is unnecessary to dwell upon that, because, in other

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respects, the questions arising upon the two writs of error are identical.

The decree below, as appears by the mandate of the supreme court of Vermont, and still more clearly by its opinion, made part of the record, and reported in 63 Vt. 1, 10 L. R. A. 562, 8 Inters. Com. Rep. 488, did not proceed exclusively on the decision of a Federal question, but also upon grounds of general law.

The conclusion of that court, following the decision of this court in *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [30: 1200], 1 Inters. Com. Rep. 308, that the statute of Vermont of 1882, so far as it sought to tax the earnings derived from interstate commerce, was unconstitutional, was in favor of the Rut-[639]land Railroad *Company, and therefore cannot be questioned on a writ of error sued out by that company.

The court did declare that the provision of the statute, which requires the lessee to pay the tax and deduct the amount from the rent, does not impair the obligation of a contract, because both railroad companies, as well as the rent due from the one to the other, were proper subjects for taxation under the laws of Vermont, and the method to be adopted for the collection of the tax was purely a question of legislative discretion.

But the decision of this part of the case (the only part decided against the plaintiff in error) was not put upon that consideration alone. On the contrary, the court went on to say: "But it by no means follows, because the defendant has paid to the state taxes, under a law afterwards held to be void, by withholding the amount thereof from the rent, that the Rutland Company can now claim the balance of the rent for this reason." And this proposition was rested on several distinct grounds.

The first of those grounds, as summed up by the state court, was as follows: "Down to May 27, 1887, the date on which the decision in *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [30: 1200], 1 Inters. Com. Rep. 308, was promulgated, the doctrine of the cases decided by the supreme court upheld the constitutionality of the taxation in question. *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 284 [21: 164]; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 [21:888]. . . . The Supreme Court of the United States is the supreme arbiter when a Federal question is involved. Down to 1887 that court had ruled the Federal question now under consideration in a way that upheld the legislation in question. Its decisions then promulgated were the supreme law of the land, absolutely binding upon both parties to this cause. Hence all payments of taxes, made under our law, which down to that time must be treated as valid for present purposes, were made in strict conformity to law. The subsequent change in the decisions of the United States Supreme Court is only operative prospectively, and all acts done in obedience to the former decisions are valid and cannot be disturbed."

[640]*But the conclusion that "the defendants are not liable to pay as rent the amount paid by them as taxes upon the earnings of the Rutland Road" was also put upon other grounds, namely, that the taxes upon the earnings of the Rutland Railroad were taxes which, as between the Rutland Company and the Central Vermont Company, it was the duty of the Rutland Company to pay; that, the lease being silent, the duty to pay, under the common law, rested upon the lessor; that this question had been decided in the former suit between the parties; that by the statute of 1882 the thing taxed was the property of the Rutland Company, and the Central Vermont Company was but the collector of the tax; that the Central Vermont Company having been compelled by law to make the payments to discharge an obligation of another, the law implied a promise to repay, and the Central Vermont Company would have an action to recover the amount from the Rutland Company, and a court of equity would avoid circuity of action; that the Rutland Company, in its treasurer's letter of September 19, 1883, had simply objected that the tax was invalid, and had made no suggestion that the statute was unconstitutional, and no offer to indemnify the Central Vermont Company, and the latter could not, in prudence, do otherwise than pay the taxes, and was under no duty to incur the expense and assume the perils of delay and of litigation to test the constitutionality of the statute; and that the Rutland Company, in a court of equity, could not have relief for what, as between the parties, itself should have done, and what, by its own laches, it had suffered to be done, professedly in its behalf, by the Central Vermont Company.

These grounds involved no Federal question, and were broad enough to support the judgment, without regard to the question whether the provision of the statute, under which the Central Vermont Company paid the taxes and deducted them from the rent, was or was not constitutional.

Such being the case, the conclusion is inevitable that the court has no jurisdiction to review the decision of the state court.

It is well settled, by a long series of decisions of this court, *that where the highest court [641] of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involved in a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question. *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 [22: 429]; *Jenkins* v. *Loewenthal*, 110 U. S. 222 [28: 129]; *Beaupré* v. *Noyes*, 138 U. S. 397 [34: 991]; *Walter A. Wood Mowing & R. Mach. Co.* v. *Skinner*, 139 U. S. 293 [35: 193]; *Hammond* v. *Johnston*, 142 U. S. 73 [35: 941]; *Tyler* v. *Cass County*, 142 U. S. 288 [35: 1016]; *Delaware City S. & P. S. B. Nav. Co.* v. *Reybold*, 142 U. S. 636 [35: 1141]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111], in the last two of which many other cases to the same effect are cited.

In *Williams* v. *Weaver*, the court of appeals of New York held that assessors of taxes were not personally liable in damages to the owner of national bank shares alleged to have been taxed in violation of a statute of the United

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States. 75 N. Y. 30. A writ of error to review the judgment was dismissed by this court because, as was said by *Mr. Justice* Miller in delivering the opinion, "If the defendants, in assessing property for taxation, incur no personal liability for any error they may commit, the fact that the error committed is a misconstruction of an act of Congress can make no difference." 100 U. S. 547 [25: 708].

In *Young* v. *American S. S. Co.* 105 U. S. 41 [26: 966], it was held, in an opinion delivered by *Mr. Justice* Field, that the question whether fees exacted in violation of a statute of the United States, and paid without objection, could be recovered back, was not a Federal question, the decision of which by the highest court of a state could be reviewed by this court on writ of error.

In *Tyler* v. *Cass County*, above cited, an action was brought against a county to recover back money paid at a sale for taxes of lands alleged to be subject to a lien of the United States, and therefore exempt from taxation. The supreme court of North Dakota—while holding that, in view of the decision of this court in *Northern P. R. Co.* v. *Rockne* ("*Northern P. R. Co.* v. *Traill County*") 115 U. S. 600 [29: 477], the lands were not taxable, and nothing passed by the sale—gave judg-**642**]ment for the defendant. *1 N. D. 369. In support of a writ of error sued out by the plaintiff from this court, it was argued that the assessor had no jurisdiction to decide whether the lands in question were or were not taxable; and that the state court, in holding that the act of the assessor, in assessing the lands against private parties in possession, though they in fact belong to the United States, would not be without jurisdiction, decided against immunity from the jurisdiction of the assessor. But this court dismissed the writ of error, and, speaking by the *Chief Justice*, said: "The question arising for determination in the state court was whether the money which had been paid by the purchaser of the lands at the tax sale could be recovered back, either at common law or under the Dakota statute in their behalf. The ground upon which the tax title was held to have failed was that the United States had a lien upon the lands, and that, therefore, they could not, under the laws of the United States, be sold for taxes; but that fact did not impress with a Federal character the inquiry as to the right of recovery." 142 U. S. 290 [35: 1017].

That case cannot be distinguished in principle from the case at bar. In this case, as in that, it was argued that the state court, while it declared the statute to be unconstitutional, yet by its decision gave effect to the unconstitutional statute. But in each case the decision of the Federal question was not an essential element in determining whether the plaintiff was entitled to recover against the defendant.

Writs of error dismissed for want of jurisdiction.

JAMES STEWART, *Plf. in Err.*, [643
v.
DANIEL S. C. McHARRY.

(See S. C. Reporter's ed. 643-650.)

Decision of land department.

A state court has no jurisdiction to re-examine the decision of the land department on a question of fact, to wit, a residence on a homestead, unless the decision was procured by fraud or imposition.

[No. 866.]

Submitted Oct. 22, 1895. Decided Nov. 18, 1895.

IN ERROR to the Supreme Court of the State of California, to review a judgment of that court affirming the judgment of the Superior Court of the County of Contra Costa, California, sustaining a demurrer to the cross-complaint and adjudging that the plaintiff, Daniel S. C. McHarry, do recover from the defendant, James Stewart, certain land situated in said county. *Affirmed.*

See same case below, 85 Pac. Rep. 141.

The facts are stated in the opinion.

Messrs. **E. W. McGraw** and **Theodore Wagner** for plaintiff in error.

Messrs. **Charles E. Wilson** and *W. S. Wells* for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us on error to the supreme court of California. The action was ejectment, commenced in July, 1891, to recover possession of certain parcels of land situated in the county of Contra Costa, in that state.

The plaintiff in the court below, defendant in error here, alleges in his complaint that on the 26th of February of that year he was the owner in fee and entitled to the possession of certain parcels of land, described as lots Nos. 2 and 3 of section No. 22, and lot No. 1, and the northeast quarter of the northeast quarter of section No. 27, in township No. 2 north, of range No. 3 west, Mount Diablo base and meridian, according to the official survey of the government of the United States.

That while he was such owner, and thus seised and entitled to the possession of the premises, the defendant, on the day mentioned, without right or title, entered upon the premises and ejected him therefrom, and ever since has withheld, and still unlawfully withholds, the possession thereof, to the damage of plaintiff of $1,000.

That the value of the rents, issues, and profits of the premises from the entry stated and while the plaintiff has been excluded therefrom is $50.

The plaintiff, therefore, prays judgment against the defendant for the possession of the premises and the recovery of the sum of $1,000 for withholding the same, and the sum of $50 for the value of its rents and profits, and for such other and further relief as to the court may seem meet and proper.

The defendant in his amended answer denies generally and specifically each of its allegations, except that he is and has been in the pos-

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session of the premises, which he admits, and 645]* claims that he is the owner thereof and entitled to their possession. And he denies that the plaintiff, by reason of the defendant's possession, has been damaged in the sum of $1,000, or in any other sum.

And in his answer, treated as a cross-complaint, the defendant makes certain allegations as to the acquisition and possession of other property, upon which he asserts a right to enter the tract in controversy as an adjoining farm homestead, averring that on the 2d day of October, 1882, he became the owner and went into the actual possession of a tract of land situate in the county of Contra Costa, being a portion of the land which was awarded to one James McClellan, under partition of a certain rancho entitled Pinole Rancho in which he was interested, as it was surveyed and patented by the United States, and which portion Getta Stewart, his wife, acquired from him.

That the portion thus acquired, a tract of land containing about sixty (60) acres, was, on October 2, 1882, conveyed to the cross-complainant by deed executed and acknowledged by her. And he alleges that in the month of March, 1876, he went into actual possession of certain public lands of the United States situate in the county of Contra Costa, embracing a portion of the property for which this action is brought, containing, according to the public surveys, seventy (70) acres and twenty-five (25) hundredths of an acre, and that he has, from that date, remained in the actual possession thereof, and used and cultivated the same, and that the public lands adjoin the land conveyed to him by Getta Stewart, and were reserved from settlement under the United States laws, on account of unsettled Spanish and Mexican land grants, until the 16th of April, 1883, when the boundaries of the Rancho El Sobrante, of which they were a part, were finally settled.

That on the 10th day of December, 1883, the survey of the public lands was approved by the United States surveyor general of California, and the map of the township was filed in the United States land office of California.

That the cross-complainant, in the month of March, 1876, and on the 16th day of April, 646]1883, and since those periods,*and on the 10th day of December, 1883, and thereafter, resided upon the land acquired by him from Getta Stewart.

That on the 10th of December, 1883, and since the month of March, 1876, he was the head of a family, and was then of the age of forty-nine years, and was, at the dates mentioned, a naturalized citizen of the United States; and was on the 2d day of October, 1882, and thereafter, on the 10th day of December, 1883, and since, the owner of and in the actual and peaceable possession of the land conveyed to him by Getta Stewart.

That on December 10, 1883, he appeared in person at the United States land office at San Francisco, state of California, and applied to the register to enter as an adjoining farm homestead under the provisions of sections 2289 and 2290 of the Revised Statutes of the United States, the public land above referred to as in his possession. The sections of the Revised Statutes referred to are as follows:

"Sec. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed, in the aggregate, one hundred and sixty acres.

"Sec. 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the *head of a family, or is twenty-one years[647 or more of age, or has performed service in the army or navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified."

That in compliance with the sections of the Revised Statutes, and on December 10, 1883, the cross-complainant made affidavit before the register of the United States land office at San Francisco, California, that he was then the head of a family, and of the age of fifty-six years, and a naturalized citizen of the United States, and that the application was for his exclusive use and benefit; that the entry of the land was made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person, and that the land was not mineral land, and that he was the owner of adjoining land upon which he was then residing, and the amount of land applied for would not, with the land already owned by him, exceed in the aggregate one hundred and sixty acres.

That he paid the fees and commissions required by law and demanded by the land officers, and thereupon was permitted to enter the land as an adjoining farm homestead, and that the receiver of the land office gave to him a receipt therefor.

He further alleges that on the 13th of December, 1883, the plaintiff in the action, McHarry, filed a pre-emption declaratory statement in the United States land office at San Francisco, alleging settlement on the 19th of January, 1876, upon a tract of land described substantially as the premises for which recovery is sought in the present action, and gave notice that he claimed a pre-emption right to the land.

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That the land described in the pre-emption declaratory statement of the plaintiff included 648]the land in the actual possession *of, and entered by, the cross-complainant as an adjoining farm homestead. That plaintiff did not then, nor has he ever since, had possession of the land included in the cross-complainant's homestead entry, or any part thereof.

He further alleges that a hearing of their respective claims was had before the register and receiver of the United States land office at San Francisco, and that he, the cross-complainant, and the plaintiff produced witnesses in support of their respective claims to the land, whose testimony was taken and reduced to writing in the land office.

That at such hearing the fact was proved that the cross-complainant had been in the actual, peaceable, and continuous possession of the land included in his homestead entry since the month of March, 1876: that Getta Stewart, his wife, was in the actual possession of the land conveyed to him by her deed, and had been in such actual possession since the year 1871 to the date of the conveyance, and that with the deed she delivered possession thereof to him, and that he then took possession thereof and continued in actual possession thereof with his family, consisting of his wife, said Getta Stewart, and her children by her former marriage, on the 10th day of December, 1883; and that the facts thus proved were not disputed, and that no evidence whatever to put the facts so proved in issue was ever brought before said land officers at the hearing.

That at the hearing of the contest before the register and receiver the fact was proven that the plaintiff and members of his family threatened the life of the cross-complainant and attacked him at various times since he took possession of the lands, shot at him, at the house in which he and his family resided, and thus put him in reasonable fear of his life and of personal violence of himself and family, and thereby compelled him to remove to the town of Martinez, and that thereafter he employed the tenants who held actual possession of the land for him, and that the tenants were assaulted by the plaintiff in a similar manner, and that upon two occasions the plaintiff and members of his family were arrested for such assaults. That the register and receiver refused to find facts from such testimony, and decided that it was unnecessary to consider the same.

649]*That the plaintiff claimed to have made a settlement upon adjoining subdivisions of land, and by reason of such settlement included the land in the possession of and contained in the homestead entry of the cross-complainant, in his pre-emption claim, and the register and receiver found such facts to be true, but nevertheless decided that the land included in the cross-complainant's homestead entry was not a valid adverse claim to the plaintiff's pre-emption claim, for the reason that the cross-complainant did not acquire any right or title by the deed from his wife to the land adjoining the land embraced in his homestead entry, in which ruling they erred.

And the cross-complainant further avers that on March 7, 1885, the land officers made a decision in the matter of the conflicting claims of the cross-complainant and plaintiff to the land, in favor of the plaintiffs.

That on the 10th day of March, 1885, being within the time required by, and in accordance with, the rules and regulations of the General Land Office, the cross-complainant filed his appeal from the decision of the register and receiver to the Commissioner of the General Land Office.

That thereupon the Commissioner of the General Land Office considered the same and reviewed the evidence and the decision of the register and receiver, and on the 1st day of September, 1886, rendered a decision reversing that of the register and receiver, and awarding to the cross-complainant the land claimed by him and included in his homestead entry.

That thereupon the plaintiff, McHarry, on the 6th day of November, 1886, appealed from the decision of the Commissioner of the General Land Office in the contest to the Secretary of the Interior.

That on the 16th day of September, 1889, the Secretary of the Interior reversed the decision of the Commissioner of the General Land Office, awarding the public land claimed by the cross-complainant to the plaintiff. One ground of the decision of the Secretary, awarding the public land to the plaintiff, is thus stated in his opinion:

"The statute requires *residence* on the original farm. The proof shows that Stewart and his family, while making a show*of residence[650 on the tract claimed as an original farm, had in fact leased said farm to a tenant for a number of years, covering the period of his adjoining farm entry, and that they in fact resided several miles from said farm in the town of Martinez, where Stewart had an established permanent business and a residence connected with his place of business. The excuse set up by Stewart for such nonresidence, namely, that it was because of danger of violence and injury at the hands of the McHarrys, is not sustained by the evidence. Mrs. Stewart testifies that she went to the farm and remained there for short periods, whenever she felt inclined, and seems never to have been molested, and no attempt by the McHarrys to prevent Stewart or his family from residing on the original farm at any time is shown."

The plaintiff demurred to the cross-complaint, the demurrer was sustained, and judgment was rendered thereon and on the answer, in favor of plaintiff, and defendant appealed to the supreme court of the state by which the judgment was affirmed. 85 Pac. Rep. 141.

The supreme court held that Stewart's ownership and title were sufficient to entitle him to an additional farm homestead, and that the land department erred as matter of law in its conclusion in regard thereto, but that in respect of Stewart's residence on the land conveyed to him by his wife, that was a question of fact, and the court had no jurisdiction to re-examine the conclusions of the land department thereon, in the absence of a clear showing that the decision was procured by fraud or imposition, which did not appear in the case. With these views we concur.

Judgment affirmed.

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651] LAWRENCE P. MILLS, *Appt.*,
v.
W. BRIGGS GREEN.

(See S. C. Reporter's ed. 651-653.)

Appeal, when dismissed—judicial notice.

1. When, pending an appeal, an event occurs without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the appeal; and such event, when not appearing in the record, may be proved by extrinsic evidence.
2. Where the whole object of the suit is to secure the right to vote at an election for delegates to a constitutional convention, and before the appeal to this court the day to vote has passed and the convention has assembled, the appeal will be dismissed.
3. This court takes judicial notice of the election of delegates to and the assembling of a state constitutional convention, on appeal from the decision of a lower Federal court.

[No. 732.]

Submitted Oct. 28, 1895. Decided Nov. 25, 1895.

APPEAL from a decree of the United States Circuit Court of Appeals for the Fourth Circuit reversing the orders of the United States Circuit Court for the District of South Carolina, and dissolving an injunction and remanding the case to that court with directions to dismiss the suit, in a suit in equity brought by Lawrence P. Mills for an injunction against W. Briggs Green, the supervisor of registration of Richland county, South Carolina, restraining him from the performance of certain acts, and for further relief. On motion to dismiss. *Dismissed.*

See same case below, 67 Fed. Rep. 818, 25 U. S. App. 383.

The facts are stated in the opinion.

Messrs. **Wm. A. Barber,** Attorney General of South Carolina, **Edward McCrady,** and *George S. Mower* for appellee, in favor of motion.

Mr. **Henry N. Obear** for appellant, in opposition.

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity, filed April 19, 1895, in the circuit court of the United States for the district of South Carolina, by Lawrence P. Mills, alleging himself to be a citizen of the state of South Carolina and of the United States, and a resident of a certain precinct in the county of Richland, and qualified to vote at all Federal and state elections in the precinct, and suing in behalf of himself and all 652] other citizens *of the county in like circumstances, for an injunction against W. Briggs Green, the supervisor of registration of the county.

The bill alleged that by a statute of South Carolina of December 24, 1894, a convention was called to revise the Constitution of the state, the delegates to be elected on the third Tuesday of August, 1895, and the convention to assemble on the second Tuesday of September, 1895; that the same and other statutes of South Carolina contained regulations as to the registration of voters, and as to certificates of registration, which were in violation of the Constitution of South Carolina, and of the Constitution of the United States, in various particulars pointed out, as abridging, impeding, and destroying the suffrage of the citizens of the state and of the United States; that the defendant was exercising the duties prescribed by those statutes, and intended to continue to do so, and specifically intended to furnish and deliver to the boards of managers appointed to hold the election of delegates to the constitutional convention the registration books of the several precincts, to be used by the managers at that election; that the plaintiff had failed to register as a voter, because, notwithstanding repeated efforts to become registered, he found himself unable to comply with the unreasonable and burdensome regulations prescribed by the unconstitutional registration laws; that he was desirous of voting for delegates to the constitutional convention at the election prescribed by the statute of 1894 for that purpose; that the registration books in the defendant's hands did not and would not contain the plaintiff's name; that he, and others under like circumstances, would not be permitted to vote at that election, unless their names were found upon the books, and unless they could produce registration certificates; and that, if the defendant were permitted to continue the illegal, partial, and void registration, and were allowed to turn over the books to the managers, the plaintiff would be deprived of his right to vote at that election, and grievous and irreparable wrong would be done to him, and to other citizens under like circumstances.

The prayer of the bill was for "a writ of injunction, *restraining and enjoining the [653 said defendant, individually and as supervisor of registration, from the performance of any of the acts hereinbefore complained of," and for further relief.

On the filing of the bill, the circuit court granted a temporary injunction, as prayed for, and ordered notice to the defendant to show cause on May 2, 1895, why it should not be continued in force; and on that day, after a hearing, ordered it to be continued until the final determination of the case, or until the further order of the court. 67 Fed. Rep. 818.

The defendant appealed to the circuit court of appeals, which, on June 11, 1895, reversed the orders of the circuit court, dissolved the injunction, and remanded the case to that court with directions to dismiss the bill. 25 U. S. App. 383. The plaintiff, on September 4, 1895, appealed to this court; and the appeal was entered in this court on September 19, 1895.

The defendant moved to dismiss the appeal, assigning, as one ground of his motion, "that there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject-matter upon which the judgment of this court can operate."

We are of opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record or discussed by counsel.

The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions

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or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord* v. *Veazie*, 49 U. S. 8 How. 251 [12: 1067]; *California* v. *San Pablo & T. R. Co.* 149 U. S. 308 [37: 747].

654] *If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house or of a railroad or of any other structure, persists in completing the building, the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages. *Tucker* v. *Howard*, 128 Mass. 361, 363, and cases cited; *Atty. Gen.* v. *Great Northern R. Co.* 4 De G. & S. 75, 94; *Terhune* v. *Midland R. Co.* 36 N. J. Eq. 318, 38 N. J. Eq. 423; *Platteville* v. *Galena & S. W. R. Co.* 43 Wis. 493.

But if the intervening event is owing, either to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand.

For example, appeals have been dismissed by this court when the plaintiff had executed a release of his right to appeal (*Elwell* v. *Fosdick*, 134 U. S. 500 [33: 998]); or when the rights of both parties had come under the control of the same persons (*Lord* v. *Veazie*, 49 U. S. 8 How. 251 [12: 1067]; *Chamberlain* v. *Cleveland*, 66 U. S. 1 Black, 419 [17: 93]; *American Wood Paper Co.* v. *Heft*, 75 U. S. 8 Wall. 333 [19: 378]; *East Tennessee, V. & G. R. Co.* v. *Southern Teleg. Co.* 125 U. S. 695 [31: 853]; *South Spring Hill Gold Min. Co.* v. *Amador Medean Gold Min. Co.* 145 U. S. 300 [36: 712]); or when the matter has been compromised and settled between the parties (*Dakota County* v. *Glidden*, 113 U. S. 222 [28: 981]); or when pending a suit concerning the validity of the assessment of a tax, the tax was paid (*San Mateo County* v. *Southern P. R. Co.* 116 U. S. 138 [29: 589]; *Little* v. *Bowers*, 134 U. S. 547 [33: 1016]; *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696 [35: 906]); or the amount of the tax was tendered, and deposited in a bank, which by statute had the same effect as actual payment and receipt of the money. *California* v. *San Pablo & T. R. Co.* 149 U. S. 308 [37: 747].

Where appeals were taken from a decree of foreclosure and sale, and also from decrees made in execution of that decree, and the principal decree was reversed, it was held that the later appeals having been annulled by operation of law, their subject-matter was withdrawn, and they must be dismissed for

655] *lack of anything on which they could operate. *Chicago, D. & V. R. Co.* v. *Fosdick*, 106 U. S. 47, 48 [27: 47].

Where, pending an appeal from a decree dismissing a bill to restrain a sale of property of the plaintiff under assessments for street improvements and to cancel tax lien certificates, the assessments and certificates were quashed and annulled by a judgment in another suit, the appeal was dismissed, without costs to either party. *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62 [34: 572].

Where, pending a writ of error in an action which did not survive by law, the plaintiff died, the writ of error was abated. *Martin* v. *Baltimore & O. R. Co.* ("*Gerling* v. *Baltimore & O. R. Co.*") 151 U. S. 673 [38: 311].

In the great case of *Pennsylvania* v. *Wheeling & B. Bridge Co.*, which was a bill in equity filed in this court, under its original jurisdiction, for an injunction against the construction and maintenance of a bridge across the Ohio river, to the obstruction of the free navigation of the river, this court entertained jurisdiction, and on May 27, 1852, decreed that the bridge was an obstruction and a nuisance, and should be either abated or elevated so as not to interfere with the free navigation of the river, and awarded costs against the defendant; but suspended the enforcement of the decree for a limited time, to allow the defendant to carry out a scheme by which the obstruction to navigation might be removed. 54 U. S. 13 How. 518, 626, 627 [14: 249, 294, 295]. By the act of Congress of August 31, 1852, chap. 111, § 7, the defendant was authorized to have and maintain the bridge at its then site and elevation; and the officers and crews of all vessels and boats navigating the river were required to regulate the use of their vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of the bridge. 10 Stat. at L. 112. The bridge having been blown down by a violent storm in the summer of 1854, and the defendant preparing to rebuild it according to the original plan, the plaintiff, on June 26, 1854, obtained from Mr. Justice Grier, in vacation, an injunction which was served upon the defendant, notwithstanding which it proceeded with the erection of the bridge, and completed it in November, 1854. *At December term, 1854, of this court, [**656** the defendant moved to dissolve that injunction; and the plaintiff filed motions for a sequestration against the defendant, and for an attachment for contempt against its officers for disobeying the former decree of this court and the injunction of Mr. Justice Grier, and for an execution for the costs awarded by the former decree of this court. This court held that the act of 1852 was a constitutional exercise of the power of Congress to regulate interstate commerce, and that since that act the portion of its former decree which directed the alteration or abatement of the bridge could not be carried into execution; and therefore denied the plaintiff's motions for sequestration and attachment, dissolved the injunction, and only granted to the plaintiff execution for the costs decreed by this court before the passage of the act of Congress. 59 U. S. 18 How. 421, 431, 436, 459, 460 [15: 435, 437, 439, 449].

In a suit by a county to restrain a railroad corporation from building a railroad along a public highway, the supreme court of Iowa held that an order refusing an

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injunction, though erroneous when made, should not be reversed when the legislature, pending the appeal, had authorized the act complained of. *Linn County* v. *Hewitt*, 55 Iowa, 505.

Still more analogous to the present case is one brought before the court of appeals of New York, and stated in its opinion as follows: "This action was commenced to restrain certain persons from proceeding to incorporate the village of North Tarrytown under the general act of the legislature authorizing the incorporation of villages. The persons made defendants are those who signed the notice required, and the officers of the town who would be inspectors of the election. A temporary injunction was obtained, which was dissolved, and the election was held, and a majority of votes determined in favor of the incorporation, and the proceedings for such incorporation have been perfected, village officers chosen, and the corporation is in operation. By a supplemental complaint these facts were set up, and judgment demanded that all these acts be declared null and void. The grounds of the action are that the statute was not complied **657**]with, and that *the statute itself is unconstitutional. We do not deem it necessary to determine whether the action is maintainable as originally commenced. As it appeared upon the trial, and is presented to us upon appeal, no effectual judgment can be rendered in it. The acts sought to be restrained have been consummated, and from a project to incorporate a village, the village has become incorporated. The defendants are not necessary or proper parties to the action upon the facts disclosed at the trial. The village itself, or the trustees who are now exercising the franchise, are the necessary parties to the action, and an injunction restraining the defendants would have no practical effect upon the corporation. We do not deem it proper, therefore, to express an opinion upon the points presented, involving the validity of the statute or the regularity of the proceedings under it, for the reason that a decision could not be made effectual by a judgment." *People* v. *Clark*, 70 N. Y. 518.

In the case at bar, the whole object of the bill was to secure a right to vote at the election to be held, as the bill alleged, on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the circuit court of appeals dismissing his bill, that date had passed; and, before the entry of the appeal in this court, the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. 21 S. C. Stat. 802, 803. The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. The lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the Constitution and public laws of each state of the Union. *Owings* v. *Hull*, 34 U. S. 9 Pet. 607, 625 [9: 246, 252]; *Lamar* v. *Micou*, 112 U. S. 452, 474 [28: 751, 759], and 114 U. S. 218, 223 [29: 94, 95]; *Hanley* v. *Donoghue*, 116 U. S. 1, 6 [29: 535, 537]; *Fourth Nat. Bank of New York* v. *Francklyn*, 120 U. S. 747, 751 [30: 825, 827]; *Gormley* v. *Bunyan*, 138 U. S. 623 [34: 1086]; *Martin* v. *Baltimore & O. R. Co.* ("*Gerling* v. *Baltimore & O. R. Co.*") 151 U. S. 673, 678 [38: 311, 313]. Taking judicial notice of the Constitution and laws of the state, this court must take judicial *notice of the days of public general elec-[**658** tions of members of the legislature, or of a convention to revise the fundamental law of the state, as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect. 1 Greenl. Ev. § 6; *Brown* v. *Piper*, 91 U. S. 37, 42 [23: 200, 201]; *Gardner* v. *Barney*, 73 U. S. 6 Wall. 499 [18: 890]; *Hoyt* v. *Russell*, 117 U. S. 401 [29: 914]; *Jones* v. *United States*, 137 U. S. 202, 216 [34: 691, 697].

It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the circuit court, no relief within the scope of the bill could now be granted.

Appeal dismissed without costs to either party.

J. N. GILLIS, John T. Faxon, Administrator of the Estate of F. B. Rice, Deceased, and J. N. Voss, *Plffs. in Err.*,

v.

A. W. STINCHFIELD.

(See S. C. Reporter's ed. 658-660).

Review of state judgment.

A judgment of a state court based upon an estoppel on general principles of law and a statute of the state, irrespective of any Federal question, as an independent ground broad enough to maintain its judgment, cannot be reviewed in this court on writ of error, although a Federal question was also decided.

[No. 661.]

Submitted Nov. 14, 1895. Decided Nov. 25, 1895.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming the judgment of the Superior Court of Tuolumne County, California, in favor of the plaintiff, A. W. Stinchfield, against the defendants, J. N. Gillis *et al.*, for the value of certain gold taken by defendants from the mining claim of plaintiff. On motion to dismiss. *Dismissed.*

See same case below, 40 Pac. Rep. 98.

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4: 97; Matthews Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37: 267.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought by Stinchfield against Gillis and others in the superior court of Tuolumne county, California, to recover the value of certain gold alleged to have been taken by defendants from the mining claim of plaintiff. Gillis, for many years, had held and asserted ownership of a mining claim known as the Carrington, and had sold and conveyed by deed of grant, bargain, and sale a portion of the ground to Stinchfield. Immediately after executing the deed to Stinchfield, Gillis located that portion of the claim which he retained, and denominated his location the Carrington, and afterwards Stinchfield located the ground he had purchased, and denominated it the Pine Tree claim. Thereafter Gillis, or those **659]*** under him, entered upon the ground he had sold to Stinchfield at the intersection of two veins, one of which had its apex in the portion of the original claim which Gillis had retained, and the other had its apex in the ground sold to Stinchfield, and dug out and appropriated a large amount of gold, the space of vein intersection from which the gold was taken being entirely in Stinchfield's ground.

The trial court gave judgment for Stinchfield, and Gillis appealed to the supreme court of California, by which the judgment of the lower court was affirmed. 40 Pac. Rep. 98. The supreme court was of opinion that Gillis was estopped, under the law of California, by his deed to Stinchfield, from claiming priority of title to the space of vein intersection by reason of the location which he had made after the execution of the deed, but before the location by Stinchfield of the ground conveyed to him. The same conclusion had been reached and announced on a former appeal. 96 Cal. 88.

A writ of error from this court having been allowed, a motion to dismiss was submitted.

Messrs. **M. A. Wheaton, F. J. Kierce,** and *I. M. Kalloch* for defendant in error, in favor of motion.

Messrs. **J. C. Campbell,** *F. W. Street,* and *J. F. Rooney* for plaintiffs in error, in opposition.

THE CHIEF JUSTICE: Neither in the pleadings, nor in the proceedings during the trial, nor in the specifications of error below, was any Federal question specifically raised, nor was any right, title, privilege, or immunity of a Federal nature set up or claimed. *Sayward* v. *Denny,* 158 U. S. 180 [39: 941]. It is, however, contended that the record shows that a Federal question arose in the case, as considered by both the superior and the supreme courts, and was decided adversely to plaintiffs in error, namely, that Gillis had the right to follow what was known as the Rice vein, which had its apex on the Carrington mine, upon its dip, beneath the surface of the Pine Tree mine, and to appropriate to his own use the **660]** gold found *in that vein at the point of its intersection with the so called West vein, which had its apex on the Pine Tree mine, because the Carrington mine was the older or prior location; and that this could only be determined by an application of sections 2322 and 2336 of the Revised Statutes. But the decision of the supreme court was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad enough to maintain the judgment. The writ of error must therefore be dismissed. *Eustis* v. *Bolles,* 150 U. S. 361 [37: 1111]; *Rutland R. Co.* v. *Central Vermont R. Co. ante,* 384.

Writ of error dismissed.

THEODORE LAMBERT, *Appt.,*

v.

GEORGE BARRETT, Sheriff of the County of Camden, in the State of New Jersey.

(See S. C. Reporter's ed. 660-663).

Federal question.

Whether the governor of a state can, under its Constitution and statutes, issue a warrant of execution of one convicted of murder unless a reprieve has been granted within ninety days after conviction, or whether a new time for the execution must be fixed by the trial court, are not Federal questions, and their decision does not involve a denial of due process of law or an infraction of the Federal Constitution.

[No. 771.]

Submitted Nov. 11, 1895. Decided Nov. 18, 1895.

APPEAL from an order of the Circuit Court of the United States for the District of New Jersey denying the petition of Theodore Lambert for a writ of habeas corpus. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This is an appeal from a final order of the circuit court of the United States for the district of New Jersey, denying the petition of Theodore Lambert for a writ of habeas corpus. It appeared from the petition that Lambert was convicted by the verdict of a jury, June 15, 1894, of the murder of William Kairer in the court of oyer and terminer and general jail delivery of Camden county, New Jersey, and sentenced October 13 to be hanged on December 13, 1894; that on the *fourth of Decem- **[661** ber the governor of New Jersey granted a reprieve, suspending the execution of the sentence until January 3, 1895, and on December 22, 1894, issued a death warrant for the execution of Lambert on said third of January; that on December 29, 1894, application was made to one of the judges of the circuit court of the United States for the third circuit for a writ of habeas corpus, which was denied, and on January 2

NOTE.—*As to what is due process of law,* see note to Pearson v. Yawdall, 24: 436.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question.—see note to Hamblin v. Western Land Co. 37: 267.

As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution,—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

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an appeal was taken to this court; that on the same day a citation was issued to Barrett, sheriff of the county of Camden, in whose custody petitioner was, together with an order by one of the justices of this court, staying the execution of Lambert "until the further order of this court." It also appeared that the appeal was heard in this court March 25, 1895, and the appeal thereafter dismissed for want of jurisdiction, and a mandate to that effect was duly issued, but that it was not filed nor any entry of final judgment made in the circuit court. Petitioner further averred that on May 28, 1895, the governor issued another death warrant to the sheriff of Camden county, directing the execution of the death sentence on the 27th of June following; that on June 5, 1895, a petition was presented to the supreme court of New Jersey for a writ of habeas corpus to inquire into the cause of the detention of Lambert, and that the same was granted and made returnable on June 10, and after hearing argument the court held that Lambert was lawfully in custody; that subsequently application was made to the chancellor of the state for a writ of error to remove the last-mentioned judgment to the court of errors and appeals, which was refused.

Petitioner charged that under section 766 of the Revised Statutes any proceedings to carry out the judgment against him by or under the authority of the state of New Jersey before final judgment was entered in the circuit court were null and void, and that as such judgment had not been entered, the sheriff restrained him of his liberty for the purpose of carrying the death warrant into execution in violation of that statute of the United States; that the governor had no prerogative, right, or authority under or by virtue of the laws of New Jersey to grant the reprieve or issue the death 662] warrant; *and that the second death warrant was in the nature of a new sentence, which could not be had without the presence of petitioner, and placed petitioner twice in jeopardy of his life; all of which was in violation of the Constitution and laws of the United States.

Mr. **John L. Semple** for appellant.
Mr. **Wilson H. Jenkins** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By section 766 of the Revised Statutes, where an appeal from the final decision of a circuit court of the United States, denying the writ of habeas corpus to a person alleging restraint of his liberty by state authority in violation of the Constitution or laws of the United States, is "in process of being heard and determined," any proceeding against such person in respect of the matter under consideration is to be deemed null and void. As no order staying proceedings under state authority is made a condition to such stay, the bare pendency of the appeal has that effect, and, in consequence, many applications for habeas corpus have been made to the circuit courts, and, on denial, many appeals taken to this court on inadequate and insufficient grounds. It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.

When, in the instance of the first application for habeas corpus made by this petitioner, the appeal to this court was dismissed, the supersedeas fell with the disposition of the case; and when final judgment was entered here, and especially after the mandate had issued, the authorities of the state had power to proceed, although the mandate may have been, as is said, delivered to them instead of to the circuit court. *Jugiro* v. *Brush*, 140 U. S. 295, 296 [35: 512; 513].

The Constitution of New Jersey provides that the governor *may grant reprieves "to ex- [663 tend until the expiration of a time not exceeding ninety days after conviction;" and by section 123 of the criminal procedure act of that state, it is provided that when a reprieve is granted to any convict sentenced to the punishment of death and he is not pardoned, it shall be the duty of the governor to issue his warrant to the sheriff of the proper county for the execution of the sentence at such time as is therein appointed and expressed. It is contended that if there is no reprieve there can be no warrant; that there was no authority to issue either, except within ninety days after conviction; and that appellant must be brought before the trial court and a new date be fixed for the execution. But these are matters for the determination of the state courts, and they appear to have been passed upon adversely to petitioner. That result involves no denial of due process of law or the infraction of any provision of the Constitution of the United States. *Lambert* v. *Barrett*, 157 U. S. 697 [39: 865]; *Holden* v. *Minnesota*, 137 U. S. 483 [34: 784]; *Schwab* v. *Berggren*, 143 U. S. 442 [36: 218]; *McElvaine* v. *Brush*, 142 U. S. 155, 159 [35: 971, 973]; *Ex parte Cross*, 146 U. S. 271 278 [36: 969, 972].

Order affirmed.

GEORGE GOODE, *Plff. in Errr.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 663-673.)

General verdict—decoy letter—theft from the mail—city postoffice.

1. A general verdict upon all the counts in an indictment, they being sufficient in form, is good, if any one of the counts is sustained by the evidence.
2. The fact that the letter from which money was taken was a decoy, with a fictitious address, is no defense to an indictment for theft from the mail.
3. A letter is deposited in the postoffice, if put in any place where letters are usually kept or deposited therein,—as the box of a letter carrier,—within U. S. Rev. Stat. § 5469, making it an offense to steal a letter from the postoffice.
4. Evidence that a place is known as a station of

NOTE.—*As to obstructing the mail; what constitutes the offense,*—see note to United States v. Kirby, 19: 278.

As to liability of postmaster general and postmaster for loss and detention of letters and papers, see note to Dunlop v. Munroe, 3: 329.

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a city postoffice, has been used as such for years, and that it is a postoffice *de facto*, is sufficient; and it is not necessary to show that it had been established by law, under an indictment for theft of a letter from the mail.

[No 616.]

Argued Nov. 1, 1895. Decided Nov. 25, 1895.

IN ERROR to the District Court of the United States for the District of Massachusetts to review a judgment convicting George Goode for embezzlement and theft from the mail. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

George Goode, a letter carrier, was indicted and convicted in the district court for the district of Massachusetts for embezzlement and theft from the mail. The indictment contained seven counts, the first three of which charged a violation of Rev. Stat. § 5467, and the last four a violation of section 5469. (The substance of these sections is printed in the margin.) * The case was submitted to the jury under certain instructions, hereafter to be considered, who returned a verdict of guilty upon the whole indictment.

The facts of the case were substantially as follows:

Goode, the plaintiff in error, was a letter carrier employed in the branch postoffice at Roxbury, which had formerly been an independent postoffice, but is now known as the Roxbury station of the Boston postoffice. **665**] Complaints having been *made of thefts from the mails at this office, Thomas J. Boynton, a postoffice inspector, prepared two decoy letters, one of which was addressed to Whitcomb, Keyes, & Co., a firm of merchant tailors on Washington street in the Roxbury district, and was subsequently delivered to them in the regular course of business, and one addressed to John Muldoon, Esq., 153 Ziegler street, Boston, Mass., and postmarked West Cheshire, Conn.

Boynton, in fact, took an envelope containing that postmark, filled in the date, which was missing on the postmark, with type which he had in his office for that purpose, and canceled the stamp with a canceler, such as was used ordinarily in the smaller postoffices. He enclosed in the letter two one-dollar silver certificates and five two-cent postage stamps, marked the postage stamps by means of pin holes, and gave the letter to one McGrath, who was assistant superintendent of the mailing division of the main postoffice in Boston, but who was stationed temporarily, by direction of the postmaster, at the Roxbury office.

McGrath, when the letter carriers were out, called as witness the superintendent and person having charge of the branch postoffice, and in his presence put the letter into defendant Goode's box. This was not the ordinary method of depositing the mail. Indeed, he passed by the places on the outside as well as the inside of the postoffice, where letters are usually mailed, and went into the back room, where the letters after *passing through [**666** the mails are sorted. Goode returned from his route, took up all the letters in his box, and went to his desk, which was situated in the same room. His own route terminated at No. 51 Ziegler street, and it was his duty to put this Ziegler street letter into the box of the carrier whose route included the higher numbers of Ziegler street, or to put it into what was known as the "list box." This list box was kept for the reception of any letter known as a "beat" or a "nixie," that is, a letter addressed to a person not to be found in the district. On Goode's return from his route, the letter not being found in either of these boxes or elsewhere, he was searched and the five marked postage stamps were found upon his person. It was shown that, while absent on his route, he had the opportunity of disposing of the letter and the silver certificates therein contained. There was a large number of other letters in the box in which this Muldoon letter was put by McGrath. McGrath knew at the time that there was no such place as 153 Ziegler street, and that there was no such person as John Muldoon. He put the letter in the box for the purpose of being able to identify its contents in case Goode embezzled them.

Goode was sentenced upon conviction to imprisonment at hard labor for three years, and thereupon sued out this writ of error.

Messrs. **Elbridge R. Anderson** and *Charles W. Bartlett*, for plaintiff in error:

The Muldoon letter, so called, was not a letter. A letter is a written or printed message, a communication made by visible characters, from one person to another at a distance. The Muldoon letter was not a message nor a communication from one person to another. On the evidence there was no such man as John

*§ 5467. Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter . . . intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any postoffice or branch postoffice established by authority of the Postmaster General, and which shall contain any . . . postage stamp . . . or other pecuniary obligation or security of the government, . . . any such person who shall steal or take any of the things aforesaid out of any letter, . . . which shall have come in his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years.

§ 5469. Any person who shall steal the mail or steal or take from or out of any mail or postoffice, branch postoffice, or other authorized depository for mail matter, any letter or packet; any person who shall take the mail, or any letter or packet therefrom, or from any postoffice, branch postoffice, or other authorized depository for mail matter, with or without the consent of the person having custody thereof, and open, embezzle, or destroy any such mail, letter, or package which shall contain any . . . postage stamp . . . or other pecuniary obligation or security of the government; . . . any person who shall, by fraud or deception, obtain, from any person having custody thereof, any such mail, letter, or packet containing any such article of value shall, although not employed by the postal service, be punishable by imprisonment at hard labor for not less than one year and not more than five years.

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Muldoon. There can be no message or communication to that which is not in existence.

United States v. *Denicke*, 35 Fed. Rep. 407; *Reg.* v. *Gardner*, 1 Car. & K. 628.

The Muldoon letter, so called, never became a letter or mail matter under the statute, because it never got into the mail in any of the usual ways provided by the postoffice authorities.

United States v. *Rapp*, 30 Fed. Rep. 818; *Reg.* v. *Rathbone*, 1 Car. & M. 220.

The Muldoon letter, at the time McGrath carried it into the postoffice, was not mailable matter, and was not proper to be mailed. It had not been in the hands of any postmaster or in custody of mail, and it had no stamp upon it except that one which had been canceled by Boynton. A letter is not one until it is proper to be mailed in the usual course of mail.

United States v. *Taylor*, 37 Fed. Rep. 200.

The Muldoon letter was never deposited in the Roxbury postoffice nor in the mail for the Roxbury district deposited in the branch postoffice of the United States. It never went into the office so as to get into the custody of the postmaster. The mere fact that it was carried into the postoffice building and put into a sorting case and in a sorter's box is not enough. It must get into the mail through the usual channels and by proper means. Had it been thrown on the floor it could not be said that it had been deposited in the mail, and the contention is that what was done amounted to no more. A letter to be "deposited" must be confided to the care of the postal department for transmission.

Walster v. *United States*, 42 Fed. Rep. 891.

The Muldoon letter, so called, was not one "intended to be conveyed by mail, nor one intended to be carried or delivered by the defendant, a mail carrier or letter carrier."

United States v. *Matthews*, 35 Fed. Rep. 890.

A letter addressed to a person not in existence and to a place that does not exist, and one that does not get into the mail in the usual course, is not intended to be conveyed by mail nor carried by a letter carrier under U. S. Rev. Stat. §§ 5467, 5469.

There are some cases that appear to hold a contrary doctrine to those above cited, which, on examination, do not.

United States v. *Foye*, 1 Curt. 364; *United States* v. *Wight*, 38 Fed. Rep. 106; *United States* v. *Dorsey*, 40 Fed. Rep. 752; *United States* v *Bethea*, 44 Fed. Rep. 802; *United States* v. *Cottingham*, 2 Blatchf. 470.

The court should have left the question as to whether the Muldoon letter was intended to be conveyed by mail or carried by a letter carrier to the jury as a question of fact, if he refused the defendant's request for rulings and instructions.

Walster v. *United States*, 42 Fed. Rep. 891.

Defendant, if guilty of any crime under the evidence in this case, was guilty of simple larceny of Boynton's money and postage stamps, which could only be punished by the state courts. The district court had no jurisdiction of that crime.

United States v. *Baugh*, 4 Hughes, 501.

Wherever error is apparent on the record it is open to revision whether it be made to appear by a bill of exceptions or in any other manner.

Suydam v. *Williamson*, 61 U. S. 20 How. 427 (15: 978).

Where error is apparent on a record, no exception need be shown, and it need not have been presented by a bill of exceptions.

Moline Plow Co. v. *Webb*, 141 U. S. 616 (35: 879); *Clinton* v. *Missouri P. R. Co.* 122 U. S. 469 (30: 1214); *Baltimore & P. R. Co.* v. *Sixth Presby. Church Trustees*, 91 U. S. 127 (23: 260).

Anything appearing upon the record which would have been fatal on a motion in arrest of judgment is equally as fatal upon a writ of error, although objection was not taken below.

Slacum v. *Pomery*, 10 U. S. 6 Cranch, 221 (3: 205).

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error:

The letter is one which the letter carrier should never have taken out of the postoffice at all, but should have transferred at once in sorting his mail to some other box in the office; or, if he took it with him inadvertently upon his route, he was bound on returning to dispose of it as aforesaid. He therefore is properly chargeable with having stolen a letter out of a branch postoffice. The letter was lawfully in that office, having been placed there by a high official in the presence and with the authority of the superintendent having charge of the office.

Under the broad language of the present statute it is entirely immaterial that the letter did not reach the carrier's desk through the ordinary medium of the public letter box. A carrier can be no less chargeable with theft because the letter which he steals has reached his hands in an unusual manner, so long as it is really a letter and really within the branch postoffice. The letter was there *de facto* at any rate, if not *de jure* (*Wright* v. *United States*, 158 U. S. 232, 238, 239 (39: 963, 965)), and the thief is in no position to claim irregularity.

Ingraham v. *United States*, 155 U. S. 434, 437 (39: 213, 214); *Cochran* v. *United States*, 157 U. S. 286, 290 (39: 704, 705).

The person in charge of a postoffice may mail a letter behind a partition as well as through the public letter box, and the clerks and carriers cannot be heard to question in a civil or criminal suit the action of their superior officer in this regard. The letter in question was within the protection of the Federal statutes, although it was a decoy. The person and place to which it was addressed were both fictitious.

Rex v. *Egginton*, 2 Bos. & P. 508; *Grimm* v. *United States*, 156 U. S. 604 (39: 550); *United States* v. *Foye*, 1 Curt. 364; *United States* v. *Wight*, 38 Fed. Rep. 106; *United States* v. *Bethea*, 44 Fed. Rep. 802.

It is not necessary for a conviction under § 5467 that the letter in question should be intended to be conveyed by mail, nor is the indictment limited to this branch of the statute. There was, however, evidence before the jury that the letter was "intended to be conveyed by mail" within the meaning of the section under consideration. It has been held in certain cases that a letter cannot be "intended to be conveyed by mail" when the duty of the

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employee with whom it is deposited is simply to transfer it to a neighboring desk, which will necessarily be the end of its circuit.

United States v. *Rapp*, 30 Fed. Rep. 818 (Newman, *J.*); *United States* v. *Denicke*, 35 Fed. Rep. 407 (Speer, *J.*); *United States* v. *Matthews*, 35 Fed. Rep. 890 (*Mr. Justice* Harlan).

It is respectfully suggested that an unnecessarily narrow interpretation is given to the words "by mail" in these decisions.

This court can take judicial notice of a United States branch postoffice in the city in which its sessions are held; nor is it necessary that the branch postoffice shall have been established *de jure*.

Wright v. *United States*, 158 U. S. 232, 238, 239 (39: 963, 965); *Ingraham* v. *United States*, 155 U. S. 434, 438 (39: 213, 214).

Mr. Justice **Brown** delivered the opinion of the court:

To make a case under Rev. Stat. § 5467, it is necessary for the government to prove—

(1) That the person charged was employed in the postal service.

(2) That the letter that he is charged with secreting, embezzling, or destroying was entrusted to him or came into his possession, and was intended to be conveyed by mail, carried, or delivered by carrier, messenger, route agent, or other person employed in the postal service, or forwarded through or delivered from any postoffice or branch office, etc.

(3) That it contained one of the articles of value described in the statute, one of which is postage stamps.

(4) Or that the person so employed stole one of such articles out of any such letter, etc., provided the same had not been delivered to the party to whom it was directed.

Upon the other hand, section 5469 applies to every person, irrespective of his employment in the postoffice, and to establish a case under this section it is only necessary to prove—

(1) That the defendant stole the mail or that he took from out of the mail or postoffice or other authorized depository a letter or packet, or took such mail or letter or packet therefrom, or from any postoffice, etc., or otherwise authorized depository, with or without the consent of the person having the custody thereof.

669] *(2) That he opened, embezzled, or destroyed any such mail, letter, or packet containing an article of value.

(3) Or by fraud or deception obtained from any person having custody thereof any such mail, letter, or packet, containing such article of value.

As the verdict was general upon all the counts, which are conceded to be sufficient in form, if any one of the counts was sustained by competent testimony, the verdict must stand. *Claasen* v. *United States*, 142 U. S. 140 [35: 966]; *Evans* v. *United States* (No. 1) 153 U. S. 584 [38: 830].

1. The main contention of the defendant is that the Muldoon letter was not a letter in point of fact, inasmuch as it was not only a decoy, that is, not written in good faith as a message or communication to the person addressed, but was wholly fictitious; that there was no such person as John Muldoon, no such place as 153 Ziegler street, and the letter could not possibly have been delivered.

That the fact that the letter was a decoy is no defense is too well settled by the modern authorities to be now open to contention. *King* v. *Egginton*, 2 Bos. & P. 508; *United States* v. *Foye*, 1 Curt. 364; *United States* v. *Cottingham*, 2 Blatchf. 470; *Bates* v. *United States*, 10 Fed. Rep. 97; *United States* v. *Whittier*, 5 Dill. 35, 39; *United States* v. *Moore*, 19 Fed. Rep. 89; *United States* v. *Wight*, 38 Fed. Rep. 106; *United States* v. *Matthews*, 35 Fed. Rep. 890, 896; *United States* v. *Dorsey*, 40 Fed. Rep. 752. Indeed, this court held, at the last term, in *Grimm* v. *United States*, 156 U. S. 604 [39: 550], that the fact that certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a government detective was no defense to an indictment for mailing such prohibited publications.

The question whether a letter addressed to a fictitious person, known to be such, is a letter within the meaning of the statute, is more serious, and there are certainly authorities which lend support to the theory of defendant in that regard. Thus, in *Reg.* v. *Rathbone*, 1 Car. & M. 220, a detective mailed a decoy letter, containing a marked sovereign, to a fictitious address in London, and placed it in a heap of *letters which the prisoner was about to [**670** sort, and which he had to deliver that day. The letter was not delivered, and in the course of the same day the prisoner was arrested and searched, and the marked sovereign found in his pocket. It was held that this was not a "post letter," or a letter put into the post; but as there was a separate count for the larceny of the sovereign, he was held to have been properly convicted of that. A similar ruling was made in *Reg.* v. *Gardner*, 1 Car. & K. 628, wherein the prisoner was held to have been properly convicted of the larceny of certain marked money contained in a letter which was addressed to a fictitious person, the court adhering to its previous ruling that it was not the stealing of a post letter.

The authority of these cases, however, was seriously shaken by that of *Reg.* v. *Young*, 1 Den. C. C. 194. In that case the letter contained a half sovereign, and was addressed to a fictitious person. The prisoner, instead of transmitting the letter to the general postoffice, abstracted it from the receiving box, opened it, took out the half sovereign, and kept both the letter and the money. It was held to be a post letter, having all the ingredients under the statute, and "whether it can be delivered or no seems beside the question." On the *Gardner Case* being cited, Pollock, Chief Baron, said he had seen reason to think his dictum in that case was incorrect, and the judges were unanimously of the opinion that the conviction was right.

The question has been generally ruled in the same way in this country. *United States* v. *Foye*, 1 Curt. 364; *United States* v. *Wight*, 38 Fed. Rep. 106; *United States* v. *Dorsey*, 40 Fed. Rep. 752; *United States* v. *Bethea*, 44 Fed. Rep. 802.

If the word "letter" were given the technical construction of a written message or com-

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munication from one person to another, it would strike at the whole system of decoy or test letters, none of which contain bona fide communications. This would render it practically impossible to detect thefts and embezzlements by employees, since, in a large majority of cases, the letters and their envelopes are 671] thrown away or *destroyed for the very purpose of preventing their being identified in case the employee is arrested; and the contents of the letter, which it is ordinarily impossible to identify, only are abstracted. If, however, the contents can be identified, as they always are in test letters, by a private mark put upon them, the discovery of such contents upon the person of the employee affords almost conclusive evidence of the theft of the letter in which they are inclosed.

It makes no difference with respect to the duty of the carrier, whether the letter be genuine or a decoy with a fictitious address. Coming into his possession as such carrier, it is his duty to treat it for what it appears to be on its face—a genuine communication; to make an effort to deliver it, or if the address be not upon his route, to hand it to the proper carrier, or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purposes of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employee in the regular course of his official business. His duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be,—in other words, it is not for him to judge of its genuineness.

2. The question whether this letter "was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person," etc., does not properly arise at this stage of the case, since, under section 5469, it is only necessary to show that the article embezzled or taken was a letter or packet properly deposited, etc., the subsequent limitation of the prior section with respect to the intention of the party mailing the letter being omitted here. Whether the court erred in refusing the defendant's request in that particular, therefore, becomes immaterial, in view of the last four counts, which are drawn under section 5469, and contain no allegation that the letter in question was intended to be conveyed by mail or carrier. Indeed, it is somewhat doubtful whether it could 672] be material at all in view of *section 5468, declaring that the fact that any letter, etc., has been deposited in any postoffice or branch postoffice, or in charge of any agent of the postal service, shall be evidence that the same was "intended to be conveyed by mail" within the meaning of section 5467. Had defendant been convicted under the first three counts and acquitted under the last four, of course the objection might be material; but where a general verdict of guilty is rendered, an objection taken to evidence admissible under one or a part of the counts is untenable.

3. Was there competent evidence to show that the letter was deposited in any mail or postoffice, branch postoffice, or other authorized depository for mail matter, within the meaning of section 5469? If, to meet the requirements of this section, it were necessary to show that the letter was deposited in one of the ordinary boxes accessible to the public and used for the reception of letters regularly mailed, the evidence is obviously insufficient, since it is shown that McGrath, in mailing this letter, passed by the place where letters were usually mailed, entered the back room of the office, where letters were sorted, and put this letter into Goode's box. This was clearly sufficient to charge Goode with the duty of delivering, or attempting to deliver, the letter, and it makes no difference that, before it was put into this box, it did not go through the usual channel or reach it in the ordinary way. The term "branch postoffice," within the meaning of the act, includes every place within such office where letters are kept in the regular course of business, for reception, stamping, assorting, or delivery. Of course, a letter thrown upon the floor, or laid upon a desk appropriated to other and different purposes, could not be said to have been deposited in the postoffice; but if it be put in any place where letters are usually kept or deposited for any purpose, we think it is within the act.

4. While there was no direct evidence that this branch postoffice was established by authority of the Postmaster General, there was evidence that it was known as the Roxbury station of the Boston postoffice, had been used as such for years, and that it was a postoffice *de facto*. For the purposes of this case, it was quite unnecessary to show that it had been regularly *established as such by law. *In-* [673 *graham* v. *United States*, 155 U. S. 434 [39: 213]; *Wright* v. *United States*, 158 U. S. 232 [39: 963].

The judgment of the court below is therefore affirmed.

FRANK MOORE, *Plff. in Err.*, *v.* STATE OF MISSOURI.

(See S. C. Reporter's ed. 673-680.)

Second offense—twice put in jeopardy—equal protection of the law—state law—due process of law—state decision.

1. The increased severity of punishment for a second offense is not a punishment for the same offense the second time.
2. A person is not put twice in jeopardy for the same offense by a law punishing more severely for a second offense, nor is the increase of punishment by reason of the first offense cruel and unusual.
3. A person by being punished more severely for the second offense is not denied the equal protection of the laws.
4. A state may provide that persons who have before been convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against a law.
5. A person is not denied due process of law by being convicted of burglary in the second degree under an indictment for burglary in the first degree.
6. A person is not denied due process of law by a state court because his case was not heard by the court in banc, consisting of seven judges, instead

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of a division of that court consisting of three judges, under a state Constitution providing that Federal questions shall be transferred to the court in banc, where the state court was justified in refusing to transfer the case to the court in banc.

[No. 498.]

Argued and Submitted October 30, 1895. Decided November 25, 1895.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court affirming the judgment of the St. Louis Criminal Court convicting Frank Moore of burglary in the second degree, and orders denying certain motions in a criminal case and refusing to transfer the cause to the court in banc. *Affirmed.*

See same case below, 121 Mo. 514.

Statement by *Mr. Chief Justice* **Fuller:**

Frank Moore was indicted in the St. Louis criminal court for burglary in the first degree and larceny in a dwelling house, on May 26, 1893. The indictment also charged that defendant "on the eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the city of St. Louis aforesaid, in the St. Louis criminal court, was duly convicted, on his own confession, of the offense of grand larceny, and in accordance with said conviction was duly sentenced by said court to an imprisonment in the penitentiary for the term of three years, and was duly imprisoned **674**] *in said penitentiary in accordance with said sentence, and that after his discharge from the penitentiary upon compliance with the sentence, he committed the said offenses of burglary and larceny." Being duly arraigned, he pleaded not guilty, but subsequently withdrew his plea, and filed a motion to quash the indictment for duplicity, and "because section 3959, under which the said indictment purports to charge the defendant with a former conviction, is unconstitutional and illegal and void and in conflict with the Constitution of the United States and the state of Missouri." The motion being overruled, he was again arraigned, pleaded not guilty, and was put upon his trial, which resulted in a verdict of guilty of burglary in the second degree, his punishment being fixed by the jury at imprisonment in the penitentiary for life. A motion for a new trial was made for the following causes among others, "because the court erred in overruling defendant's motion to quash the indictment for the reason that it violated both the state and Federal Constitutions;" and, that motion being overruled, Moore filed a motion in arrest of judgment upon various grounds, and among them, that burglary in the second degree was not included in the offense of burglary in the first degree, but was a separate and distinct offense; that the statute upon which the indictment was founded was "unconstitutional and void, in that it violates the 14th Amendment of the Federal Constitution, and violates the 'bill of rights' in the Constitution of Missouri in prescribing a second punishment for the same offense, and different punishment for different persons for committing the same offense;" that the indictment in charging the former conviction attacked defendant's character when not in issue; and that the indictment failed to inform the defendant of the accusation against him. The motion in arrest was overruled and Moore sentenced to the penitentary for life in accordance with the verdict, whereupon he appealed to the supreme court of Missouri, division No. 2, by which the judgment was affirmed. 121 Mo. 514. Moore afterwards moved for a rehearing upon the ground, among others, that he "was acquitted by the jury of all and every charge against him in the *indictment, and yet stands [**675** sentenced for an offense not named in the indictment, nor included in any offense described therein, and thus is deprived of his constitutional right of being prosecuted under an indictment informing him of the nature and cause of the accusation against him;" and also moved that the motion and cause be transferred to the court in banc. These motions were denied, and thereafter Moore moved the supreme court sitting in banc to set aside the judgment of division No. 2, and to order that division to transfer the cause to the court in banc for the reason that the cause involved a Federal question, or questions raised by his motions to quash the indictment, for new trial, and in arrest of judgment. The supreme court in banc denied this motion, and also a second motion to the same effect. A writ of error from this court was subsequently allowed.

Mr. **Charles T. Noland** for plaintiff in error.

Messrs. **R. F. Walker,** Attorney General of Missouri, **Morton Jourdan,** and **C. O. Bishop** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Admitting that the first ten articles of amendment to the Constitution of the United States were adopted as limitations on Federal power, it is argued for plaintiff in error that the fundamental rights secured thereby are protected by the 14th article of amendment from invasion by the states, in the prohibition of the abridgment of the privileges and immunities of citizens of the United States; of the deprivation of life, liberty, or property without due process of law; and of the denial of the equal protection of the laws; and it is contended that section 3959 of the Revised Statutes of Missouri of 1889 is in violation of that amendment, in that persons are thereby subjected to be twice put in jeopardy for the same offense, and to cruel and unusual punishment; and deprived of *the equal protection of the laws. [**676** That section, which is also to be found in the Revised Statutes of Missouri of 1879 and the General Statutes of Missouri of 1865, is as follows:

Sec. 3959. SECOND OFFENSE, HOW PUNISHED.—If any person convicted of any offense punishable by imprisonment in the penitentiary, or of petit larceny, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon

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a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under the provisions of this law, might extend to imprisonment in the penitentiary for life, then such person shall be punished by imprisonment for life; second, if such subsequent offense be such that upon a first conviction the offender would be punishable by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

Similar provisions have been contained in state statutes for many years and they have been uniformly sustained by the courts. In the opinion of the supreme court of Missouri it is said: "The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense, the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime; and we are unable to see how the statute which imposes such increased punishment violates the [677] provisions of our *Constitution hereinbefore quoted. . . . The fact that the indictment charged a former conviction of another and entirely different offense is not, in fact, charging him with an offense with respect of the former offense in the case in hand. The averments as to the former offense go as to the punishment only." And *People* v. *Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *Rand* v. *Com.* 9 Gratt. 738; *Ross' Case*, 2 Pick. 165; *Plumbly* v. *Com.* 2 Met. 413; *Ingalls* v. *State*, 48 Wis. 647; *Maguire* v. *State*, 47 Md. 485; *State* v. *Austin*, 113 Mo. 538; and *Reg.* v. *Clark*, 6 Cox, C. C. 210,—are cited. And see *People* v. *Butler*, 8 Cow. 347; *Johnson* v. *State*, 55 N. Y. 512; *Kelly* v. *People*, 115 Ill. 583, 56 Am. Rep. 184; *Blackburn* v. *State*, 50 Ohio St. 428; *Sturtevant* v. *Com.* 158 Mass. 598.

The reason for holding that the accused is not again punished for the first offense is given in *Ross' Case* by Chief Justice Parker, that "the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself;" in *Plumbly* v. *Com.* by Chief Justice Shaw, that the statute "imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed;" in *People* v. *Stanley*, that "the punishment for the second is increased, because by his persistence in the perpetration of crime, he has evinced a depravity which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense;" and in *Kelly* v. *People*, "that it is just that an old offender should be punished more severely for a second offense—that repetition of the offense aggravates guilt." It is quite impossible for us to conclude that the supreme court of Missouri erred in holding that plaintiff in error was not twice put in jeopardy for the same offense, or that the increase of his punishment by reason of the commission of the first offense was not cruel and unusual. *Ex parte Kemmler*, 136 U. S. 436 [34: 519]. Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every other *person in [678] like case with him, and convicted as he had been, would be subjected to the like punishment.

The 14th amendment means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 [25: 989]. The general doctrine is that that amendment, in respect to the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the state to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the state in administering the process provided by the law of the state. *Re Converse*, 137 U. S. 624 [34: 796]. And the state may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. *Pace* v. *Alabama*, 106 U. S. 583 [27: 207]; *Leeper* v. *Texas*, 139 U. S. 462 [35: 225].

2. It is further urged by plaintiff in error that the crimes of burglary in the first degree and burglary in the second degree were so distinct and separate that plaintiff in error was not sufficiently informed of the nature and cause of the accusation against him by the indictment for burglary in the first degree, and was in fact convicted under what was, in effect, no indictment at all, and therefore denied due process of law. It is true that, in order to a conviction for a minor offense, it must be an ingredient of the major and substantially included in the offense charged in the indictment, but it is clearly a matter for the state courts to determine whether, in a given case, an indictment is sufficient in that regard. *Caldwell* v. *Texas*, 137 U. S. 692 [34: 816].

Under the statutes of Missouri, burglary in the first degree is defined to be "breaking into and entering the dwelling house of another, in which there shall be at the time some human *being, with intent to commit some felony [679] or any larceny therein," in the several modes pointed out; and burglary in the second degree consists in breaking into a dwelling house with intent to commit a felony or any larceny, "but under such circumstances as shall not constitute the offense of burglary in the first degree," or entrance into a dwelling house in such manner as not to constitute burglary as hereinbefore specified, "with intent to commit a felony or any

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larceny," or the commission by a person being in, of felony or larceny or the breaking of any door or otherwise, to get out, or the breaking of an inner door with intent to commit felony or larceny, when entrance is made through an open outer door or window, or where a person is lawfully in the house, etc.

The St. Louis criminal court and the supreme court of the state appear to have had no difficulty in concluding upon the evidence that it was for the jury to say whether plaintiff in error had committed the crime of burglary in the second degree, and that he could be lawfully convicted therefor under an indictment for the greater offense. It may be admitted that these courts did not suppose that they were passing on any Federal question in this regard, for no such question was specifically and seasonably raised; but if it had been we do not think that the plaintiff in error was denied due process of law in the view which was taken of his case.

3. Finally, it is said that plaintiff in error was denied due process of law because his case was not heard by the court in banc, consisting of seven judges, but was left on the disposition of it by division No. 2, consisting of three judges. In an amendment to the Constitution of Missouri, adopted in 1890, the supreme court was divided into two divisions, division No. 1 consisting of four judges and division No. 2 of the remaining three, the latter division having exclusive cognizance of all criminal cases. It was also provided that when a Federal question was involved, the cause, on the application of the losing party, should be transferred to the full bench for its decision. *Duncan* v. *Missouri*, 152 U. S. 377 [38: 485].

In *Bennett* v. *Missouri P. R. Co.* 105 Mo. 642, it was held that the court would not take juris-
680] diction on the *ground that a Federal question was involved, unless that question was raised in and submitted to the trial court, and such court had the opportunity to pass upon it; and that while it could not be laid down by rule how every such question must be raised in the trial court, it should, at least, be fairly and directly presented by some of the methods recognized by the practice and procedure of the court. In this instance, the supreme court in banc refused to direct the case to be transferred, and we cannot say that it was not justified in that refusal. The interjection into the motions to quash and for a new trial, of the assertion that section 3959 was in conflict with the Constitution of the United States, and also in the motion for arrest, was perhaps regarded as not sufficiently definite to invoke a distinct ruling on the points afterwards suggested, and, moreover, the full court may have been of the opinion that there was no sufficient ground for the contention that a violation of the Federal Constitution had occurred to require it to hear argument upon that subject. At all events, as we find that there was no ground for questioning the judgment of the supreme court because of such violation in the legislation on which that judgment was based or in the conduct of the trial, we cannot hold that the plaintiff in error was subjected to an unconstitutional ruling in not being allowed to have his case heard at large by seven judges instead of three.

Judgment affirmed.

DANIEL A. BUCKLIN, *Appt.*, *v.* UNITED STATES (No. 1).

(See S. C. Reporter's ed. 680, 681.)

Review of criminal case.

The final judgment of a court of the United States in case of the conviction of a capital or otherwise infamous crime is reviewable in this court only upon writ of error, and not on appeal.

[No. 246.]

Submitted October 21, 1895. Decided November 18, 1895.

APPEAL from a judgment of the District Court of the United States for the District of Kansas convicting Daniel A. Bucklin of the crime of perjury. *Dismissed.*

The facts are stated in the opinion.

Mr. **Thos. T. Taylor** for appellant.

Mr. **J. M. Dickinson,** Assistant Attorney General, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellant Bucklin was convicted of the crime of perjury under U. S. Rev. Stat. § 5392, and sentenced to imprisonment at hard labor in the penitentiary for the term of one and one half years, and also to pay a fine of $100. He seeks a review of that judgment by the present appeal.

The appeal must be dismissed. By section five of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), "appeals or writs of error may be taken from the district courts or from the existing circuit courts" of the United States directly to this court, in certain enumerated cases, civil and criminal, among others, "in cases of conviction of a capital or otherwise infamous crime." There was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error. The final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime is not reviewable here except upon writ of error. Our review of the judgment, when brought here in that form, is confined to questions of law, properly presented by a bill of exceptions, or arising upon the record.

Appeal dismissed.

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 6: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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682] DANIEL A. BUCKLIN, *Plff. in Errr.,*
v.
UNITED STATES (No. 2).

(See S. C. Reporter's ed. 682-687.)

Consolidation of criminal cases—refusal of new trial—verdict as to one defendant jointly tried —power of jury.

1. When a person convicted did not object at the proper time, in the trial court, to being tried by the same jury with other parties indicted, nor except to the order of consolidation of the cases, he cannot in this court complain of the action of the trial court.
2. A refusal to grant a new trial cannot be reviewed upon writ of error.
3. Where three criminal cases are consolidated and tried together, it is error in the court to instruct the jury that they could not find a verdict as to some of the defendants, and disagree as to the others.
4. A jury may find a verdict of guilty or not guilty as to part of defendants jointly tried in a criminal case, and disagree as to the others.

[No. 572.]

Submitted October 21, 1895. Decided November 18, 1895.

IN ERROR to the District Court of the United States for the District of Kansas to review a judgment of that court convicting Daniel A. Bucklin of the crime of perjury. *Reversed.*

The facts are stated in the opinion.

Mr. **Thos. T. Taylor** for plaintiff in error.

Mr. **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is the same case as the one just disposed of. The accused, being in doubt whether the judgment against him could be reviewed here on appeal, brought this writ of error.

The plaintiff in error was indicted in the district court of the United States for the district of Kansas under U.S. Rev. Stat. § 5392, providing that "every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath **683]** states *or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than $2,000, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

By the third section of the act of June 14, 1878 (20 Stat. at L. 113, chap. 190) entitled "An Act to Amend an Act Entitled, 'An Act to Encourage the Growth of Timber on the Western Prairies'" (18 Stat. at L. 21, chap. 55), it was provided, in reference to the affidavit required to be filed by any person applying for the benefits of that act, "that if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act: *Provided,* That the party making claim to said land, either as a homestead settler, or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases."

This act, and all laws supplementary thereto or amendatory thereof, were repealed by the act of March 3, 1891, entitled "An Act to Repeal Timber Culture Laws and for Other Purposes." But the repealing act declared that it should not affect any valid rights theretofore accrued or accruing under said laws, but all bona fide claims lawfully initiated before its passage might be protected on due compliance with law, in the same manner, on the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if the repealing statute had not been enacted. 26 Stat. at L. 1095, chap. 561.

The indictment charged, in substance, that the accused, for the purpose of contesting a named timber culture claim that had been made and entered in the proper land office at Wichita, Kansas, presented himself before H. P. Wolcott, the *duly appointed, quali- **[684** fied, and acting register of the United States land office at Larned, in the second division of the district of Kansas, and authorized by law to administer oaths in contests relating to timber culture entries; that the accused, after being sworn by the said register to testify the truth, the whole truth, and nothing but the truth touching his right to enter such contest, did knowingly, wilfully, feloniously, and falsely testify to certain facts (fully set out in the indictment) material to the proceeding of contest; that his testimony was embodied in a deposition subscribed and sworn to by him before said register, and was by him stated to be true when he did not believe it to be true, and that in so doing he wilfully and corruptly committed perjury, etc.

At the time of the trial there were pending in the court below two other separate indictments, one against Thomas Bucklin and one against George Elder, each of whom was indicted for perjury growing out of the same transaction as that set out in the indictment against Daniel A. Bucklin.

By order of the court the three cases were consolidated and tried at the same time and to the same jury.

Upon the conclusion of the evidence, and after receiving the instructions of the court and hearing the argument of counsel, the jury retired, and, having deliberated three days without making a verdict, came into court in a body, and through their foreman propounded to the court this question: "Can we find a verdict as to some of the defendants and disagree as to the others?" The court answered: "You can find a verdict of guilty as to all, a

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verdict of not guilty as to all, or you can find some guilty and some not guilty, but you cannot find a verdict as to some and disagree as to others." To this action of the court the accused excepted.

The jury again retired, and returned a verdict of guilty as to Daniel A. Bucklin, and not guilty as to each of the other defendants.

Motions for new trial and in arrest of judgment having been successively made and overruled, the defendant was sentenced to hard labor in the penitentiary for the term of one year and six months and to pay a fine of $100.

685] *1. It is assigned for error that the court below consolidated the three indictments, and permitted them to be tried together. As the charges against the defendants, respectively, grew out of the same transaction, both the court and the defendants may have deemed it convenient to have all the cases tried at the same time and by the same jury. It is consistent with the record that the plaintiff in error preferred that the jury which tried the other defendants should try him. But as it does not appear that the plaintiff in error objected at the time to being tried by the same jury with the other parties indicted, nor that he excepted to the order of consolidation, we need not consider whether that order, if objected to seasonably, could have been properly made. He cannot now complain of the action of the court. *Logan* v. *United States*, 144 U. S. 263, 296 [36: 429, 440].

2. One of the grounds for arrest of judgment was that the indictment does not state an offense under the laws of the United States. This point does not seem to be pressed in the brief of counsel. It is without merit. The indictment conforms, in every substantial particular, to U. S. Rev. Stat. § 5396, providing that "in every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

3. It is assigned for error that the court overruled the defendant's motion for a new trial. A refusal to grant a new trial cannot be reviewed upon writ of error. *Blitz* v. *United States*, 153 U. S. 308, 312 [38: 725, 726]; *Wheeler* v. *United States*, *ante*, 244.

4. But there was error prejudicial to the ac-

686]cused in the *instruction to the jury that while they might find a verdict of guilty as to all three defendants on trial, or find some guilty and some not guilty, they could not find a verdict as to some and disagree as to others.

The learned Assistant Attorney General refers to section 1036 of the Revised Statutes, providing that "on an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury." He properly insists that that section is not, in terms, applicable to separate indictments, tried together. But he frankly states that the instruction is so clearly erroneous as to suggest the possibility of a mistake in the bill of exceptions.

Upon a careful examination of the record we find nothing that justifies the assumption that a mistake occurred in the preparation of the bill of exceptions.

Taking the record as disclosing all that occurred at the time the jury came into court for additional instructions, there was error in the ruling that the jury could not find a verdict as to some of the defendants, and disagree as to others. The jurors had been deliberating for three days without returning a verdict as to either of the defendants, when they were instructed that their duty was, either to find each defendant not guilty, or each guilty, or some guilty and the others not guilty. If some of the jurors wavered in their minds as to the guilt of all the defendants—and the delay in returning the verdict justifies the belief that such was the fact—it may be that the instruction of which complaint is made worked injury to the plaintiff in error. We cannot say that it did not. To say that the court would not receive from the jury a report of a disagreement as to one defendant was, in effect, to announce that the jurors would be held together until the court should deem it to be its duty to discharge them finally, and would not be discharged unless or until they returned a verdict of guilty or not guilty. This tended to coerce the jury into making a verdict. The accused was entitled, of right, to go *be-

687] fore a new jury, if the one that tried him was unable to agree that he was guilty of the offense charged.

As it was competent for the jury to return a verdict of guilty or of not guilty as to the defendants Thomas Bucklin and George Elder, and to report a disagreement as to Daniel A. Bucklin, the instruction complained of must be held to have been erroneous; and as this error may have injuriously affected the rights of the accused, the judgment is reversed, with directions to grant him a new trial.

Reversed.

THE BAYONNE.

(See S. C. Reporter's ed. 687-694.)

Certificate of jurisdiction—assignment of errors—allowance of appeal.

1. An assignment of errors in the United States district court after the term at which the decree was entered, directed by that court to be filed *nunc pro tunc*, and filed as of that term, is not a sufficient certificate to this court of the question of the jurisdiction of that court, on appeal.
2. If such assignment of errors could be treated

NOTE.—*As to jurisdiction of United States district courts*, see note to Glass v. The Betsey, 1: 485.

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as a certificate, it came too late, and where there is nothing in the record, prior to the expiration of the term at which the decree was entered, to indicate any attempt or intention to file a certificate during that term, and there is no omission to enter anything which had been actually done at that term, the case does not come within the rule that permits an amendment of the record *nunc pro tunc*.

3. The allowance of the appeal cannot be treated as a certificate, although the prayer for appeal states that claimant appealed upon the ground that the court was without jurisdiction to make the decree, where it specifies no question of jurisdiction, but asks that the whole record be sent up, as if the appeal were on the whole case.

[No. 215.]

Submitted November 18, 1895. Decided December 2, 1895.

APPEAL from a decree of the District Court of the United States for the Southern District of New York in favor of the United States imposing a penalty upon the steamship Bayonne, under the act of June 29, 1888, to prevent obstructive and injurious deposits in the harbor and adjacent waters of New York city. On motion to dismiss, and cross-motion to remand for certificate or for certiorari. *Dismissed for want of jurisdiction because of the lack of the proper certificate,—a defect which cannot now be supplied.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a libel filed by the United States in **688**] the district *court for the southern district of New York to recover a penalty from the steamship Bayonne, under the act of Congress approved June 29, 1888, entitled, "An Act to Prevent Obstructive and Injurious Deposits within the Harbor and Adjacent Waters of New York City, by Dumping or Otherwise, and to Punish and Prevent Such Offenses." 25 Stat. at L. 209, chap. 496. The 1st section of that act provides:

"That the placing, discharging, or depositing, by any process, or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than $250, nor more than $2,500, and the imprisonment to be not less than thirty days, nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor."

The act further provides for the punishment of every master, engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel, who shall knowingly engage in towing any scow, boat, or vessel loaded with prohibited matter to an unauthorized place of deposit; requires masters of scows and boats carrying such matter to apply to the supervisor of the harbor for a permit defining the precise limits within which their contents might be discharged, and provides for a remedy in admiralty by the concluding paragraph of section 4, which reads as follows: "Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties *imposed [**689** thereby, and may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

The supervisor of the harbor, assuming to act under and by virtue of the statute, directed that the prohibited matter must not be deposited "except to the south and east of a certain white spar buoy, known as the 'Mud buoy,' which buoy is 3 miles south of Coney Island and located as follows: Stone Beacon light bearing west ¾ south, distant 4½ miles; West Brighton observatory bearing northwest by south ½ north, distant 3½ miles; Sandy Hook lighthouse bearing southwest, distant 6 miles; Scotland lightship bearing south ½ west, distant 6½ miles; Sandy Hook light bearing south southwest, distant 7¾ miles."

Certain ashes were dumped from the deck of the Bayonne into tidal waters, not to the south and east of the Mud buoy, but to the southward and westward thereof, at or near the mouth of Gedney's channel, at a point more than 3 miles from Sandy Hook and more than 3 miles from Coney Island and the shore of Long Island. These ashes were dumped by the direction of the mate for the relief of the ship in the usual course of her navigation, the vessel being at the time about twenty minutes beyond Sandy Hook, contrary to the orders of the master, which were that ashes should not be put overboard until the ship was an hour at sea after the pilot left her, and this constituted the alleged use and employment of the vessel in violation of the act of Congress.

It was adjudged by the district court that by force of the statute and of the definition of the limits by the supervisor where the deposit of ashes must take place, the steamship became liable to a penalty of $250, for which sum, with costs, a final decree was entered in favor of the United States, December 21, 1892. On the 31st of December the claimant filed the following prayer for appeal:

"The above-named claimant, John Edward Payne, considering himself aggrieved by the final decree entered in this cause on the 21st day of December, 1892, hereby appeals from *said decree to the United States Supreme [**690** Court upon the ground that this court was without jurisdiction to make the said decree; and thereupon he prays that his said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree was made, may be sent up, duly authenticated, to the United States Supreme Court."

This was indorsed by the district judge "Appeal allowed."

On January 17, 1893, the following assignment of errors was filed as of December 31,

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1892, by direction of the district judge that the same should be filed *nunc pro tunc:*

"The learned court below erred in taking jurisdiction of the cause and entering a decree against the steamship Bayonne in the following particulars:

"First. Because the act in question creates no lien enforceable *in rem* except as against a boat or vessel used or employed in violating some provision of the act, whereas the Bayonne was not used or employed in violating any provision of the act.

"Second. Because the act does not create a lien enforceable against the Bayonne *in rem* to recover the penalties to which the person or persons who committed the offense complained of may have been subject under section 1 of the act.

"Third. Because if the act does create a liability on the part of the Bayonne for the pecuniary penalty to which the person or persons who committed the offense may be subject under section 1 of the act, such penalty is not recoverable against the Bayonne *in rem* without a previous imposition of the fine upon the offender or offenders.

"Fourth. Because the limits within which the deposit of refuse matter was intended to be prohibited have never been drawn by the supervisor of the harbor in accordance with the requirements and specifications of the act or in accordance with the law, and therefore the deposit of ashes at the place they were deposited by a person or persons from the deck of the Bayonne did not constitute an offense for which the Bayonne can be held responsible under the provisions of the act."

691] *The appeal was duly prosecuted and the record filed in this court February 20, 1893.

A motion to dismiss having been made, appellant served notice of a motion "to remand this cause to the district court for the purpose of having annexed to the record a certificate distinctly certifying to this court the jurisdictional questions involved in this appeal, or in the alternative for a writ of certiorari to have such certificate annexed to the transcript of record." Annexed to this motion was a certificate by the district judge, filed November 8, 1895, which, after stating the case, continued as follows:

"I further certify that the questions of jurisdiction involved in the said appeal of the claimant are:

"1. Whether the said steamship Bayonne, by reason of ashes being dumped from her deck by the order of her mate, contrary to the directions of the captain, was 'used or employed in violating any provision of this act,' within the meaning of the 4th section of said statute, so as to create a lien against the vessel enforceable by proceedings *in rem* to recover the penalty therein and thereby provided.

"2. The 1st section of the statute provides as follows: [Here followed section already quoted.]

"A further question of jurisdiction involved in the claimant's appeal is whether the supervisor of the harbor, by simply prescribing that all refuse, dirt, ashes, and other prohibited matter must be deposited to the eastward and southward of the said Mud buoy, has prescribed the limits within which the deposit of ashes and other prohibited matter is strictly forbidden as required by the above 1st section of the act, and, if so, whether the limits so prescribed are within the 'tidal waters of the harbor of New York, or its adjacent or tributary waters,' so as to make the deposit of the said ashes from the deck of said steamer, under the circumstances stated, and at the place specified, a violation of the statute, subjecting the steamer to the penalty therein provided."

This certificate was directed by the district judge, November 8, 1895, to be filed *nunc pro tunc* as of January 17, 1893.

*The motion to dismiss and the cross-[692 motion to remand for certificate or for certiorari were submitted on briefs.

Mr. **Holmes Conrad,** Solicitor General, for appellee, in favor of motion to dismiss:

As the record now stands, this appeal must be dismissed for lack of any certificate of jurisdiction. The authorities are hereinbefore set forth.

The present certificate of the district judge comes too late. His jurisdiction to grant such a certificate was lost when the term of court expired. *Colvin* v. *Jacksonville*, 158 U. S. 456 (39: 1053). Even consent of the parties would not confer jurisdiction. *Virginia* v. *Tennessee*, 158 U. S. 267 (39: 976). Nothing in the record prior to the expiration of the December term, 1892, indicates any intention in the court to file a certificate. There is no "misprision of the clerk in recording inaccurately or omitting to record an order of the court." *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 299 (36: 162, 163). No consent to the filing of such certificate was given by the parties within the term (*Waldron* v. *Waldron*, 150 U. S. 361, 378 (39: 453, 457)), nor has the United States ever consented thereto.

Hickman v. *Fort Scott*, 141 U. S. 415, 418 (35: 775, 776).

Mr. **J. Parker Kirlin,** for appellant in opposition to motion to dismiss, and for cross-motion to remand for certificate, etc.:

The questions of jurisdiction are certified to this court from the court below, within the fair intendment of the act.

Shields v. *Coleman*, 157 U. S. 168 (39: 660); *Maynard* v. *Hecht*, 151 U. S. 324 (38: 179); *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322 (39: 438).

If the jurisdictional questions are not certified from the court below, as required by the statute, the court may grant appellant's motion to remand for correction of the record by addition of the separate certificate on file in the district court or for a certiorari to have the certificate brought up to this court and here annexed to the record.

Chicago v. *Bigelow*, reported only in U. S. Sup. Ct. Rep. 19 L. ed. 257; *Everhart* v. *Huntsville Female College*, 120 U. S. 223 (30: 623).

Motions to remand for correction of record in essential matters are favored and granted when made in due season.

The Harrison, 14 U. S. 1 Wheat. 298 (4: 95); *Ballard* v. *Searls*, 130 U. S. 50 (32: 846); *Northern P. R. Co.* v. *Walker*, 148 U. S. 391 (37: 494).

Or a certiorari may be granted to bring up the omitted certificate.

Redfield v. *Parks*, 130 U. S. 623 (32: 1058).

It is usual to allow errors or omissions in

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such matters to be corrected or supplied by remand of the cause, or otherwise.

Gumbel v. *Pitkin*, 113 U. S. 546 (28: 1129); *Anson* v. *Blue Ridge R. Co.* 64 U. S. 23 How. 1 (16: 517); *O'Reilly* v. *Edrington*, 96 U. S. 724 (24: 659).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

No question as to the constitutionality of the act of Congress arises on this appeal, but it is contended that the jurisdiction of the district court was in issue, and that therefore the appeal was properly taken directly to this court. But the judiciary act of March 3, 1891, provides that in cases where the jurisdiction of the court below is in issue, that question, and that alone, shall be certified to this court for decision, the inquiry being limited to the question thus certified. *United States* v. *Jahn*, 155 U. S. 109, 113 [39: 87, 89].

In *Maynard* v. *Hecht*, 151 U. S. 324 [38: 179], we held that a certificate from the court below of the question of jurisdiction to be decided was an absolute prerequisite to the exercise of jurisdiction here, and indicated by reference to the settled rules in relation to certificates of division of opinion in what manner we thought the certificate should be framed.

In *Colvin* v. *Jacksonville*, 158 U. S. 456 [39: 1053], it was decided that such certificate must be granted during the term at which the judgment or decree is entered.

The district court of the United States for the southern district of New York has monthly terms. Rev. Stat. § 572. The decree here was entered December 21, and the appeal allowed December 31, 1892. On the 17th of the following January, during a new term of the court, the assignment of errors was directed to be filed *nunc pro tunc* as of December 31, 1892. If that assignment could be treated as a certificate, it came too late, and, as there is nothing in the record, prior to the expiration of the December term, to indicate any attempt or inten-[693]tion to file a certificate during that *term, and there was no omission to enter anything which had actually been done at that term, the case did not come within the rule that permits an amendment of the record *nunc pro tunc*. *Hickman* v. *Fort Scott*, 141 U. S. 415, 418 [35: 775, 776]; *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 299 [36: 162, 163]. We do not, however, regard the assignment of errors, and the action of the court in directing it to be filed, as a compliance with the statutory provision and equivalent to the certificate required.

The certificate of November 8, 1895, which gives a statement of the case and certifies certain specific questions as questions of jurisdiction, was also wholly unavailing at that date.

Nor do we think that the allowance of the appeal can be treated as a certificate. The prayer for appeal did, indeed, state that claimant appealed "upon the ground that this court was without jurisdiction to make the said decree," but it specified no question of jurisdiction, and asked "that a transcript of the record and proceedings and papers upon which said final decree was made should be sent up," as if the appeal were on the whole case. The entry of the district judge thereon was "Appeal allowed." This was wholly insufficient to subserve any other than the ostensible purpose.

In *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322 [39: 438], the defendant in an action of ejectment filed two pleas to the jurisdiction of the court, which pleas were sustained, and judgment thereupon entered as follows: "And for reasons in writing filed herewith, as part of this order, the court doth further consider that it has no jurisdiction of this case, and that the said action of ejectment be and the same is hereby dismissed for want of jurisdiction, but without prejudice to the parties to this suit." A bill of exceptions was taken, in which it was declared that the court "held that the court did not have jurisdiction of this suit, and ordered the same to be dismissed, to which opinion and action of the court the plaintiff did then and there except." The plaintiff then prayed for a writ of error from this court, which was allowed by an order under the hand of the judge, and entered on record, reciting the final judgment entered, "dismissing the said *case because the said court, in its opin-[694]ion, did not have jurisdiction thereof," and that plaintiff prayed for a writ of error "upon the said question of jurisdiction," and averring "that said writ of error be allowed and awarded as prayed for." Under these circumstances it was thought that the question was sufficiently certified.

In *Shields* v. *Coleman*, 157 U. S. 168 [39: 660], a receiver appointed by a state court intervened in a suit in the circuit court of the United States for the recovery of possession of railroad property from the receiver of the circuit court, and, his application having been denied, he prayed an appeal to this court from the decree and interlocutory orders by which the circuit court assumed and asserted jurisdiction over the property. The circuit court allowed the appeal by an order stating: "This appeal is granted solely upon the question of jurisdiction," and reserving to the court the right, which it subsequently exercised, of determining what portion of the proceedings should be incorporated into the record for the purpose of presenting that question. We entertained jurisdiction in that case also. But we are of opinion that this case cannot be brought within either of those last cited.

The conclusion is that this appeal must be dismissed for want of jurisdiction because of the lack of the proper certificate, a defect which cannot now be supplied. We have assumed that jurisdictional questions existed, within the meaning of § 5 of the act of March 3, 1891, though not properly raised, but we do not wish to be understood as intimating any opinion on that subject.

Appeal dismissed.

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695] JOHN ANSBRO, *Piff. in Err.*
v.
UNITED STATES.

(See S. C. Reporter's ed. 695 696.)

Federal question—assignment of error—certificate.

1. A definite issue as to the possession of a right under the United States Constitution must be distinctly deducible from the record, before the judgment of the court below can be revised by this court on the ground of error in the disposal of such a claim by its decision.
2. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the act of March 3, 1891, § 5.
3. Where the jurisdiction of the circuit court was in issue, a certificate of such question of jurisdiction to this court for decision is necessary, or the case is not properly here.

[No. 558.]

Argued November 19, 1895. Decided December 2, 1895.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment of that court convicting John Ansbro of the crime of dumping injurious deposits within the harbor and adjacent waters of New York city, in violation of the act of June 29, 1888. *Dismissed.*

The facts are stated in the opinion.

Messrs. **Albert A. Wray**, *John F. Foley*, and *James Emerson Carpenter* for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

John Ansbro was indicted for the crime of dumping injurious deposits within the harbor and adjacent waters of New York city, in violation of the act of Congress of June 29, 1888 (25 Stat. at L. 209, chap. 496), was tried before Judge Benedict and a jury in the circuit court of the United States for the southern district of New York, convicted, and sentenced December 20, 1894, to six months' imprisonment. There were six counts in the indictment against him, three of which were waived by the district attorney; he was acquitted upon two and convicted upon the second count alone. The act in question is entitled, "An Act to Prevent Obstructive and Injurious Deposits within the Harbor and Adjacent Waters of New York City, by Dumping or Otherwise, and to Punish 696] and *Prevent Such Offenses," and has just been referred to in the case of *The Bayne*, 159 U. S. 687 [*ante*, 306].

By its 1st section the discharge or deposit of refuse, dirt, ashes, mud, and other specified matter in the harbor of New York city or adjacent waters within the limits prescribed by the supervisor of the harbor is forbidden; every such act made a misdemeanor; and every person engaged in or who shall aid, abet, authorize, or instigate a violation of the section, subjected to a punishment therein prescribed. Section 2 provides that every master and engineer on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with such prohibited matter to any point or place of deposit or discharge in the waters of the harbor of New York or in its adjacent or tributary waters, or in those of Long Island sound, or to any point or place elsewhere than within the limits defined by the supervisor of the harbor, shall be deemed guilty of a violation of the act, and punished as provided. Section 3, under which Ansbro was convicted, is as follows:

"That in all cases of receiving on board of any scows or boats such forbidden matter or substance as herein described, it shall be the duty of the owner or master, or person acting in such capacity, on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, to apply for and obtain from the supervisor of the harbor appointed hereunder a permit defining the precise limits within which the discharge of such scows or boats may be made; and any deviation from such dumping or discharging place specified in such permit shall be a misdemeanor within the meaning of this act; and the master and engineer, or person or persons acting in such capacity, on board of any towboat towing such scows or boats, shall be equally guilty of such offense with the master or person acting in the capacity of the master of the scow, and be liable to equal punishment."

The punishment prescribed by sections 1 and 2 of the act consists of fines of not less than $250 or more than $500, or imprisonment not less than thirty days or more than one year, or both.

*Ansbro sued out a writ of error from [697 this court, and we are met on the threshold of the case with the question whether we can take jurisdiction. Under section 5 of the judiciary act of March 3, 1891, appeals or writs of error may be taken from the district courts or from the existing circuit courts directly to this court in any case in which the jurisdiction of the court is in issue and the question of jurisdiction is certified from the court below for decision; in cases of conviction of a capital or otherwise infamous crime; in any case that involves the construction or application of the Constitution of the United States; and in any case in which the constitutionality of any law of the United States is drawn in question.

The offense for which Ansbro was indicted is not punishable by imprisonment for a term of over one year or at hard labor; and persons convicted thereof cannot be sentenced to imprisonment in a penitentiary. Rev. Stat. §§ 5541, 5542. Ansbro was not convicted, therefore, of an infamous crime.

If the jurisdiction of the circuit court was in issue, no certificate of such question of

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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jurisdiction to this court for decision appears in the record, and without such certificate the case is not properly here on that ground.

The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case "that involves the construction or application of the Constitution of the United States," or "in which the constitutionality of any law of the United States is drawn in question." But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment, were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors filed February 18, 1895.

A case may be said to involve the construction or application of the Constitution of the United [698] States when a title, right, *privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. *Borgmeyer* v. *Idler*, 159 U. S. 408 [*ante*, 199]; *Carey* v. *Houston & T. C. R. Co.* 150 U.S. 170 [37: 1041]; *Ex parte Lennon*, 150 U.S. 395 [37:1121]; *Northern P. R. Co.* v. *Amato*, 144 U. S. 465, 472 [36: 506, 509]; *Sayward* v. *Denny*, 158 U. S. 180 [39: 941]. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the 5th section of the act of March 3, 1891.

Writ of error dismissed.

LITTLE ROCK & MEMPHIS RAILROAD COMPANY, *Appt.*,

v.

EAST TENNESSEE, VIRGINIA, & GEORGIA RAILROAD COMPANY and ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILROAD COMPANY.

(See S. C. Reporter's ed. 698-700.)

Jurisdiction of this court.

This court has no jurisdiction of an appeal from a decree of the circuit court rendered October 1, 1891, in a case pending March 3, 1891, under the joint resolution of that date preserving jurisdiction in pending cases wherein appeals should be taken before July 1, 1891.

[No. 65.]

Argued and Submitted November 14, 1895. Decided December 2, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Tennessee dismissing a suit in equity brought by the Little Rock & Memphis Railroad Company, plaintiff, against the East Tennessee, Virginia, & Georgia Railroad Company *et al.*, for an injunction requiring defendants to afford plaintiff equal facilities with any other connecting road, etc. *Dismissed.*

The facts are stated in the opinion.

Messrs. **U. M. Rose** and **G. B. Rose** for appellant.

Messrs. **John F. Dillon**, *Winslow S. Pierce*, and *Rush Taggart* for appellees.

Mr. Chief Justice* **Fuller delivered [699] the opinion of the court:

This was a bill in equity filed by the Little Rock & Memphis Railroad Company against the East Tennessee, Virginia, & Georgia Railroad Company and the St. Louis, Iron Mountain, & Southern Railroad Company in the circuit court of the United States for the western district of Tennessee, April 13, 1889, praying for a mandatory injunction against the defendants, requiring them to afford complainant "the same equal facilities as are afforded to any other connecting road, and for such other relief as may be deemed equitable." Defendants filed their joint and several demurrers July 17, 1889, and on the first of October, 1891, the cause having theretofore been submitted to the court, a final decree was entered dismissing the bill of complaint for want of equity, from which decree complainant prayed an appeal to this court, which was allowed and duly perfected.

By the 5th section of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517) appeals or writs of error can be taken directly to this court in six classes of cases there enumerated, and the case before us falls within none of them. Jurisdiction as existing before the passage of the act was preserved by a joint resolution of March 3, 1891 (26 Stat. at L. 1115), as to pending cases and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. In this case the decree was not rendered until the first day of October of that year. It follows that the appeal must be dismissed. *National Exch. Bank* v. *Peters*, 144 U. S. 570 [36: 545].

By the 16th section of the interstate commerce act (24 Stat. at L. 379, chap. 104; 25 Stat. at L. 855, chap. 382), it was provided that where the Commission had made any lawful order or requirement, and a party refused to obey or perform it, it should be lawful for the

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NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution.*—see notes to Martin v. Hunter, 4:97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws.—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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Commission, or any person or company interested therein, to apply to the circuit court sitting in equity for the enforcement of such order; and it was further provided, in respect of the action of the circuit court, that "whenever the subject in dispute shall be of the value of 700]$2,000 *or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal." In *Interstate Commerce Commission* v. *Atchison, T. & S. F. R. Co.* 149 U. S. 254 [37: 727], 4 Inters. Com. Rep. 347, where an appeal was taken directly to this court after July 1, 1891, from an order in a proceeding under that act we held that it would not lie. Certainly there can be no different result in this case.

Appeal dismissed.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1895.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1895.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] UNITED STATES, *Appt.*,
v.
UNION PACIFIC RAILWAY COMPANY and WESTERN UNION TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 1-53.)

Railroad and telegraph line from Missouri river to the Pacific ocean—duty of railroad company—operating its own telegraph line—power of Congress—amending acts—agreements between railroad companies—transfer of franchise—right of telegraph company—equity jurisdiction.

1. The object of Congress in passing the acts of July 1, 1862, and the amendatory act of July 2, 1864, chap. 216, was the maintenance and operation of both a railroad and telegraph line from the Missouri river to the Pacific ocean, and governmental aid was given to accomplish that result.

2. Any company named in the act of 1862, and receiving the aid therein granted by the government, was, by that act and the amendatory acts of 1864 and 1874, required itself and through its own officers and employees to construct, maintain, and operate both a railroad and telegraph line, and could not assign or transfer to any other corporation its franchises in that regard.

3. That the several railroads authorized by that act were empowered to arrange with certain telegraph companies to place their telegraph lines on the line of said railroads, and such transfer was to be a fulfillment on the part of said railroad companies of the provision of the act in regard to the construction of a telegraph line, did not affect the power of Congress to require the railroad company itself to maintain and operate the telegraph line, by its officers and employees alone.

4. The power reserved to Congress to add to, alter, or amend the acts of 1862 and 1864, authorized Congress to make such additions, alterations, or amendments as would secure the maintenance or operation by the railroad company, through its own officers and employees, of a telegraph line over its main line and branches.

5. It is entirely competent for Congress to add to, alter, or amend the acts of 1862 and 1864, so as to require the Union Pacific Railway Company to maintain and operate, by and through its own officers and employees, telegraph lines for railroad, government, commercial, and other purposes, and to exercise itself and alone all the telegraphic franchises conferred upon it.

6. The agreements of 1866, 1869, and 1871, between the Union Pacific Railway Company and the Western Union Telegraph Company, and between the Union Pacific Railroad Company and the Atlantic & Pacific Telegraph Company, by which the Western Union Company is given the monopoly of the use of the roadway of the railway company for telegraphic purposes, and transferring to the telegraph company the franchises given by the government to the railway company, are invalid and not binding on the railway company.

7. The agreement of July 1, 1881, between the Western Union Telegraph Company and the Union Pacific Railway Company, is illegal as giving the former company exclusive rights in the use of the railroad for telegraph business, and as transferring to that company the telegraphic franchise granted by the government to the latter company, and is not authorized by the Idaho act of 1864 or by the act of 1862.

8. No railroad company operating a post road of the United States over which interstate commerce is carried on can, consistently with the act of July 24, 1866, bind itself, by agreement, to exclude from its roadway any telegraph company incorporated under the laws of a state that has accepted the provisions of that act, and desires to use such roadway for its line in such manner as not to interfere with the ordinary travel thereon.

9. For any failure or refusal by the railway company to comply with the act of August 7, 1888, §§ 1, 2, the remedy of the United States is not restricted to an action at law by mandamus, but equity has jurisdiction to enforce a compliance with those sections.

[No. 334.]

Argued October 18, 19, 1894. Decided November 18, 1895.

NOTE.—*As to right of telegraph and telephone companies to use public streets and erect poles therein; compensation; injunction; poles for street car propulsion; placing electric wires under surface of streets,*—see note to St. Louis v. Western U. Teleg. Co. 37: 810.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

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APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit reversing the decree of the circuit court, and adjudging that one agreement between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company was lawful, and that certain other agreements be annulled, between the Union Pacific Railroad Company and the Atlantic & Pacific Telegraph Company, the rights of which had been acquired by the Western Union Telegraph Company, and that a certain other contract between the Union Pacific Railway Company and the Western Union Telegraph Company was in part valid. Decree of the circut court of appeals reversed, and decree of circuit court affirmed, with directions to the circuit court to make a supplemental decree.

See same case below, 50 Fed. Rep. 28; 59 Fed. Rep. 813, 4 Inters. Com. Rep. 705.

The facts are stated in the opinion

Mr. **Lawrence Maxwell,** *Jr.*, Solicitor General, for appellant.

Messrs. **Rush Taggart, John F. Dillon,** *John M. Thurston*, and *Jeremiah M. Wilson* for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought by the United States against the Union Pacific Railway Company and the Western Union Telegraph Company under the authority of the act of Congress of August 7, 1888 (25 Stat. at L. 382, chap. 772), supplementary to the act commonly known as the Pacific Railroad act of July 1, 1862 (12 Stat. at L. 489, chap. 120), and to the act of July 2, 1864 (13 Stat. at L. 356, chap. 216) and other acts amendatory of the act of 1862.

By the 1st section of the above act of 1888, it is provided that all railroad and telegraph companies to which the United States have granted any subsidy in lands or bonds or loan of [4]*credit for the construction of either railroad or telegraph lines, and which, by the acts incorporating them, or by any amendatory or supplementary act, were required to construct, maintain, or operate telegraph lines, and all companies engaged in operating such railroad or telegraph lines "shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid."

The 2d section declares that any telegraph company, having accepted the provisions of U. S. Rev. Stat. tit. 65, *Telegraphs*, which should extend its line to any station or office of a telegraph line belonging to any one of the railroad or telegraph companies referred to in the first section, shall have the right and shall be allowed "to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and *telegraph* companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination, for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable."

If any railroad or telegraph company referred to in the first section, or any company operating such railroad or telegraph line, refuses or fails, in whole or in part, to maintain and operate a telegraph line as provided in the act of 1888 and the acts to which it is supplementary, "for the use of the government or the public, for commercial or other purposes, without discrimination," or refuses or fails to make or continue such arrangements for the interchange of business with any connecting telegraph company, then, by the 3d section, application for *relief may be made to the in-[5 terstate commerce commission, whose duty it shall be to ascertain the facts, and prescribe such arrangement as will be proper in the particular case.

The 4th section is in these words: "In order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation."

The 5th section subjects to fine and imprisonment any officer or agent of a company operating its railroads and telegraph lines who refuses or fails, in such operation and use, to afford and secure equal facilities to the government and the public, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business as provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or refuses to abide by or perform and carry out within a reasonable time the order or orders of the interstate commerce commission. The party aggrieved may also sue the company whose officer or agent violates the

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provisions of the act for any damages thereby sustained.

6]*The 6th section makes it the duty of all railroads and telegraph companies to report to the interstate commerce commission in relation to certain matters, and to file with that body copies of all contracts and agreements of every description between it and every other person or corporation in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines or property over or upon its rights of way.

The defendant, the Union Pacific Railway Company, is a corporation formed by the consolidation (under the authority of the above acts of Congress of July 1, 1862 (12 Stat. at L. 489, chap. 120) and July 2, 1864 (13 Stat. at L. 356, chap. 216), of the following companies: The Union Pacific Railroad Company, incorporated by the act of July 1, 1862; the Kansas Pacific Railway Company, formerly known as the Union Pacific Railway Company, Eastern Division, which latter company succeeded to the rights and powers of the Leavenworth, Pawnee, & Western Railroad Company, a Kansas corporation that accepted the aid provided by the act of July 1, 1862; and the Denver Pacific Railway & Telegraph Company, a corporation of Colorado.

The present suit proceeds on the ground that the Union Pacific Railway Company is conducting its business under certain contracts and agreements with the Western Union Telegraph Company that are not only repugnant to the provisions of the above act of 1888, but are inconsistent with the rights of the United States, and in violation of the obligations imposed upon the railway company by other acts of Congress. The relief asked was a decree annulling those contracts and agreements and compelling the railway company to maintain and operate telegraph lines on its roadways, as required by the act of 1888.

By the final decree of the circuit court it was adjudged, among other things, that the following agreements be annulled and held for naught:

An agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company;

Two agreements, one of September 1, 1869, 7] and one of *December 14, 1871, between the Union Pacific Railroad Company and the Atlantic & Pacific Telegraph Company, the rights of the latter company having been acquired, as is claimed, by the Western Union Telegraph Company; and,

An agreement of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Company. 50 Fed. Rep. 28.

It will be well, at this point, to refer to the principal parts of the several agreements that were set aside and annulled by the final decree of the circuit court.

By the agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company, the railway company agreed to pay to the telegraph company the cost of the telegraph poles that had been erected by the latter company along the railroad between Wyandotte and Fort Riley, except for such as have been already furnished and erected by said railway company, and also the cost of the wire and insulators for a telegraph line with one wire, between those points, except for such distance as the railroad company had already provided wires and insulators; to furnish and distribute along their road west of Fort Riley, as fast as the same was completed, suitable poles for a first-class telegraph line, and wires and insulators for a telegraph line with one wire; to supply and distribute suitable telegraph poles, as required from time to time; to repair and renew the line as might be necessary; to transport, free of charge, for the telegraph company all persons engaged in and material required for the construction, reconstruction, working, repairing, and maintaining said telegraph line; and to furnish a suitable telegraph office in the depot at Wyandotte, Kansas, free of charge, and pay one half of the salary of the operator in such office, or so much thereof as was necessary to save the telegraph company from loss at that office,—such operator to be fully qualified to do the business of the railway company, and to be appointed and his salary fixed by the parties to the contract.

The railway company further stipulated "not to transport any persons engaged in or property intended for the construction or repair of any other line of telegraph along their railway, *except at the usual and regular rates [8 charged by said railway company for passengers and freight, nor give permission to nor make any agreement with any other telegraph company to construct or operate any telegraph line upon the lands or roadway of said railway company, without the consent in writing of the telegraph company. The above agreed to by said railway company so far as it has the right to do so."

The telegraph company agreed, upon its part, that it would erect poles, attach the insulators, and string the wire to be furnished or paid for by the railroad company, as provided, as fast as each section of 20 miles of railroad was completed; that the first wire should belong to the railway company, and be for their use exclusively after the second wire was put up, "but no commercial or paid business shall be transmitted by the railway company from any station where the telegraph company shall have an office, without the consent of the latter;" that if the business of the railway company should, in its opinion, require more than one wire, they might appropriate another wire, upon paying to the telegraph company the cost of such wire on the poles, the telegraph company to attach such other wire for the use of the company; that the business of the railway company of every kind, and the family, private, and social messages of its executive officers, should be transmitted, without charge, between all telegraph stations on the line of said roadway, and between all such stations and St. Louis, and over all other lines in Missouri, Kansas, Colorado, and New Mexico, then owned or controlled, or which might thereafter be owned or controlled, by the telegraph company, provided, so far as said lines in Colorado and New Mexico were concerned, and the road or roads of the Union Pacific

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Railway Company, Eastern Division, were, at the time, in process of construction towards Santa Fé or Denver, or both, all such business should be transmitted free of charge over all other lines then or thereafter to be owned or controlled by the telegraph company within the United States, to an amount not exceeding $4,000 per annum, with a rebate of one half of regular tariff charges for all in excess of that amount: that until a second wire 9] was put up, *both parties could use the first wire, the business of the railway company having preference; and if either wire was interrupted or required by the United States, both parties might use the other one as far as practicable, but without delay or charge to the railway company; that the telegraph company should furnish all main batteries required for the efficient working of the telegraph line provided for, and keep the line in good working order, without expense to the railway company, except for the materials which the latter had agreed to supply.

Again: That "the railway company may establish, at their own expense, as many offices as they require, and at all places where the telegraph company has no separate office the employees of the railway company shall, so long as it may not interfere with the business of said railway company, receive, transmit, and deliver such commercial or paid business as may be offered at the tariff rates of the telegraph company, provided such paid business does not amount to enough to pay the expenses of a separate telegraph office, and shall account for and pay over to the latter, monthly, the amount thereof at such rates; and concerning such business, all rules, regulations, and orders of the telegraph company applicable thereto shall be observed; but said railway company shall not be amenable in any way to said telegraph company for the acts or operations of said agents, otherwise than to remedy the difficulty in future;" that each party, at its own expense, should have the right to add as many lines as its business required; that it would perform without charge for the railway company what should be decided by competent authority to be its telegraph obligations to the government of the United States; and that a telegraph line should be constructed on the road of the railway company from Leavenworth to Lawrence at such time, between May 31, 1867, and September 1, 1868, as that company might decide, and upon the same terms and conditions as that west of Fort Riley.

By the agreement of September 1, 1869, between the Atlantic & Pacific Telegraph Company and the Union Pacific Railroad Company, the railroad company, in consideration of thirty-three thousand shares of the stock of 10]the telegraph *company (for an increase of whose stock the agreement made provision), dismissed and leased to that telegraph company "all its telegraph line, wires, poles, instruments, offices, and other property by it possessed appertaining to the business of telegraphing for the purpose of sending messages and doing a general telegraphic business," to have and to hold during the whole term of the charter of the telegraph company, and any renewals thereof, subject to the rights of the United States, as set forth in the charter of the railroad company, and on condition that the telegraph company should fully perform all duties that were or might be imposed upon the railroad company by its charter or by the laws of the United States.

It was further stipulated in that agreement that the telegraph company should proceed at once, as soon as arrangements were perfected for extending its line to San Francisco, to put two additional wires, fully equipped and furnished, on the poles demised along the whole length of its line; the railroad company to maintain and keep in repair such poles, wires, and equipments at its expense during the period of such demise, until from age or other cause they were required to be renewed, in which case the telegraph company should meet the cost of renewal; that the railroad company should at its own expense employ, during a period of twenty-five years, suitable persons to operate said telegraph at its own stations, other than at Omaha and such other stations as required, for the business of both parties, operators in addition to those needed by the railroad company; that the railroad company should have the right free of expense to the constant and perpetual use of two of the wires when required for its business, and the free use for its business of the whole line of telegraph, which should then or thereafter belong to or be controlled or operated by the telegraph company, to and from all parts of the United States, for all purposes connected with the management of the road or its business; that the telegraph company should have such preferential privileges and facilities for its business as are usually granted by railroad companies in contracts of connection with telegraph companies; and that the railroad company should "afford all other telegraph companies *only such facilities [11 as by law they now are or may hereafter be required to afford as common carriers or otherwise in which shall not be included the privilege of using hand cars or stopping trains except at regular stations, or transporting the officers or servants of such companies, except on regular passenger trains at regular rates of fare, or of transporting material for such companies or persons (other than the parties of the first part), except on regular freight trains and at the usual rates of freight, unless the facilities aforesaid, or some of them, shall be required by law to be afforded such companies or persons."

These companies entered into a supplementary agreement on the 14th day of December, 1871, by which the original contract was modified in certain particulars that need not be set out, and which provided that for all the purposes of both the original and supplementary contract the road of the railroad company "demised by said original contract shall be deemed and taken to terminate at the junction of the Union Pacific Railroad Company with the Central Pacific Railroad Company, as now established, which junction is at a point about five miles west of Ogden, and all the rights of the parties under said contract and supplement shall be made to conform to this modification."

The agreement between the Western Union Telegraph Company and the Union Pacific Railway Company of July 1, 1881, recites that the former corporation had acquired all

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of the property, rights, and franchises of the Atlantic & Pacific Telegraph Company, and was in possession of and operating a separate line of poles and wires along the main line of the Union Pacific Railway Company between Omaha and Ogden; that the parties were then, and for some time past had been, operating lines of telegraph along various roads of the railway company, under sundry contracts, thirteen in number, including the above agreements of 1866, 1869, and 1871, and made between the railway company or companies formerly in possession of lines of railroad then controlled by and forming part of that company, and the Western Union Telegraph Company, or other telegraph companies that had 12]become *merged into the latter company; and that it was desirable to terminate existing disputes, and embody the agreement of the parties in one new contract, in lieu of said existing contract.

The expressed purpose of this agreement was to provide telegraph facilities for the parties, and to maintain and operate the lines of telegraph along all the railway company's roads in the most economical manner in the interest of both parties, as well as to fulfil the obligations of the railway company to the government of the United States and the public, in respect to the telegraphic service required by the act of July 1, 1862, and its amendments.

Among other provisions of the above agreement are the following:

"Third. The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, upon, and under the line, lands, and bridges of the railway company and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires, or either of them, or underground or other system of communication for commercial or public uses or business with the right to put up from time to time, or cause to be put up or constructed under the provisions of this agreement, such additional wires on its own or the railway company's poles, or such additional lines of poles and wires or either, as well on its bridges as on its right of way, or to construct such underground lines, as the telegraph company may deem expedient, doing as little damage and causing as little inconvenience to the railway company as is practicable, and the railway company will not transport men or material for the construction or operation of a line of poles and wire or wires or underground or other system of communication in competition with the lines of the telegraph company party hereto, except at and for the railway company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations: *Provided, always*, That in protecting and defending the exclusive 13]rights *given by this contract, the telegraph company may use and proceed in the name of the railway company, but shall indemnify and save harmless the railway company from any and all damages, costs, charges, and legal expenses incurred therein or thereby.

"Fourth. It is mutually understood and agreed that all of the telegraph lines and wires covered by this contract, whether belonging to or used by the telegraph company or the railway company for the purpose of this contract, as herein provided, shall form part of the general system of the telegraph company. The railway company further agrees that its employees shall transmit over the lines owned, controlled, or operated by the parties hereto all commercial telegraph business offered at the railway company's offices, and shall account to the telegraph company exclusively for all of such business and the receipts thereon, as provided herein. No employees of the railway company shall, while in its service, be employed by or have any connection with any other telegraph company than the telegraph company party hereto, and the telegraph company shall have the exclusive right to the occupancy of and connection with the railway company's depots or station houses for commercial or public telegraph purposes as against any other telegraph company: *Provided*, That if any person or party, or any officer of the government, tender a message for transmission over the railway telegraph lines between Council Bluffs and Ogden at any railway telegraph station between those points and require that the service be rendered by the railway company, the operator to whom the same is tendered shall receive and forward the same accordingly at rates to be fixed by the railway company to the point of destination if not beyond its own lines. If the destination of said message be beyond said railway company's lines, the telegraph company, when receiving the same at the point at which it leaves the said railway lines, may demand the prepayment of tolls for the service of forwarding the message on its own lines: *Provided, however*, That the local receipts of the railway company on such messages shall be divided between the parties hereto in the same manner and subject to the *same conditions as provided in the tenth [14 clause of this agreement."

"Sixth. Each party hereto shall pay one half of the entire cost of all poles, wires, insulators, tools, and other material used for the maintenance, repair, and renewal or reconstruction of existing lines and wires along all of the railway company's railroads, and for the construction, maintenance, repair, and renewal or reconstruction of such additional wires or lines of poles and wires as may be required for commercial or railroad telegraph purposes along said railroads, and along future branches or extensions thereof, and along new railroads constructed or acquired by the railway company, until the total number of wires shall amount to three for the exclusive use of each party hereto between Council Bluffs and Ogden, two for the exclusive use of each party hereto between Kansas City and Denver, and one for the exclusive use of each party hereto on all other portions of the railway company's railroads, branches, and extensions. Each party hereto shall pay the entire cost of the construction, maintenance, repair, and renewal or reconstruction of wires for its exclusive use in excess of the number hereinbefore mentioned. The material of the telegraph company for additional wires to be transported free of charge by the railway company over its own

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lines, as hereinafter provided. The telegraph company agrees to furnish, at its own expense, all blanks and stationery for commercial or other public telegraph business, and all instruments, main and local batteries, and battery material for the operation of its own and the railway company's wires and offices. . . .

"Seventh. . . . The telegraph company agrees to furnish, free of charge, for the railroad business of the railway company, a direct wire connecting the railway company's office in Omaha, Nebraska, with its office in Kansas City, Missouri, and with the railway company's offices at intermediate railroad stations of the railway company along the Missouri river, including Council Bluffs; and the telegraph company will receive, transmit, and deliver, free of charge, at and from its offices at said intermediate stations of the railway company, such messages on the railroad busi-
15]ness of the railway company *as may be offered by its agents and officers for points on the railway company's roads, provided that the telegraph company may use said wire for the transaction of commercial or public telegraph business when not in use for railroad business."

"Eighth. All messages of the officers and agents of the railway company pertaining to its railroad business may be transmitted free of charge between all telegraph stations on the lines of its various railroads over wires set apart for railroad business. . . . It is understood and agreed that the free telegraphic service herein provided for is for the transmission of messages concerning the operation and business of the railway company's railroads, and shall not be extended to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the railway company, the tolls on which messages should properly be chargeable to such customers.

"Ninth. The railway company agrees to transport free of charge over its railroads, upon application of the superintendent or other officer of the telegraph company, all officers of the telegraph company when traveling on its business, and all employees of the telegraph company when traveling on the telegraph company's business connecting with or pertaining to the lines or wires and offices along any of the railroad company's railroads. And the railroad company further agrees to transport and distribute free of charge along the line of any and all its railroads all poles and other materials for the construction, maintenance, operation, repair, or reconstruction of the lines and wires covered by this agreement, and of such additional wires or lines of poles and wires as may be erected under and in pursuance of the provisions of this agreement. Also all material and supplies for the establishment, maintenance, and operation of the offices along said railroads, it being understood that no charge shall be made for the transportation of poles or other materials over any of the railway company's railroads for use on any other of its railroads.

"Tenth. The telegraph company agrees to supply instruments and local batteries and blanks and stationery for commercial telegraph business, as hereinbefore provided at offices
16]*established and maintained by the railway company. At all telegraph stations of the railway company its employees shall receive, transmit, and deliver such commercial or public messages as may be offered, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and the railway company shall cause all of such receipts to be paid over to the telegraph company monthly.

"As compensation to the railway company for the services herein provided for, the telegraph company agrees to pay or return to the railway company monthly one half of the cash receipts at telegraph stations maintained and operated by and at the expense of the railway company, tolls on ocean cable messages and tolls for lines of other companies excepted, all of which shall be retained by the telegraph company, it being understood that the railway company shall not be entitled to any portion of the tolls on ocean cable messages or tolls belonging to lines of other companies or to any portion of amounts checked against other offices. . . .

"The railway company agrees that its employees shall not compete with the telegraph company's offices in the transaction of commercial telegraph business at any point where the telegraph company may now or hereafter have an office separate from the railway company's office, by cutting rates or by active efforts to divert business from the telegraph company."

"Twelfth. It is further agreed that the management of the wires, the repairs of all the lines along the railway company's railroads, and the distribution of all materials for use on said lines shall be under the supervision and control of a competent superintendent, who shall be appointed and paid jointly by the parties hereto, and whose salary shall be fixed by mutual agreement, and said superintendent shall be equally the servant of each of the parties hereto, and shall, as far as practicable, protect and harmonize the interest of both parties hereto in the transaction of the railroad and commercial telegraph business along the railway company's railroads. . . .

"Thirteenth. The railway company shall have the right to the free use of any telegraphic patent rights or new discoveries or inventions that the telegraph company now owns
*and uses in its general telegraph business[17
or which it may hereafter own and use as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroads as provided for herein.

"Fourteenth. The telegraph company hereby promises and agrees to assume and protect the railway company from the payment of all taxes levied and assessed upon the telegraph property belonging to either of the parties to this agreement.

"Fifteenth. The provisions of this agreement shall extend to all railroads and branches or extensions thereof now or hereafter owned or controlled by the railroad company, provided, however, that in case the railway company shall hereafter acquire the ownership or control of any railroad upon which the telegraph company may already have a line of telegraph in operation, the provisions of this

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contract shall not apply to such railroad and telegraph line without the mutual consent of the parties hereto at the time of such acquisition."

The contract of 1881 was, by its terms, to continue in force for twenty-five years, and existing contracts with other companies, and in respect to other roads, were to be deemed superseded, so long as the last contract was fully observed on the part of the railway company, but to be again in force, for the protection of the Western Union Telegraph Company, in case this contract should not be kept in good faith by the railroad company for the full term of twenty-five years.

By the decree of the circuit court it was further adjudged that the Union Pacific Railway Company "at once put an end to all relations between it and the defendant, the Western Union Telegraph Company, not equally allowed to all other persons or corporations operating, owning, or using the telegraph as a means of communication, and also at once resume possession of its offices, poles, wires, instruments, and all its other property belonging or appertaining to the business of telegraphy along such of its main and branch lines as were aided by the government under the act of July 1, 1862, and acts amendatory and supplemental thereto, and henceforth, by and through its own corporate officers and employees, maintain and operate, for railroad, governmental, 18]commercial, and *other purposes, such telegraph lines and instruments, and in all ways exercise by itself alone all the telegraph franchises conferred upon it and obligations assumed by it under the several acts granting subsidies in land or bonds or loan of credit to it and to its constituent companies, or the acts amendatory of or supplemental thereto; and in all cases where the said defendant company has not now adequate facilities to enable it to thus conduct the telegraph business and afford equal facilities to all without discrimination in favor of or against any person, company, or corporation whatever, and to receive, deliver, and exchange business with connecting telegraph lines and all companies desiring to make such connections on equal terms and afford equal facilities to all, and without discrimination for or against any one of such connecting lines and upon just and equitable terms (all of which said defendant is required and directed to at once proceed to do), then said defendant shall at once construct and provide such facilities as are necessary to carry out the provisions of this decree and the several acts of Congress creating or aiding said defendant company or its constituent parts, and all acts amendatory and supplemental thereto."

It was further adjudged that the Western Union Telegraph Company "at once vacate all the offices of said railway company without interference or damage to the same, and without removing, until the further order of this court, any property therefrom or from the line of said railway company which has heretofore been jointly used by the two companies, or the ownership of which is in dispute or is so connected with or mixed with the property of the railway company as to make it difficult of identification, or the removal of which will interrupt or interfere with the discharge of the duties of the defendant railway company, as herein set forth and enjoined;" this decree, however, not to be construed as preventing the railroad company from leasing to the telegraph company "the right to occupy with its wires, instruments, batteries, and operators, upon reasonable and proper terms, any of its poles along the right of way and space in the depots or stations of the said the Union Pacific Railway Company not required by the railway company for the transaction of its business."

*Sixty days after the entry of the decree[19 were given to make such necessary arrangements, adjustments, and changes as might become necessary by reason of the annulling of the above agreements, and in order that the provisions of the decree might be carried into effect. And the right was reserved to the telegraph company to apply for and have stated an account between the defendants in respect of the value of the telegraph property along the line of the railway company, the cost of maintenance and profits of the telegraph lines, the amounts contributed thereto by the respective defendants or their assignors or predecessors in title, and all matters affecting the equities of the defendants—the United States to have the right to intervene on such accounting for the protection of its interests and those of the public. 50 Fed. Rep. 28.

Upon appeal by the defendants to the United States circuit court of appeals the decree of the circuit court was reversed, and the cause remanded with directions to enter a modified decree adjudging, among other things, that the agreement of October 1, 1866, was a lawful and binding contract, and continued in force until it was superseded by the agreement of July 1, 1881; that the agreements of September 1, 1869, and December 14, 1871, were beyond the powers of the Union Pacific Railroad Company, and must be annulled; that the equities arising out of the two last-named agreements were adjusted and settled by the parties interested when they made the contract of July 1, 1881; and, that the last-named agreement was valid and binding in all respects, except that the third and fourth paragraphs were null and void to the extent, and only to the extent, that they secured or granted, or were intended to secure and grant, to the Western Union Telegraph Company any exclusive rights, privileges, or advantages whatsoever. 59 Fed. Rep. 813, 4 Inters. Com. Rep. 705.

Before examining the provisions of the agreements that were annulled by the decree of the circuit court, it is necessary to ascertain the nature and extent of the obligations imposed upon the Union Pacific Railroad Company and the other constituent companies of the Union Pacific Railway*Company, in respect[20 of the construction, maintenance, and operation of telegraph lines along the routes of their respective roads. If it be found that the Union Pacific Railway Company, in the exercise of the rights and powers of its constituent companies, was not, prior to the passage of the act of August 7, 1888, under any legal duty, in addition to the construction of a railroad on the routes prescribed, to maintain or operate telegraph lines on or along its roadways, the

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question will arise, whether it was competent for Congress to require that company, through its own officers and employees exclusively, to maintain or operate telegraph lines on or over its roadways, to be used for railroad, governmental, commercial, and other purposes, and itself alone exercise the telegraph franchises conferred by the acts of Congress.

The Union Pacific Railroad Company was created by the above act of Congress of July 1, 1862. 12 Stat. at L. 489, chap. 120. Its title indicated that the subsidy granted was to aid in the construction of both a railroad and a telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes.

Proceeding under that act, the company began in 1865 and in 1869 completed the construction of a railroad from Omaha to Ogden, making connection at the latter place with the Central Pacific Railway, extending from Ogden to San Francisco. It also constructed, on the north side of its right of way, a telegraph line between Omaha and Ogden.

By the 1st section of the above act of July 1, 1862, the Union Pacific Railroad Company was authorized and empowered "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph" from a named point in the then territory of Nebraska to the western boundary of Nevada territory; by the 2d section, a right of way through the public lands was given "for the construction of said railroad and telegraph line;" by the 3d section, a grant of public lands was made "for the purpose of aiding in the construction of said railroad and telegraph line;" by the 4th section, 21] patents for lands granted were to be *issued upon the certificate of commissioners appointed by the President, when it appeared that forty consecutive miles of the "railroad and telegraph line" had been completed and equipped in all respects as required, and were ready for the service contemplated by the act; by the 5th section, provision was made for issuing to the company bonds of the United States that should constitute a first mortgage on the whole line of "the railroad and telegraph, together with the rolling stock"—such bonds to be issued when the commissioners certified to the completion and equipment of forty consecutive miles of "railroad and telegraph," in accordance with the provisions of the act; by the 6th section, the grants of lands were declared to be made "upon condition that said company shall pay said bonds at maturity and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit such despatches over said telegraph line," etc.; by the 7th section, the company was required, within one year after the passage of the act, to file its assent to its provisions, and complete said "railroad and telegraph" from the point of beginning as provided to the western boundary of Nevada territory before the first day of July, 1874; and by the 8th section, "the line of said railroad and telegraph" was prescribed.

The 9th section authorized the Leavenworth, Pawnee, & Western Railroad Company — which, prior to January 1, 1862, had located its line of road from Leavenworth to Fort Riley—to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri at the aforesaid point, on the one hundredth meridian of longitude west of Greenwich, upon "the same terms and conditions in all respects" as were provided in the act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude named. The same section authorized the Central Pacific Railroad Company, a California corporation, to construct "a railroad and telegraph line" from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of that state, "upon the same *terms [22 and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California."

The 10th section authorized the Kansas and California companies, or either of them, after completing their roads, to unite upon equal terms with the first-named company in constructing so much of said "railroad and telegraph line and branch railroads and telegraph lines" in the act mentioned, through the territories from the state of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in relation to the said Union Pacific Railroad Company. And the Hannibal & St. Joseph Railroad, the Pacific Railroad Company of Missouri, and the first-named company, or either of them, on filing their assent to the act, were authorized to unite upon equal terms, with the said Kansas company, in constructing said railroad and telegraph to said meridian of longitude, with the consent of the state of Kansas; "and in case said first-named company shall complete its line to the eastern boundary of California before it is completed across said state by the Central Pacific Railroad Company of California, said first-named company is hereby authorized to continue in constructing the same through California, with the consent of said state, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said state, is authorized to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed."

By the 11th section it was provided, in respect of bonds *issued in aid of the construction [23 of the most mountainous and difficult parts of the road, that "no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad

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and telegraph;" by the 13th section, that "the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line;" and by the 14th section, that the Union Pacific Railroad Company should construct a single line of railroad and telegraph from the western boundary of Iowa, at a point to be designated by the President, so as to form a connection with that company's line on the said one hundredth meridian of longitude, upon the same terms and conditions prescribed "for the construction of said railroad and telegraph first mentioned;" and whenever a railroad was constructed through Minnesota or Iowa to Sioux City, then the above company should construct a railroad and telegraph line from Sioux City to connect with the Union Pacific Railroad.

The 15th section declared that any company then or thereafter incorporated should have the right to connect its road with the road and branches provided by the act, at such places and upon such terms as the President might prescribe. But by an act of Congress, passed June 20, 1874 (18 Stat. at L. 111, chap. 331), the following addition was made to this section of the act of July 1, 1862 (12 Stat. at L. 489, 496, chap. 120): "And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misde-
24 meanor, and, upon conviction thereof, *shall be fined in any sum not exceeding $1,000, and may be imprisoned not less than six months; . . . and it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway & Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3, 1869."

The 16th section of the act of 1862 further provided that all of the railroad companies mentioned in the act, or any two or more of them, might form themselves into one consolidated company, the latter company to proceed thereafter "to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act."

The 17th section provided that in case said company or companies failed to comply with the terms and conditions of the act "by not completing the said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies."

The 18th section provided that whenever it appeared that "the net earnings of the entire road and telegraph," including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to the United States, Congress could reduce the rates of fare thereon, if unreasonable in amount, and fix and establish the same by law. And "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and *telegraph line, and keep-[25
ing the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act."

The act of July 1, 1862, was amended, in various particulars, by the act of July 2, 1864, chap. 216. 13 Stat. at L. 356. By the 10th section of the latter act the former was so amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and other companies authorized to participate in the construction of the proposed lines of road, could "issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States," and "the lien of the United States shall be subordinate to that of the bonds of any or either of said companies, hereby authorized to be issued on their respective roads, property, and equipments," except as to those provisions of the act of 1862, relating to the transmission of despatches, and the transportation of mails, troops, munitions of war, supplies, and public stores of the United States.

Section 15 of the same act was in these words: "That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others, and it shall not be lawful for the proprietors of any line of telegraph, authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured, for each offense, the sum of $100 and such other

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damages as he may have suffered on account of 26]said refusal or failure, to *be sued for and recovered in any court of the United States, or of any state or territory of competent jurisdiction."

The 16th section provided that any two or more of the companies authorized to participate in the benefits of that act might at any time unite and consolidate upon such terms and conditions as were not incompatible with such act or the laws of the state or states in which the roads of such companies were, and such consolidated company should be entitled to receive from the government all the grants, benefits, and immunities that the respective constituent companies were entitled to, subject to all the restrictions imposed upon them.

By the 22d section it was declared that "Congress may, at any time, alter, amend, or repeal this act."

In our judgment, it is not difficult to ascertain the intention of Congress in passing the acts of July 1, 1862, and the amendatory act of July 2, 1864, chap. 216. The supreme object to be attained was the maintenance and operation of both a railroad and telegraph line from the Missouri river to the Pacific ocean, and governmental aid was extended in order to accomplish a result so important to the whole country.

The authority given to the Union Pacific Railroad Company to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad *and telegraph* line on that route, § 1; the grant of public lands *for the purpose* of aiding in the construction of said railroad *and telegraph line*, § 3; the direction that patents for lands granted should be issued as each forty consecutive miles of such railroad *and telegraph line* appeared, upon the certificate of the commissioners, appointed by the President, to have been completed and *equipped* in all respects as required, § 4; the making the bonds of the United States a first mortgage on the whole line of the railroad *and telegraph*, § 5; the explicit declaration that the grants of public lands were made *upon the condition*, among others, that *the company* should keep said railroad *and telegraph line* in repair and *use*, and at all times transmit despatches over said *telegraph line*, § 6; the requirement that the company should complete said railroad *and telegraph* on the route prescribed and within a named time, § 7; the reservation that Congress 27]may at any *time, having due regard to the rights of the companies named, add to, alter, amend, or repeal the act in order that it may better accomplish the object of the government, namely, "to promote the public interest and welfare by the construction of" said railroad *and telegraph line*, and keep the same in working order, and to secure to the government at all times (but particularly in time of war) "the use and benefits of the same for postal, military, and other purposes," § 18,—these and other provisions are wholly inconsistent with the idea that the Union Pacific Railroad Company could have fulfilled its obligations to the government by simply constructing a railroad, without making any provision whatever for the construction, maintenance, or operation of a telegraph line, thereby leaving all communication by telegraph, along its route, to the absolute control of private corporations deriving no corporate authority from the national government, and whose operations would not ordinarily be subjected to national supervision.

The same observations are applicable to the Leavenworth, Pawnee, & Great Western Railroad Company—afterwards, and successively, as has been stated, the Union Pacific Railway Company, Eastern Division, and the Kansas Pacific Railway Company. That corporation was authorized to construct, not simply a railroad, but a railroad *and telegraph line*, between certain points, upon the same *terms and conditions* as were prescribed in the act for the construction of a railroad *and telegraph line* by the Union Pacific Railroad Company.

The purpose of Congress, as indicated in the act of 1862, to provide for the construction of telegraph lines by the companies named in it, in connection with their respective railroads, was unchanged at the time of the passage of the amendatory act of July 2, 1864, chap. 216. The latter act, as we have seen, gave authority to the companies authorized to participate in the construction of the roads that were to connect the Missouri river with the Pacific ocean to place a first mortgage on their respective railroads *and telegraph lines*, and made the mortgage held by the United States subordinate to it. § 10. It did more. It required those companies to operate and use their roads *and telegraph* for all purposes of communication, *travel, and transportation, so far as[28 the public and government are concerned, "as one connected, continuous line," and without discrimination against either road—a requirement that would not have been made if Congress had not intended that each company receiving aid from the government should itself maintain and operate or control, or should provide for the maintenance, on its own route and under its own control, of a telegraph line for the accommodation of both the government and the general public.

What we have said as to the objects that Congress intended to accomplish by aiding the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean is based upon sections one to eighteen, inclusive, of the act of July 1, 1862, and upon the provisions of the amendatory acts of July 2, 1864, chap. 216, and June 20, 1874. 18 Stat. at L. 111, chap. 331. If we look alone to those sections and provisions, the conclusion must be that any company named in the act of 1862, and receiving the aid therein granted by the government, was required itself, and through its own officers and employees, to construct, maintain, and operate both a railroad and telegraph line, and could not assign or transfer to any other corporation its franchises in that regard.

But there is a section in the act of 1862 showing that, for the benefit of certain telegraph companies that had already expended large sums in the construction of telegraph lines, Congress was willing, in a named contingency, to relieve the railroad companies receiving governmental aid, from, at least, any present obligation to construct telegraph lines on their

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respective rights of way. That contingency is indicated in the 19th section of the act of 1862, which provides:

"That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into, and the 29] transfer of said *telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein."

A similar provision relating to the Union Pacific Railroad Company and the United States Telegraph Company and its associates was embodied in the 4th section of the act of Congress, commonly known as the Idaho act of July 2, 1864, chap. 220 (13 Stat. at L. 373), entitled "An Act for Increased Facilities of Telegraph Communication between the Atlantic and Pacific States and the Territory of Idaho." 13 Stat. at L. 373, chap. 220.

By the latter act the United States Telegraph Company and their associates were authorized to erect a line or lines of magnetic telegraph between the Missouri river and San Francisco on such routes as they might select, to connect with its lines then constructed and being constructed through the states of the Union. It was given the use of such unoccupied land of the United States as was necessary for right of way and materials, and for the establishing of stations along said line for repairs, not exceeding at any station one quarter-section of land, and such stations not to exceed one in fifteen miles on the average of the whole line, unless said lands should be required by the government of the United States for railroad or other purposes. § 1. Under the direction of the President of the United States it was authorized to erect a telegraph line from Fort Hall to Portland, Oregon, and from Fort Hall to Bannock and Virginia City, in the territory of Idaho, with the same privileges as to the right of way, and so forth, as provided in the 1st section; the United States to have priority in the use of said lines of telegraph to Oregon and Idaho. § 2. It was authorized to send and receive despatches, on payment of the regular charges for transmission, over any line then 30] or thereafter to be constructed by the *authority or aid of Congress, to connect with any line or lines authorized or erected by the Russian or English governments, and all despatches received by its line or lines were to be transmitted in the order of their reception, and the answers delivered to the United States Telegraph Company for transmission over their lines to the office whence the original message was sent, whenever so directed by the sender thereof. § 3. By the 4th section it was provided: "The several railroad companies authorized by the act of Congress of July 1, 1862, are authorized to enter into arrangements with the United States Telegraph Company so that the line of telegraph between the Missouri river and San Francisco may be made upon and along the line of said railroad and branches as fast as said roads and branches are built, and if said arrangements be entered into and the transfer of said telegraph line be made in accordance therewith to the line of said railroads and branches, such transfer shall, for all purposes of the act referred to, be held and considered a fulfilment on the part of said railroad companies of the provision of the act in regard to the construction of a telegraph line; and, in case of disagreement, said telegraph company are authorized to remove their line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of said railroad companies."

Referring to the 19th section of the act of 1862, *Mr. Justice* Miller, in *Western U. Teleg. Co.* v. *Union P. R. Co.* 3 Fed. Rep. 721, 728, 1 McCrary, 581, 588, said: "The three telegraph companies here spoken of, together constituted, at the time this statute was passed, a continuous line of telegraph from the Missouri river to San Francisco; and it was obvious that the building of another line parallel to that, and not far distant from it, would have a very injurious effect upon the value of the property of those telegraph companies; and it was to protect those companies and to prevent the injury which would follow from the construction of another line between the same points, over an uninhabited region of country, that Congress provided that, by an arrangement with the railroad company, if those companies should remove their *wires along the [31 line of that road so they could be used both for railroad purposes and the use of the general public, then the obligation of the railroad company, under the act of Congress, to build another line, should no longer exist."

In reference to the 4th section of the Idaho act, the same eminent Justice said: "It does not admit, in my opinion, of any reasonable doubt that if the United States Telegraph Company mentioned in that statute, or any company which had the same rights and authorities on that subject that that company had, entered into an agreement with the Pacific Railroad Company, or any of its branches built under the authority of the original act of 1862, which secures the proper construction and operation of a line of telegraph along its road for the benefit of the public, that it is absolved from the obligation imposed upon it by the act of 1862, to construct and operate such a telegraph line. It was manifestly the design of this act of 1864 to enable the United States Telegraph Company to become substituted, by a proper arrangement with the Pacific Railroad Company and its branches, to the right to build a telegraph line along the track and right of way of those railroad companies, and thereby to relieve those companies from the obligation to build and operate such a line." 3 Fed. Rep. 727.

We concur in these observations as to the

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scope and effect of the 19th section of the act of 1862, and of the like section in the Idaho act of July 2, 1864, chap. 220. But it must be observed that the transfer to the roadway of the Union Pacific Railroad of the lines of the telegraph companies, or either of them, named in the 19th section of the act of 1862, was not in pursuance of any "arrangement" made with those companies. On the contrary, as stated by counsel, the lines constructed by telegraph companies between Omaha and Ogden, and operated by the Western Union Telegraph Company prior to the actual completion of the railroad between those points, were transferred to the south side of the railroad as the work of railroad construction proceeded, without any arrangement whatever with the railroad company. This was done under that clause in the 19th section of 32] the act of *1862, providing that "in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of said railroad companies named herein."

In reference to the telegraph line from Kansas City *via* Lawrence and Rossville to Denver, the claim is that a part of it was constructed under some arrangement between the railroad company and Samuel Hallett, contractor; that the balapce was constructed under the contract of October 1, 1866, between the Western Union Telegraph Company and the Kansas Pacific Railroad Company, the latter contracting by the name it then used of the Union Pacific Railway Company, Eastern Division; and that after that date and until 1880 the line of telegraph extending from Kansas City to Denver was operated under the contract of October 1, 1866. It is further claimed that the telegraph line so constructed was accepted by the government as a substitute for the line which the charter of the railroad company required it to construct, maintain, and operate.

If it were true that the telegraph line on the Kansas Pacific branch was constructed on the roadway of the railroad company under such an "arrangement" with the railroad company as was contemplated or permitted by the 4th section of the Idaho act, and that the government, by not declaring to the contrary, is to be deemed to have accepted the construction by the telegraph companies of a line on the south side of the right of way of the Union Pacific Railroad as equivalent to an "arrangement" allowed by the 19th section of the act of 1862, the question would remain, whether such arrangements, even if legal in all respects when made, so tied the hands of the government that it could not, at a subsequent date, in execution of the purposes of Congress, require the railroad company, by its own officers and employees exclusively, to maintain or operate telegraph lines for railroad, governmental, and commercial purposes on and over its roads, for the construction of which the aid of the United States was accepted.

We have seen that the object of giving governmental aid to the corporations named in the 33] act of 1862 was to *promote the public interest and welfare by the construction and operation of a railroad and telegraph line, to the use and benefit of which the government should be entitled at all times, particularly in time of war, for postal, military, and other purposes; and that "the better to accomplish" that object Congress reserved the power, capable of being exercised at any time, of *adding to*, altering, amending, or repealing such act, having "due regard to the rights" of the companies named in it; and that by the act of 1864, chap. 216, the several companies authorized to construct the roads named were required to operate and use their roads and telegraph for all purposes of communication, travel, and transportation as one connected, continuous line, affording equal advantages and facilities as to rates, time, and transportation, without discrimination against other companies, or against persons requiring the transmission of news and messages.

No express limitation is imposed upon the exercise of the power so reserved, except that the act of 1862 required that due regard be had to the rights of the railroad companies that accepted its provisions. But, looking at the entire act, it is clear that there was no purpose to interfere with the authority of Congress to enact such laws, by way of addition to or alteration of existing legislation, as were necessary or conducive to the attainment of the public objects sought to be attained. Indeed, the words in the act of 1862, "due regard for the rights of said companies named therein," suggest only such restrictions as the law, without such words, would imply.

It would not be competent for Congress, under the guise of altering and amending the act in question, to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which governmental aid was given. Neither could it, by such alteration or amendment, destroy rights actually vested, nor disturb transactions fully consummated. We may here not inappropriately repeat what was said in *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700, 718-720 [25: 496, 501, 502], that "this power has a limit," and "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." Again, *in the same case: "The United States [34 cannot, any more than a state, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they, by legislation, compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality

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or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

But it cannot be doubted that the act of 1888 is within the general scope, and consistent with the objects, of the previous statutes relating to railroad and telegraphic communication between the Missouri river and the Pacific ocean. If Congress concluded—and we must assume, from the provisions of the act of 1862, that it did conclude—that the public interests and the general welfare would be promoted if the railroad company, accepting national aid, should exercise through its own officers and employees exclusively the telegraphic franchises granted to it, it is difficult to perceive how legislation designed to enforce such a policy can be held to be wanting in due regard to the rights of such company.

It may be that Congress passed the act of 1888 because, in its judgment, the rights of the government and of the public in the matter of telegraphic communication could be fully secured or effectively guarded only by means of telegraph lines maintained and operated by a corporation deriving its power from the general [35] government, and subject, in respect *of the general conduct of its affairs, to national supervision and control. If such considerations induced the passage of the act of 1888, can the validity of that legislation be made to turn upon the inquiry by the courts whether the policy inaugurated by Congress was best for the public interests? Can it be said that the act of 1888 is not germane or related to the objects for the attainment of which the aid of the government was bestowed, as indicated in the act of 1862? These questions must be answered in the negative. We have nothing to do with the wisdom or policy of legislation. The discretion of Congress in such matters cannot be controlled by the judiciary, nor can the courts disregard an act of legislation merely upon the ground that the public interests would, in their judgment, have been best subserved by leaving telegraphic communications, along the route of railroads constructed with national aid, under the domination of private corporations organized under state authority. We can consider only the question of legislative power. If the power existed to enact the statute of 1888, the duty of the courts is to give full effect to the will of Congress. No other position can be taken without attributing to the judiciary an authority to revise the action of the legislative branch of the government that it does not possess, and which the established principles of our government forbid it to exercise.

The contention that the act of 1888 did not have due regard to the rights of the railroad company is based upon that provision in the act of 1862 (§ 19) and a similar provision in the act of 1864 (§ 4) which permitted the railroad company to make an "arrangement" with certain telegraph companies to place their lines upon and along the route of the railroad and branches—such transfer to be held and considered, for all the purposes of the act, a *fulfilment* on the part of said railroad companies of the provisions of the act "in regard to the *construction* of said lines of telegraph." But such an arrangement, accompanied by the transfer of telegraph lines constructed by telegraph companies to the roadway of the railroad company, had no other effect than to relieve the railroad company from any *present* duty itself to construct a telegraph *line to be used under [36] the franchises granted and for the purposes indicated by Congress. It did not affect the authority of Congress, under its reserved power, to require the railroad company itself to maintain or operate in the future, by its officers and employees alone, telegraph lines on its main road and branches.

Indeed, no arrangement of the character specified could have been made, except in full view of the power reserved to add to, alter, or amend the act that permitted it. Although, as just stated, that power could not have been exercised, so as to devest either the railroad company or the telegraph company of property already acquired, or to disturb or annul any transaction fully consummated, while such arrangement was in force, it was competent for Congress to make such additions to, or such alterations or amendments of, previous statutes, as would secure the maintenance or operation by the railroad company, through its own officers and employees, of a telegraph line over and along its main line and branches.

It is of no consequence that such legislation may defeat the purpose contemplated by the parties to an arrangement of the character described; for they contracted, and could only have contracted, in view of the possible exercise by Congress of the power expressly reserved by it. If we should hold the addition made by the act of 1888 to the act of 1862, and the acts amendatory thereof, to be beyond the power of Congress, it would be difficult, if not impossible, to prescribe the lines within which the national legislature must keep, and beyond which it may not pass, when exerting its reserved power of adding to, altering, or amending statutes and charters of incorporation.

We have therefore considered the question before us just as if a contract or arrangement between the railroad and a telegraph company for the construction by the latter of a telegraph line on the route of the former expressly recited the provision of the act of 1862 by which Congress reserved the power, to be exerted at any time, to add to, amend, or repeal the act which authorized such contract or arrangement.

In this view, it must be held that by its reservation of authority to add to, alter, amend, or repeal the acts in question, *whenever it [37] chose so to do, Congress, subject to the limitation that rights actually vested or transactions fully consummated could not be disturbed, intended to keep within its control the entire subject of railroad and telegraphic communication between the Missouri river and the Pacific ocean, through the agency of corporations created by it, or that had accepted the bounty of the government. It was never intended that the railroad companies accepting such bounties should be able, by any contract or arrangement with telegraph companies, to discharge themselves, for all time and beyond the authority of Congress otherwise to provide, from the obligation to exercise, by their officers

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and agents exclusively, the telegraphic franchises received by them from the national government.

These principles are fully supported by former decisions, in which this court has determined the scope and effect of constitutional or statutory provisions that reserved to the legislature granting charters of incorporation, or enacting statutes under which private rights might be acquired, the power to alter, amend, or repeal such charters or statutes. *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 454, 457, 458 [21: 204, 205]; *Miller* v. *New York*, 82 U. S. 15 Wall. 478 [21: 98]; *Holyoke Water-Power Co.* v. *Lyman*, 82 U. S. 15 Wall. 500 [21: 133]; *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700, 720, 721 [25: 496, 501, 502]; *Greenwood* v. *Union Freight Co.* 105 U. S. 13, 21 [26:961, 965]; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476 [27: 408, 412;] *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 352 [28: 173, 175]; *Louisville Gas Co.* v. *Citizens Gaslight Co.* 115 U. S. 683, 696 [29: 510, 515]; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 408 [32: 979, 984]; *Sioux City Street R. Co.* v. *Sioux City*, 138 U. S. 98, 108 [34: 898, 902]; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 12, 14 [36: 55, 58, 59]; *Hamilton Gaslight & C. Co.* v. *Hamilton City*, 146 U. S. 258, 270 [36: 963, 968]; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 567 [38: 269, 272].

What has been said in reference to the effect of the reservation in the act of 1862 of the right of adding to, altering, amending, or repealing its provisions, is applicable to the 4th section of the Idaho act of July 2, 1864, which permitted the several railroad copmanies referred to in the act of 1862 to make an arrangement with the United States Telegraph Company, such as was permitted by the 19th section of the act of 1862 to be made with the 38] telegraph companies therein *named. The 4th section of the Idaho act was, in legal effect, nothing more than an amendment or enlargement of the 19th section of the act of 1862, by adding the name of another telegraph company to those mentioned in the latter section.

It was suggested in argument that the objects of the act of 1862 could be fully accomplished by means of a telegraph company incorporated by one of the states, and which, by placing its lines on the route of the railroad, could meet all the demands, as well of the railroad company, as of the government and the general public. But this suggestion can have no weight in the present inquiry. For if, as intimated, the execution of the act of 1888 will result in no real good to the general public, and may even be injurious to the pecuniary interests which the government has in the Union Pacific Railway and its branches, that is a question of public policy, with which the judiciary is not concerned, and the responsibility for which is with another branch of the government.

We perceive no escape from the conclusion that it is entirely competent for Congress to add to, alter, or amend the acts of 1862 and 1864, so as to require the Union Pacific Railway Company, possessing the rights and powers of its constituent companies, to maintain and operate, by and through its own officers and employees, telegraph lines for railroad, governmental, commercial, and other purposes, and to exercise, itself and alone, all the telegraphic franchises conferred upon it. It is enjoying the bounty of the government subject to the condition, among others, that it will perform these duties whenever so required by Congress.

It becomes necessary now to determine in what respects the agreements of 1866, 1869, 1871, and 1881, if kept and performed by the defendants, are inconsistent with the rights of the United States, and whether, by their necessary operation, they will interfere with the performance by the Union Pacific Railway Company of the duty imposed upon it by the act of 1888.

Looking first at the agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company, it will be seen that the Western Union Telegraph Company does not, in that *agreement, expressly undertake [39 to meet the obligations imposed by the Pacific Railroad acts upon the railroad companies named in them, of constructing, maintaining, and operating both a railroad and telegraph line on their respective routes, for the use equally of the government and the public. It does undertake to perform, without charge to the railway company, what should be "decided by competent authority" to be the telegraphic obligations of the railroad company to the government. § 10. Whom the parties regarded as competent to decide as to the nature and extent of such obligations does not appear from the agreement. The effect of this stipulation, as between the railway company and the telegraph company, was to excuse the latter from performing any services for the government until competent authority decided that such service was due from the former.

But passing this point as one not controlling in the case, it is evident that the effect, if not the object, of the agreement, was to give the telegraph company the absolute control of all telegraphic business on the route of the Union Pacific Railway Company, Eastern Division.

The provision that the railway company should transport for the telegraph company, free of charge, all the persons engaged and material required, in the construction, repairing, and maintaining the telegraph line for which the agreement provided, while exacting from other telegraph companies, for persons engaged and for property intended to be used in building a telegraph line on the railway company's roadway, the usual rates for passengers and freight, §§ 4, 5; the stipulation that the railway company should not give permission to another telegraph company to construct or operate any telegraph line upon the lands or roadway of the railway company, without the consent in writing of the telegraph company, § 5; the provision that the railway company should not, without the consent of the telegraph company, transmit commercial or paid business from any station where the latter had an office; and the provision that the railway company should account for and pay over to the telegraph company, at the tariff rates established by the latter, all sums received by

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40]* the railway company for messages sent from points where the telegraph company had no separate office, if such sums were not sufficient to meet the expenses of a separate telegraph office, § 8,—these provisions, to say nothing of others, all plainly indicate that the object of the agreement was to grant to the Western Union Telegraph Company, as against all other telegraph companies, the exclusive right to control the railway company's roadway for telegraphic purposes, so far as that could be done without interfering with the ordinary operations of the railway company.

This agreement of October 1, 1866, enabling the Western Union Telegraph Company to exclude all other telegraphic corporations from the roadway of the railway company, if not void as against public policy, independently of specific statutory provisions, was inconsistent with the act of Congress of July 24, 1866 (14 Stat. at L. 221, chap. 230), entitled "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes." The substantial provisions of this statute have been preserved in sections 5263 to 5268, inclusive, of the Revised Statutes.

By the act of June 8, 1872 (17 Stat. at L. 308, 309, chap. 335), reproduced in U. S. Rev. Stat. § 3964, all the waters of the United States, during the time the mail is carried thereon, and all railroads or parts of railroads in operation, are post roads. And by the above statute of 1866 Congress declared that any telegraph company then organized, or which might thereafter be organized, under the laws of any state of the Union, should have the right to construct, maintain, and operate lines of telegraph through or over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which had been or might thereafter be declared such by act of Congress, and over, under, or across the navigable streams of the United States; the lines of telegraph to be so constructed and maintained as not to obstruct the navigation of streams and waters or interfere with the ordinary travel on military or post roads. "And any of said companies," the act declared, "shall have the right to take and use from such public lands the necessary stone, 41]* timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other."

The remaining sections of that act were as follows: "§ 2. That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General. § 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however*, The United States may at any time, after the expiration of five years from the date of the passage of this act, for postal, military, and other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected. § 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the United States of the restrictions and obligations required by this act."

It is clear that the essential part of the agreement of 1866 is prohibited by this act of July 24, 1866. As that act gave every telegraph company organized under state laws and accepting its provisions the right to erect its poles and wires upon the post roads of the United States, the agreement of the Union Pacific Railway Company, Eastern Division, that it would not permit, except with the consent of the Western Union Telegraph Company, other telegraph companies to use its roadway, *directly tended to make the act of [42 July 24, 1866, ineffectual, and was therefore hostile to the object contemplated by Congress. *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 11 [24: 708, 711]. The railway company operating one of the post roads of the United States, over which interstate commerce was carried on, could not, at least, after the passage of that act, grant to any one or more telegraph companies the exclusive right to use its roadway for telegraphic purposes.

But it is contended that the agreement of 1866 was authorized by the Idaho act of 1864.

That act, as we have said, authorized the several railroad companies named in the act of July 1, 1862, to enter into an "arrangement" with the "United States Telegraph Company" for the transfer of its telegraph line to the roadways of the railroad company, and declared that such transfer, when made, should, for all the purposes of the act of 1862, "be held and considered a fulfilment, on the part of said railroad companies, of the provisions of this act in regard to the construction of a telegraph line."

We have already determined that the Idaho act did not affect the power that Congress reserved, of adding to, altering, amending, or repealing the original and amendatory acts. It is now to be examined as to its bearing upon the validity of the agreement of October 1, 1866.

If the Western Union Telegraph Company became the successor in right and power of the United States Telegraph Company and entitled to make any arrangement with the railroad company that its predecessor could legally have made,—and such is the claim of the Western Union Telegraph Company,—the question nevertheless remains, whether the 4th section of the Idaho act authorized any "arrangement" to be made by the Union Pacific Railway Company, Eastern Division, with the United States Telegraph Company, in conflict with the previous act of July 24, 1866.

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This question is not, in our judgment, difficult of solution.

The purpose of the 4th section of the Idaho act is quite apparent. Its effect was, as we have heretofore said, to relieve each of the railroad companies named in the act of 1862 from 43] *any *present* obligation to construct a telegraph line on its roadway, by means of an "arrangement" with the United States Telegraph Company for the construction of such a line. But no arrangement could be legally made under that act which tended in any degree to defeat the great objects of the act of 1862, and the act amendatory thereof, of July 2, 1864, chap. 216. The act of 1862 did not authorize the railroad company to agree that it would not itself, at some future time, construct and operate a telegraph line for the use of the government and the people. Nor did it, in terms or by implication, repeal or modify the clause in that act by which Congress expressly reserved the power to add to, alter, amend, or repeal, the latter act, having due regard to the rights of the railway companies named in it. Certainly, it could never be held that a due regard to the rights of either the railroad company or of any corporation claiming under it required that the government, charged by the Constitution with the duty of regulating interstate commerce, should permit the railroad company receiving national aid to invest a corporation, not deriving its authority from the United States, with the exclusive right to enjoy its roadway—a national highway—for purposes of telegraphic communication between the states.

Even if the act of July 24, 1866, had never been passed, we ought not to construe the Idaho act as permitting the railway company to bind itself by agreement to give to one telegraph company a monopoly of the use of its roadway for telegraphic purposes. In none of the acts of Congress, having for their object the establishing of communication by railroad and telegraph between the Missouri river and the Pacific ocean, is there to be found anything indicating a purpose to allow the post roads of the United States, particularly those aided by the government, to fall, for all the purposes of telegraphic communication, under the exclusive control of one or more telegraph corporations. On the contrary, as early as the act of June 16, 1860, "to facilitate communication between the Atlantic and Pacific states by electric telegraph," it was declared that nothing in that act contained should confer "any exclusive right to construct a telegraph to 44] the Pacific, *or debar the government of the United States from granting from time to time similar franchises and privileges to other parties." 12 Stat. at L. 41, chap. 137.

If, however, it be contended that this is not the correct interpretation of the Idaho act, upon what ground can it be claimed that any arrangement could be made under the Idaho act, after the passage of the act of July 24, 1866, that was inconsistent with the latter act? Can it be said that, after the passage of the act of 1866, and while it was in force, a railway company, operating a post road of the United States, could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provisions of that act? These questions can be answered only in one way, namely, that every railroad company operating a post road of the United States over which commerce among the states is carried on, was inhibited, after the act of July 24, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its operation. The object of that act was, not only to promote and secure the interests of the government, but to obtain, for the benefit of the people of the entire country, every advantage, in the matter of communication by telegraph, which might come from competition between corporations of different states. It was very far from the intention of Congress, by any legislation, to so exert its power as to enable one telegraph corporation, Federal or state, to acquire exclusive rights over any post road, especially one for the construction of which the aid of the United States had been given, and the use of which was, to some extent, under the control of the national government.

We are consequently of opinion that the agreement of October 1, 1866, was, in its essential provisions, invalid and not binding upon the railway company.

In reference to the agreements of 1869 and 1871 between the Union Pacific Railroad Company and the Atlantic & Pacific Telegraph Company, but little need be said to show that they were void. By those agreements the former corporation demised and leased to the telegraph company, to whose rights, it may be assumed, the Western Union Telegraph Company succeeded, *all the telegraph lines, [45 wires, poles, instruments, offices, and other property appertaining to telegraph business, that were possessed by the railroad company. These agreements were annulled by the circuit court, and it was likewise so adjudged by the circuit court of appeals. The same conclusion had been previously announced by *Judge* McCrary in *Atlantic & P. Teleg. Co.* v. *Union P. R. Co.* 1 McCrary, 541, 547. That able judge well said: "I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating, and maintaining a line of telegraph for commercial and other purposes, and that this is in its nature a public duty. I am further of the opinion that, by the provisions of the contract of September 1, 1869, and of December 20, 1871, the railroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be 'the demise of their telegraph lines, property, and goodwill, and of the rights and privileges, in the manner hereinafter specified,' etc.; and the property demised by the railroad company is 'all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraph business.' The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimated, I do not think this latter

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clause makes the contract good. The railroad company was not at liberty to transfer to others those important duties and trusts which it, for a large consideration and for a great public purpose, had undertaken to perform. It certainly could not devest itself of these powers and duties, and devolve them upon the plaintiff, without express authority from Congress." Again: "But if the contracts in question are not *ultra vires* by reason of the transfer of property necessary to the performance, by the railroad company, of its public duties, they are 46]so because *they attempt to transfer certain franchises of the said company. The right to operate a telegraph line, and to fix and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by Congress upon the railroad company as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts, I am compelled to hold that this feature is alone sufficient to render them in excess of the corporate power of the company."

We now come to the important contract of July 1, 1881, between the Western Union Telegraph Company and the Union Pacific Railway Company. As that contract is too lengthy to be inserted at large in the body of this opinion, we have, in our statement of the case, given such of its provisions as appear to relate directly to the issues presented by the pleadings.

We have seen that the contract of July 1, 1881, was annulled by the original decree of the circuit court, but was upheld by the circuit court of appeals, except as to the 3d and 4th paragraphs, which were adjudged by that court to be null and void to the extent that they secured and granted, or were intended to secure or grant, to the Western Union Telegraph Company, any exclusive rights, privileges, or advantages whatsoever.

Much said in this opinion touching the agreements of 1866, 1869, and 1871, is applicable to that of 1881, and need not be here repeated. We have no difficulty in holding that the latter was invalid in the particulars named in the final decree of the circuit court of appeals. But that agreement is illegal, not simply to the extent that it assumes to give to the Western Union Telegraph Company exclusive rights and advantages in respect of the use of the way of the railroad company for telegraph business, but it is also illegal because, in effect, it transfers to the Western Union Telegraph Company the telegraphic franchise granted it by the government of the United States. The duty to maintain and operate a telegraph line between the points specified in the act of 1862 was committed by Congress to certain corporations which it named, and neither they, nor any 47]corporation into which they were *merged, could, without the consent of Congress, invest a state corporation with exclusive telegraphic privileges on the line of the roads it then owned or thereafter acquired. The United States was not bound to look to the Western Union Telegraph Company for the discharge of the duties, the performance of which, in consideration of the aid received from the government, the Union Pacific Railroad Company, and other named companies, undertook to discharge for the benefit of the United States and of the public. No agreement with the telegraph company, to which the assent of the government was not given, could take from the railroad company its right at any time to itself maintain and operate the telegraph line required by the act of 1862 for the use of the government and of the public, nor impair the power of Congress to require the performance by the railroad company itself of the duties imposed by that act. As to the object of the provisions of the agreement of 1881, the circuit court, speaking by *Mr. Justice* Brewer, properly said: "They mean that the telegraphic business and the telegraphic franchise, in the sense we have defined it, should be exercised by the Western Union Telegraph Company, and that no other company, railway or telegraph, should touch it. The purpose was—a purpose disclosed by every section and line of the contract—that the public and commercial use of the telegraph wires should belong to the Western Union Company, leaving to the railroad company only so much of the telegraph wires as was necessary for its own business." Again: "So it is that the lessons of experience support and establish the construction placed upon the contract of 1881, to the effect that the telegraphic franchise, as a franchise of independent, public, and commercial transportation, was intended to be and was transferred by the railway company to the Western Union Company, leaving only to the former so much use of telegraph wire as would facilitate and further its own railroad business."

That the purpose of the agreement of 1881 was to transfer to the Western Union Telegraph Company the telegraphic franchises granted by the United States was asserted by that company in a bill filed by it (a copy of which is made a part *of the present record)[48 to prevent the Union Pacific Railway Company from complying with the mandate of the act of August 7, 1888. In that bill it was claimed that the parties stipulated in the contract of 1881 that the telegraph company "might render to the government and to the public such telegraph service as by the law of its creation it was bound to perform." And the telegraph company stated, in the same bill, that it had come about under that agreement, and through the growth of the railroad business, that the railroad company had "no wires on which it can do a general telegraph business, all those devoted to its railroad business being overburdened therewith." Again, in the same bill: "The said wires used by the defendant in the operation of its road are not equal to its necessities in that behalf, and it is impossible for it to do any business for the public or other companies on said wires without seriously interfering with and impeding the operation of its engines, cars, and trains, and if it undertake to do so it will be under the necessity of using your orator's five wires, or some of them. Upon your orator's said wires is carried on almost the entire transcontinental business of the Union; nor can your orator submit to any interference therewith by the defendant or any other party without seriously impeding and disarranging that business to its great loss and

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the public inconvenience." In addition to this, it may be stated that the telegraph superintendent of the railway company testified in this case that it would not be practicable to operate the wires used by the railroad company "for general commercial business without seriously interfering with the railroad business, and the railroad company's wires would be inadequate to carry any additional business." This inquiry need not be further extended, except to observe that there would be no occasion to make the Western Union Telegraph Company a defendant in this suit, and it would not have any standing in court to complain of the act of August 7, 1888, if it did not claim that the construction, or the maintenance and operation by the railway company, through its own employees, of a distinct telegraph line on the route of its road, for the use of the government and of the public, was in violation of the contract it had made with the railroad company.

49] *The fundamental question, therefore, is whether such a contract was permitted by the acts of Congress defining the obligations of railroad companies that had accepted the bounty of the government. For the reasons we have given in the discussion of other parts of this case, we answer this question in the negative. Such a contract is not authorized by the 4th section of the Idaho act, or by the like section (19) of the act of 1862. The "arrangements" authorized by those acts were not such as to admit of a contract that would disable the railroad company from entering upon the construction and maintenance itself of a telegraph line for the accommodation of the government and of the public, or that would prevent the United States from requiring the railroad company to maintain and operate a telegraph line to be entirely controlled by itself, and which would be wholly independent of any telegraph line operated by corporations created under the laws of a state. And we may add what has been said in reference to the prior agreements of 1866, 1869, and 1871, namely, that no railroad company, operating a post road of the United States over which interstate commerce is carried on, can, consistently with the act of July 24, 1866, bind itself, by agreement, to exclude from its roadway any telegraph company incorporated under the laws of a state which accepts the provisions of that act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon.

On behalf of the telegraph company it is contended that it was beyond the power of Congress to so legislate as "to impair the contracts, first, that between the United States and the several companies mentioned in the act of 1862; and second, those between the railway company and this defendant." We perceive no ground on which this contention can properly rest. It has already been fully examined. As we have seen, Congress, in the act of 1862, expressly reserved the power, not only to alter, amend, or repeal that act, but to add to its provisions. To what has already been said as to the power of Congress under this reserved power, we may add that the object of such reservation is to enable the legislative de-
50] partment *to protect the public interests, and "to preserve to the state control over its contract with the corporators, which, without that provision, would be irrepealable and protected from any measure affecting its obligation." *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 454, 457, 458 [21: 204-206].

Another contention of the telegraph company is that for any failure or refusal by the railway company to comply with sections one and two of the act of August 7, 1888, the remedy of the United States is an action at law by mandamus, and that equity is without jurisdiction to enforce a compliance with those sections.

It cannot be doubted that the government could lawfully proceed by mandamus against the railway company for the purpose simply of compelling it to perform any duty imposed by its charter or by statute. But that remedy would not afford the United States the full relief to which it is entitled. Here are agreements between the railway company and the telegraph company that are wholly inconsistent with the present claims of the government. Until canceled—because inconsistent with the act of 1888, and prejudicial to the rights of the government and the public—by a decree to which the telegraph company is a party, those agreements constitute an obstacle in the way of the enforcement of that act, and the protection of those rights. In a mandamus proceeding by the government against the railway company, the telegraph company could not properly be made a defendant, and no judgment in mandamus, as between the United States and the railway company, would conclude the rights of the telegraph company. The United States is certainly entitled to the interposition of equity for the cancelation of the agreements under which the telegraph company asserts rights inconsistent with the act of 1862 and the acts amendatory thereof, as well as with the act of 1888. Jurisdiction in equity being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company, and the telegraph company which relate to the general subject of telegraphic communication between the *points named by Congress. Con-[51
sequently a decree canceling the agreements of 1866, 1869, 1871, and 1881, by reason of their being in the way of the full performance by the railway company of the duties imposed by the act of 1888, may also require the railway company to obey the directions of Congress as given in the last-named act.

Indeed, in a proceeding by mandamus instituted against the railway company alone, it might be objected that a court of competent jurisdiction, in a suit brought by the telegraph company against the railroad company, had enjoined the latter, as between it and the telegraph company, from disregarding the agreement of 1881. *Atlantic & P. Teleg. Co.* v. *Union P. R. Co.* 1 McCrary, 541; *Western U. Teleg. Co.* v. *Union P. R. Co.* 3 Fed. Rep. 423, 721. It is true that the United States, with leave of court, might have intervened in that suit. But it was not bound to do so. It was entitled to institute its own suit, and bring before the court both companies, to the end that its rights might be declared and enforced by a

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comprehensive decree against both defendants.

In *Boyce* v. *Grundy*, 28 U.S. 3 Pet. 210, 215 [7: 655, 657], this court said: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." The circumstances of each case must determine the application of the rule. *Watson* v. *Sutherland*, 72 U. S. 5 Wall. 74, 79 [18: 580, 582]. In *Oelrichs* v. *Spain*, 82 U. S. 15 Wall. 211, 228 [21: 43, 45], an objection was raised that the remedy at law was ample. The court, observing that the remedy at law was not as effectual as in equity, said, among other things, that a "direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation." The final order in a proceeding by mandamus against the railway company would not conclude the rights of the telegraph company. Nor would a suit in equity by the telegraph company against the railway company conclude the rights of the United States. But a suit in equity by the United States against both companies for the purpose of annulling the 52] *agreements under which the telegraph company claims rights adverse to the United States can embrace all the matters in controversy and authorize a comprehensive decree that will terminate all disputes among the parties as to such matters. *Coosaw Min. Co.* v. *South Carolina*, 144 U.S. 550, 567 [36: 537, 543].

These principles are abundantly sustained by the authorities. In 1 Pom. Eq. Jur. § 181, many adjudged cases are cited in support of the proposition that "if the controversy contains any equitable feature, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." This principle was applied in *Peck* v. *School Dist. No. 4 of Beloit*, 21 Wis. 516, 523. That was a suit to set aside a contract made by the officers of a municipality. The court held that the contract should be set aside, and the question arose, whether the decree might not go farther and prevent the collection of the taxes assessed and levied for the purposes of the contract adjudged to be illegal. It was held that as the taxes were levied in order to carry the illegal contract into effect, their collection could be stayed as a proper subsidiary ground of relief, upon the principle that the jurisdiction of the court having once rightfully attached, it should be made effectual for all the purposes of complete relief. "The court," it was said, "will not annul the contract and at the same time permit the officers of the district to collect the taxes to be afterwards recovered back by a multiplicity of suits at law."

We are of opinion that the circuit court properly adjudged that equity had jurisdiction to give full relief in respect of all matters in issue between the United States and the defendant companies.

We perceive no substantial error in the decree passed by the circuit court. There are some minor provisions in each *of the contracts [53 annulled by it which may not be regarded as in themselves beyond the power of the contracting parties, nor inconsistent either with the duties enjoined upon the railway company by the act of 1888 or with the rights of the United States. But they are of so little practical importance, and are so interwoven with, and so difficult to be separated from, the provisions found to be illegal and to stand in the way of the due execution of the act of Congress, that the circuit court properly adjudged that the contracts referred to should be set aside and annulled.

The decree of the circuit court of appeals of January 29, 1894, is reversed and set aside, and the decree of the circuit court of October 11, 1892, is affirmed.

It is further adjudged by this court that the circuit court make a supplemental decree, enlarging the period within which the defendants may make such arrangements, adjustments, and changes as shall become necessary by reason of the annulling of the contracts of Oct. 1, 1866, Sept. 1, 1869, Dec. 14, 1871, and July 1, 1881, and to carry out the provisions of the final decree of that court. *Reversed.*

Mr. Justice **Brewer** took no part in the hearing or decision of this case on the present appeal.

UNITED STATES, *Plff. in Err.*,
v.
WESTERN UNION TELEGRAPH CO. ET AL.

(See S. C. Reporter's ed. 53-70.)

Presumption—telegraph company—notice.

1. No presumption exists that a telegraph company sending messages for the government sent them over a line operated by it but constructed by a railroad company over its route, rather than over a line owned by the telegraph company over the same route.
2. In the absence of directions from the government a telegraph company may send messages on behalf of the government over its own line at the rates established by the Postmaster General, rather than over a line constructed by a railroad company with government aid.
3. A telegraph company is bound to take notice that a telegraph line operated by it was constructed by a railroad company with government aid, and that its earnings on account of public business were dedicated by Congress to specific purposes, and could be retained by the government.

[No. 19.]

Argued December 18, 1894. Decided November 18, 1895.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of defendants, the Western Union Telegraph Company *et al.*, in an action brought by the United States to recover the moneys paid to said company on account of telegraph mes-

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sages transmitted for the government after July 1, 1881, over telegraph lines operated over the route of the Union Pacific Railway. *Affirmed.*

The facts are stated in the opinion.

Mr. **Lawrence Maxwell, *Jr.*,** Solicitor General, for plaintiff in error.

Mr. **Rush Taggart** for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by the United States to recover from the defendants in error the sum of $12,495.62, which amount, it is alleged, was paid to the Western Union Telegraph Company, on account of telegraph messages transmitted for the government, after July 1, 1881, over telegraph lines operated by that company on and over the route of the Union Pacific Railway, and was wrongfully divided between the two defendants in disregard of the rights of the United States.

The general ground upon which the government rests this claim is that the sums paid by it on account of such messages were set apart for specific purposes by the acts of Congress under which the Union Pacific Railroad Company, the predecessor of the Union Pacific Railway Company, received the aid of the United States for the construction and maintenance of its railroad and telegraph lines.

Pursuant to the direction of the circuit court a verdict was returned for the defendants, and judgment was rendered in their favor.

The relations between the United States and the defendant company are fully shown in the opinion just rendered in the case of *United States* v. *Union P. R. Co.* 160 U. S. 1 [*ante*, 319]. In order, however, that the issue in the present case may be readily understood without frequently recurring to that opinion, it is necessary to restate some of the facts disclosed in the former case.

The Union Pacific Railroad Company was incorporated by the act of Congress of July 1, [55] 1862, passed to aid in the *construction of a railroad and telegraph line between the Missouri river and the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes. 12 Stat. at L. 489, chap. 120.

That act granted to the company a right of way through the public domain for the construction of a railroad and telegraph, and in aid of such construction granted also every alternate odd-numbered section of public land, not mineral, to the amount of five alternate sections per mile, within the limits of ten miles on each side of the road, and which had not been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached. §§ 1-4.

For the purposes mentioned, the Secretary of the Treasury was required, upon the written certificate, by commissioners appointed by the President, of the completion and equipment of each 40 consecutive miles of railroad and telegraph, as prescribed by the act, to issue to the company bonds of the United States for a named amount. And to secure the repayment to the United States of any bonds so issued and delivered, with the interest thereon paid by the United States, such issue and delivery were declared to constitute, *ipso facto*, a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind belonging to the company. § 5.

By the 6th section of that act it was provided that "the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government whenever required to do so by any department thereof, and that the government shall, at all times, have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment *of said bonds and [56] interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least 5 per centum of the net earnings of said road shall also be annually applied to the payment thereof."

The 19th section was in these words: "The several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of said railroad companies named herein."

This act also provided that the better to accomplish its object, "namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." § 18.

This act was amended by an act approved July 2, 1864. 13 Stat. at L. 356, chap. 216.

The latter act contained additional grants of lands and *bonds, and by its 5th section pro- [57]

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vided that only "one half" of the compensation for services rendered for the government by the companies named in the act "shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads." By the 15th section of that act the several companies authorized to construct the roads named were required "to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others," etc. 13 Stat. at L. 356, 358, 362.

By an act approved May 7, 1878, known as the Thurman act (20 Stat. at L. 56, chap. 96, § 2), it was provided that "the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the government shall be retained by the United States, one half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking fund hereinafter provided, for the uses therein mentioned." The same act made it the duty of the Attorney General of the United States to enforce, by proper proceeding against the said several railroad companies, respectively or jointly, or against either of them, and others, "all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceeding already commenced, or that may be hereafter commenced, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the court to determine the very right of the matter without regard to 58]matters of form, *joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to." § 10.

In 1865 the Union Pacific Railroad Company began to construct its road, and in 1869 completed its main line from Omaha to Ogden. It also constructed a separate telegraph line on the *north* side of its right of way from a point at or near Omaha to Ogden.

The Leavenworth, Pawnee, & Western Railway Company, a corporation of Kansas, referred to in the 9th section of the act of 1862, and in the 12th section of the act of 1864, chap. 216,—and which at the date of the latter act was known as the Union Pacific Railway Company, Eastern Division (12 Stat. at L. 493; 13 Stat. at L. 361),—began in 1865 to construct, and in 1870 completed, a railroad from Kansas City to Denver, connecting at the latter point under the authority of an act of Congress (15 Stat. at L. 324, chap. 127) with the Denver Pacific Railroad & Telegraph Company, a corporation of Colorado, whose road extended from Denver to Cheyenne.

In 1880, these three companies—the Union Pacific Railway Company, Eastern Division, having previously changed its name to that of Kansas Pacific Railway Company—consolidated their lines, property, and franchises, and became the Union Pacific Railway Company, a defendant in this action.

As operated at the time this action was brought, the Union Pacific Railway extended from a point at or near Council Bluffs to Ogden, and from Kansas City, by the way of Denver, to Cheyenne.

The entire line from a point at or near Omaha to Ogden, and the line from Kansas City to Boaz, between Kansas City and Denver, was aided by the United States by grants of lands and by bonds; the line from Boaz to Denver, and from Denver to Cheyenne, by grants of land alone.

The United States has never been reimbursed in full for the interest paid on these bonds, and if, in this action, the government should recover the whole sum claimed by it, a large deficit would still remain over and above all payments made or credits given.

*On the 16th day of June, 1860, Congress[59 passed an act "to facilitate communication between the Atlantic and Pacific states by electric telegraph." 12 Stat. at L. 41, chap. 137.

At the date of that act, the Western Union Telegraph Company owned or operated lines extending eastward and southward from St. Joseph to Washington, New Orleans, New York, and other principal cities of the United States.

Under the act of 1860, the Pacific Telegraph Company and the California State Telegraph Company began, in 1861, to construct, and prior to 1863 had completed and put in operation, a telegraph line from St. Joseph, Missouri, by the way of Omaha and Salt Lake City, to San Francisco, upon substantially the route afterwards adopted by the Union Pacific Railroad Company for its road between Omaha and Ogden.

Proceeding under the 19th section of the act of July 1, 1862, above quoted, the Pacific Telegraph Company and the California State Telegraph Company transferred their lines from their prior location and reconstructed them upon the *south* side of the right of way of the Union Pacific Railroad Company, as rapidly as the latter constructed its road between Omaha and Ogden, and those companies or the Western Union Telegraph Company have ever since operated and maintained those lines. But this transfer was made without any arrangement with the railroad company, but under that provision of the act of 1862 declaring that, in case of disagreement, the telegraph companies "are authorized to remove their line of telegraph along and upon the line" of the railroad, without prejudice to the rights of the railroad companies named in that act. § 19.

In 1864 the Pacific Telegraph Company was consolidated with, and in 1867 the California State Telegraph Company was leased to, the Western Union Telegraph Company.

On the 1st day of September, 1869, the Union Pacific Railroad Company leased its line of

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telegraph to the Atlantic & Pacific Telegraph Company by an agreement of that date, which was supplemented by an agreement entered into on the 20th day of December, 1871. Under those agreements, which were examined in the 60] case of *United States* v. *Union* *P. R. Co. 160 U. S. 1 [*ante*, 319], the Atlantic & Pacific Telegraph Company operated the railroad telegraph lines until about February 1, 1881, when it was merged into the Western Union Telegraph Company by consolidation.

Prior to July 2, 1864, the United States Telegraph Company began the construction of a telegraph line from Wyandotte, Kansas, westward, and was constructing it at the time the Leavenworth, Pawnee, & Western Railroad Company began to build its road; and, under the act of July 2, 1864, known as the Idaho act, entitled "An Act for Increased Facilities for Telegraph Communication between the Atlantic and Pacific States and the Territory of Idaho" (13 Stat. at L. 373, chap. 220), it removed its constructed line and located the same upon the right of way of the Leavenworth, Pawnee, & Western Railroad Company, and continued to build and operate its line as the construction of that road progressed.

This Idaho act authorized the several railroad companies named in the act of July 1, 1862, to enter into arrangements with the United States Telegraph Company, so that the line of telegraph between the Missouri river and San Francisco could be made upon and along the line of said railroad and branches as fast as that road and branches were built. If such arrangements were entered into, and the transfer of the telegraph line was made, in accordance therewith, to the line of the railroads and branches, such transfer should, for all purposes of the act referred to, be held and considered a fulfilment on the part of the railroad companies of the provisions of the act in regard to the construction of a telegraph line; and in case of disagreement the telegraph company was authorized to remove its line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of the railroad companies. § 4.

On the 27th day of February, 1866, the United States Telegraph Company transferred its telegraph lines, and the right to extend the same, to the Western Union Telegraph Company, and the latter built a telegraph line along the railroad last named, as fast as that road was constructed, and on October 1, 1866, the latter 61] company, and the railroad company *under the name of the Union Pacific Railway Company, Eastern Division, entered into an agreement pursuant to which that telegraph line was completed to Denver.

The Leavenworth, Pawnee, & Western Railroad Company constructed no line of telegraph along its road, but received the compensation prescribed by the several acts of Congress for the full performance of the conditions of those acts, namely, land and bonds for the road from Kansas City to Boaz, and lands for the road from Boaz to Denver.

In title 65 of the Revised Statutes will be found substantially all the provisions of the act of July 24, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes" (14 Stat. at L. 221, chap. 230), as well as some of the provisions of other acts relating to the same general subject. Those provisions are as follows:

"§ 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

"§ 5264. Any telegraph company organized under the laws of any state shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to pre emption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other."

*Section 5265 forbids the transfer by any [62 company to any other corporation, association, or person of the rights granted by the act of July 24, 1866, or by the above title.

"§ 5266. Telegrams between the several departments of the government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain, shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several departments of the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

"§ 5267. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July 24, 1866, or under this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected."

Section 5268 provides that "before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law."

On the 7th of June, 1867, the Western Union Telegraph Company formally accepted the provisions of the act of July 24, 1866, and since about January 1, 1873, the compensation

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it was entitled to receive for sending messages for the government has been fixed by the Postmaster General.

The Union Pacific Railway Company never accepted the provisions of the act of July 24, 1866, as to its telegraph line.

On the 1st day of July, 1881, the Western Union Telegraph Company and the Union Pacific Railway Company entered into an agreement, under which the former operated all the telegraph lines named in it, and the provisions of which have been, and at the date this action was brought were being, carried out by both parties.

63] *The preamble of that agreement recites that it was made "for the purpose of providing telegraphic facilities for the parties thereto, and of maintaining and operating the lines of telegraph along the railway company's railroads in the most economical manner in the interest of both parties and for the purpose of fulfilling the obligations of the railway company to the government of the United States and the public in respect to the telegraphic service required by the act of Congress of July 1, 1862, and the amendments thereto."

All the telegraph lines and wires covered by the agreement, belonging to or used by either party, were, for the purposes of the contract, to "form part of the general system of the telegraph company;" and the railway company was to be protected by the telegraph company from the payment of all taxes levied and assessed upon the telegraph property belonging to either party.

This agreement by its terms extended to all railroads and branches or extensions then or thereafter owned or controlled by the railroad company, except to railroads that might be subsequently acquired on which the telegraph company already had a line of operation; and to such roads the agreement was not to apply, except by mutual consent of the parties.

The third paragraph of this agreement provided that "the railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, upon, and under the line, lands, and bridges of the railway company and any extension and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires, or either of them, or underground or other system of communication for commercial or public uses or business, with the right to put up from time to time or cause to be put up or constructed, under the provision of this agreement, such additional wires on its own or the railway company's poles or such additional lines of poles and wires, or either, as well on its bridges as on its right of way, or to construct such underground lines as the telegraph company may deem expedient, doing as little damage and causing as little inconvenience to the railway 64] company as is *practicable, and the railway company will not transport men or material for the construction or operation of a line of poles and wire or wires or underground or other system of communication in competition with the lines of the telegraph company party hereto, except at and for the railway company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at any other than regular stations."

By article four of the agreement it was provided that the employees of the railway company "shall transmit over the lines owned, controlled, or operated by the parties hereto, all commercial telegraph business offered at the railway company's offices, and shall account to the telegraph company exclusively for all of such business and the receipts thereon, as provided herein;" that "the telegraph company shall have the exclusive right to the occupancy of the railway company's depots or station houses for commercial or public telegraph purposes as against any other telegraph company;" and "that if any person or party, or any officer of the government, tender a message for transmission over the railway telegraph lines between Council Bluffs and Ogden at any railway telegraph station between those points, and require that the service be rendered by the railway company, the operator to whom the same is tendered shall receive and forward the same accordingly, at rates to be fixed by the railway company, to the point of destination if not beyond its own lines. . . . *Provided, however*, That the local receipts of the railway company on such message shall be divided between the parties hereto in the same manner and subject to the same conditions as provided in the 10th clause of this agreement." The 10th clause provided that "at all telegraph stations of the railway company its employees shall receive, transmit, and deliver such commercial or public messages as may be offered, and shall render to the telegraph company monthly statements of such business, and full accounts of all receipts therefrom, and the railway company shall cause all of such receipts to be paid over to the telegraph company monthly;" and the telegraph *company agreed "to return to [65 the railway company monthly one half of the cash receipts at telegraph stations maintained and operated by and at the expense of the railway company." The telegraph company agreed to furnish at its own expense all blanks and stationery for commercial or public telegraph business, and all instruments and main local batteries and battery material for the operation of its own and the railway company's wires and offices. It is also covenanted to save the railway company harmless and indemnify it against loss or damage from neglect or failure in the transmission or delivery of messages "for any person doing business with said telegraph company, or on account of any other public or commercial telegraph business" for which the railway company was to account.

No record was kept of business done under this agreement of 1881, and the parties have stipulated that "it is now impossible to prove over what particular wire or wires the messages set out in the plaintiff's bill of particulars were actually transmitted, but a part were sent over what, prior to 1881, were the wires of the railroad company, and the balance over the wires owned by the telegraph company."

Since the contract of 1881, the telegraph company and the railway company have not maintained distinct offices or employed different sets of telegraph operators, except at some of the larger towns and cities, where the West-

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ern Union Telegraph Company has, in addition, established separate offices for the transaction of commercial business away from the line of the railway, but the offices have been in common and the same set of operators have done the work required by both the telegraph company and the railway company.

In the agreed statement of facts it appears that "the amount of messages set out in the plaintiff's bill of particulars correctly states the date of each message therein set forth; the sender of the same, and from what point to what point the same was transmitted by the Western Union Telegraph Company; the amount collected by the Western Union Telegraph Company for the transmission of the same; the proportionate amount of the whole sum [66] thus paid to the Western Union *Telegraph Company which was for the bonded portion of the telegraph lines along the railways of the Union Pacific Railway Company, such sum being such proportionate amount of the whole amount paid as the distance along the bonded portion of the telegraph along said line or lines of railway bears to the whole distance the message was transmitted from the point of origin to the point of destination; that the compensation for each of the messages was computed and paid for as one entire service and at the then ruling rate for such entire distance fixed by the Postmaster General of the United States, in accordance with U. S. Rev. Stat. § 5266; all of said messages were delivered to the Western Union Telegraph Company by the agent or officer of the government sending the same, written upon the Western Union Telegraph Company's blanks, and directed to the receiver of such message at the point of destination and without any direction to transmit the same over the bonded portion of the line of telegraph of the Union Pacific Railway Company for the whole or any part of the distance, but it was known to the Western Union Telegraph Company, from the character of the said messages, that they were from one officer or agent of the government to another. That at all the times the said messages were thus transmitted by the Western Union Telegraph Company at the rates annually fixed by the Postmaster General of the United States, the ordinary rates, known as commercial rates, charged to other persons for transmitting like messages for the same distances were very much in excess of the rates fixed by the Postmaster General; that the ordinary or commercial rate upon the bonded portions of the lines of telegraph situated along the lines of railway of the Union Pacific Railway Company was likewise very much in excess of the rates fixed by the Postmaster General of the United States during the period covered by the account in this action. That as to a large number of messages included in said bill of particulars and known as Signal Service reports, the same were transmitted under special arrangement and differently from other classes of messages, upon what were known as 'circuits,' with 'drops' at all places receiving the said Signal [67] Service reports. The *method of doing said business was as follows: As many places as the Chief Signal Service Officer desired should receive the said Signal Service report were connected upon one continuous line of telegraph called a 'circuit,' and the said reports were then sent over this wire, and at each point where said reports were received an operator took the said reports; each of said points thus receiving the report being called a 'drop,' and all of said points receiving the said reports at the same time; that by reason of this method of sending reports, a specially low rate was made therefor, the said rate being fixed by the Postmaster General in the circulars issued annually, and upon the basis of amount of matter and number of drops, and extent of circuits. That the circuits for the transmission of said Signal Service reports were made up between the points named in the account in this action, and included intermediate points or drops in each case; that the amount sought to be recovered in this action is such proportionate amount of the whole amount paid as the distance along the bonded portion of the telegraph lines upon the said line or lines of railway bears to the whole distance over which such messages or reports were sent."

Such is the case made by the record now before the court.

It is clear, under the acts of 1862, 1864, and 1878, that the government was entitled to retain, and to apply as directed by Congress, all sums due on account of services rendered in its behalf, by any railroad company named in those acts, that had received the aid of the United States in the construction of its road and telegraph lines. All such sums were set apart by Congress for the payment of the principal and interest of any bonds delivered by the United States to such company. The government could therefore have retained and applied, as in the acts of Congress required, all sums due from it on account of messages sent or received by it over the telegraph line *constructed by the Union Pacific Railroad Company. Union P. R. Co. v. United States ("Sinking Fund Cases")* 99 U. S. 700 [25: 496]. No agreement between that company and the Western Union Telegraph Company, transferring to the latter the control of the *telegraph line constructed by the rail- [68] road company, could affect the rights of the United States.

If it distinctly appeared that the amount sued for was only the aggregate of sums originally due from the United States on account of public messages passing over the telegraph lines constructed by the Union Pacific Railroad Company, we should have no difficulty in sustaining the present claim of the government. But no such state of case is presented by the record. It does not even appear that the government, prior to the period covering the account in suit, requested the telegraph company to so keep its books as to show what messages sent or received on public business were transmitted over the telegraph line constructed by the railroad company on its route. Nor does it appear that any such account was kept by the government.

It is agreed to be now impossible to show over what particular wire or wires—whether those belonging to the Western Union Telegraph Company or those belonging to the Union Pacific Railway Company—the messages set out in the government's bill of particulars were, in fact, transmitted. Nothing

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more definite appears than that "a part"—how much cannot be now known—were sent over the wires originally established by the railroad company, and "the balance"—how much cannot be shown—over the wires owned by the telegraph company.

It is because of the impossibility of now distinguishing between these two classes of messages, that this action proceeds, and can only proceed upon the theory that the length which the telegraph line, constructed *by the railroad company*, bears to the entire distance, in whatever part of the United States, from the point of origin of a telegraph message to the point of its destination, measures the proportion which might have been rightfully retained by the government of the entire sum earned by the telegraph company for transmitting and delivering such messages.

According to this theory, the presumption must be indulged that every message delivered to the telegraph company for transmission, and which passed over the whole or some part of the 69] *general route of the Union Pacific Railway, passed over the telegraph line constructed on the north side of that route by the railroad company, but operated by the telegraph company, rather than over the line, on the south side of that route, owned by the telegraph company. No such presumption can be justified upon any principle of right or justice.

The telegraph company had a line of its own on the right of way of the railway company, with the consent of the United States. It accepted the provisions of the act of Congress giving the Postmaster General authority to fix the rates to be charged for any business transacted for the government. But it neither expressly nor impliedly agreed that, when no directions in the matter were given by the representative of the government, it would transmit all messages, on behalf of the government, from or to points on either side of the route of the Union Pacific Railway, over the telegraph line constructed by the railroad company, rather than over the line owned by itself. In the absence of such directions, the telegraph company was at liberty to send such messages over its own line at the rates established by the Postmaster General. If it did so, the government was probably benefited rather than injured: for the rates fixed by the Postmaster General were less than the ordinary rates, known as commercial rates, charged against private persons, and which the railway company, by its charter, was entitled to charge for public messages sent over its telegraph line. If, in the absence of any direction not to do so, the telegraph company actually used, for the purpose of transmitting a public message, the line constructed by the railroad company, there can be no doubt that the sum therefor could be retained by the United States and applied as indicated in the act of 1878; for the telegraph company, notwithstanding the agreement of July 1, 1881, would be bound to take notice of the fact that that telegraph line was constructed with the aid of the government, and that *its* earnings on account of public business were dedicated by Congress to specific purposes.

It results that although the United States was entitled to retain and apply, as directed by Congress, all sums due from *the govern- [70 ment on account of the use by the telegraph company, for public business, of the telegraph line constructed by the railroad company, the entire absence of proof as to the extent to which that line was, in fact, so used, so renders it impossible to ascertain the amount improperly paid to, and without right retained by, the telegraph company, and subsequently divided between it and the railroad company. Upon this ground, we adjudge that the court below did not err in directing a verdict for the defendants.

The judgment is affirmed.

CRAWFORD GOLDSBY, *alias* CHEROKEE BILL, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 70-77.)

Application for continuance—summoning witnesses at expense of government—evidence in criminal case—impeaching witness—testimony in rebuttal—notice of witnesses—alibi—charge to jury.

1. The action of a trial court upon an application for continuance is a matter of discretion not subject to review by this court, unless such discretion has been abused.
2. The right to summon witnesses at the expense of the government in a criminal case is by the statute (U. S. Rev. Stat. § 858) left to the discretion of the trial court: and the exercise of such discretion is not reviewable in this court.
3. A watch charm taken from a house when a robbery and murder were committed therein, and given to a witness by one whom the testimony tended to show participated in the robbery, in the presence of the accused, who at that time talked of the robbery and told the amount he got by it and that he had shot a fellow, is admissible in evidence against the accused on his trial for the murder.
4. A witness cannot be impeached by proving statements which he testifies he does not recollect hearing, made in his presence by another person not a witness in the case.
5. The judicial discretion of the trial court in allowing testimony in rebuttal cannot be reviewed in this court, in the absence of gross abuse.
6. The absence of the notice required by U. S. Rev. Stat. § 1033, of the witnesses to be produced on a criminal trial, does not disqualify a witness called to testify to matters in rebuttal. The statute does not apply to rebuttal witnesses.
7. To rebut the testimony that the accused was at a given time many miles from the place of the murder, and that he could not have reached this point then if he was present at the killing, by any more direct route than the public road, because the country was covered with wire fences,

NOTE.—*As to evidence of contradictory statements made by witnesses to impeach; in regard to what facts inquired of on cross-examination the witness may be contradicted,*—see note to Ellicott v. Pearl, 9: 475.

As to competency of witnesses in United States courts in civil cases; how far governed by state laws,—see Vance v. Campbell, 17: 168.

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testimony that he was in possession of a wire cutter is admissible.

8. Where no request is made for specific charges as to the weight of the testimony as to an alibi, the omission of the court to give them is not error.

[No. 620.]

Submitted October 21, 1895. Decided December 2, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting Crawford Goldsby, *alias* Cherokee Bill, of the murder of Ernest Melton. *Affirmed.*

Statement by *Mr. Justice* **White:**

The plaintiff was indicted on the 8th of Feb-
71]ruary, 1895, *for the murder of Ernest Melton, a white man and not an Indian. The crime was charged to have been committed at the "Cherokee Nation in the Indian country on the 18th day of November, 1894." Prior to empaneling the jury on the 23d of February, 1895, the accused filed two affidavits for continuance until the next term of court: The first, filed on the 12th of February, 1895, based on the ground that for some time prior to the finding of the indictment the defendant had been in jail, was sick, and unable properly to prepare his defense, and that he was informed if further time were given him there were witnesses, whose names were not disclosed in the application, who could be produced to establish that he was not guilty as charged. This was overruled. The second was filed on the 22d day of February, upon the ground that four witnesses, whom the court had allowed to be summoned at government expense, were not in attendance, and that there were others, whose names were given, who could prove his innocence, and who could be produced if the case were continued until the next term of court; the affidavit made no statement that the four witnesses had been actually found at the places indicated, and gave no reason for their nonattendance, and asked no compulsory process to secure it.

Before the trial the accused filed three requests for leave to summon a number of witnesses at government expense. The first was made on the 12th of February, and asked for twenty-five; the affidavit made by the accused gave the names of the witnesses and the substance of what was expected to be proved by them. The court allowed fifteen. Of the ten witnesses disallowed, two were government witnesses, and were already summoned; seven were the wives of witnesses whom the court ordered summoned, the affidavit stating that the husband and wife were relied on to prove the same fact; the other witness disallowed, the affidavit disclosed, was also relied on simply to corroborate the testimony of some of the witnesses who were allowed. The second request was made on the 16th of February, asking for six witnesses, all of whom were ordered to be summoned. The third request was made on the 19th of February for two additional witnesses, one Harris and wife.
72] *This application was refused, both being government witnesses.

On the trial the uncontradicted testimony on behalf of the government was that at about noon, on the day stated, two men robbed a store at a town in the Indian territory, and that during the course of the robbery the murder was committed by one of those engaged therein. The testimony for the prosecution tended to identify the accused, not only as having been one of the robbers, but also as being the one by whom the murder was committed. The testimony for the defense tended to disprove that of the government, which identified the accused, and tended, moreover, by proof of an alibi, to demonstrate the impossibility of the offense having been committed by him. There was a verdict of guilty as charged. The defendant brings the case by error here.

Mr. **Wm. M. Cravens** for plaintiff in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

There are fourteen assignments of error. Two address themselves to the refusal of the court to grant the applications for continuance; three to the action of the court in denying the request to summon certain witnesses at government expense; four relate to rulings of the court, admitting or rejecting testimony; and, finally, five to errors asserted to have been committed by the court in its charge to the jury. We will consider these various matters under their respective headings.

In a recent case we said: "That the action of a trial court upon an application for continuance is purely a matter of discretion not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." *Isaacs* v. *United States*, 159 U. S. 487 [*ante*, 229], and authorities there cited. We can see nothing in the action on the applications for continuance *which we have re- [73
cited in the statement of facts, to take it out of the control of this rule. The contention at bar that because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement demonstrates its error.

There was likewise no error in the action of the court in relation to the various requests to summon witnesses at government expense; on the contrary, the fullest latitude was allowed the accused. Were it otherwise, the right to summon witnesses at the expense of the government is by the statute (Rev. Stat. § 856) left to the discretion of the trial court, and the exercise of such discretion is not reviewable here. *Crumpton* v. *United States*, 138 U. S. 361, 364 [84: 958, 959].

There was proof showing that at the time of the robbery a watch charm had been taken by the accused from one of the persons present in the house which was robbed. This charm was produced by a witness for the prosecution, who testified that it had been given him by one Verdigris Kid, who, the testimony tended to show, had participated in the robbery; that this giving of the charm to the witness had taken place in the presence of the accused;

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that, at the time it was given, the fact of the robbery was talked of by the accused, he saying "that he had made a little hold up and got about $164, as well as I remember, and that he had shot a fellow, I believe." To the introduction of the watch charm objection was made. We think it was clearly admissible and came directly under the rule announced in *Moore* v. *United States*, 150 U. S. 61 [37:998]. John Schufeldt, the son of the man whose store was robbed, in his testimony on behalf of the government, identified the accused, not only as one of the robbers, but also as the one by whom the murder was committed. He was asked, on cross examination, whether he had heard his father, in the presence of a Mr. John Rose, say that the robbers were one an Indian and the other a white man. He answered that he did not recollect hearing him make such a statement. On the opening of the defendant's case, Schufeldt was recalled for further cross-examination, and the question was 74]again asked *him, he replying to the same effect, thereupon the defense put Rose upon the stand to testify to the conversation had by him with the father of Schufeldt in his (John Schufeldt's) presence, the father not being a witness in the cause. On objection the testimony was excluded on the ground that, whilst it would be competent if the proper foundation had been laid to impeach the witness, by proving statements made by him, it was incompetent to affect his credibility by proving statements made by another person, not a witness in the case. The ruling was manifestly correct.

The government called a witness in rebuttal, who was examined as to the presence of the defendant at a particular place, at a particular time, to rebut testimony which had been offered by the defendant to prove the alibi upon which he relied. This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was, and allowed the witness to testify. It was obviously rebuttal testimony; however, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here. *Wood* v. *United States*, 41 U. S. 16 Pet. 342, 361 [10: 987, 994]; *Johnston* v. *Jones*, 66 U. S. 1 Black, 209, 227 [17: 117, 122]; *Com.* v. *Moulton*, 4 Gray, 39; *Com.* v. *Dam*, 107 Mass. 210; *Com.* v. *Meaney*, 151 Mass. 55; *Gaines* v. *Com.* 50 Pa. 319; *Leighton* v. *People*, 88 N. Y. 117; *People* v. *Wilson*, 55 Mich. 508, 515; *Webb* v. *State*, 29 Ohio St. 351; Whart. Crim. Pl. & Pr. § 566; 1 Thomp. Trials, § 346, and authorities there cited.

During the course of defendant's evidence, and before he had closed his case, testimony was elicited on the subject of the defendant's hat, the purpose of which tended to disprove some of the identifying evidence given on the opening of the case. When this was adduced the prosecuting officer notified the defense that he would be obliged to call in rebuttal one Heck Thomas.

At a subsequent period in the trial Heck Thomas was sworn. As he was about to testify, objection was made as follows:

75] *"Counsel for defendant: We were going to object to Mr. Thomas being sworn. We now object to him being examined as a witness, on the ground that under the statute the defendant is required to have forty-eight hours' notice of witnesses to be used by the government, and we have had no notice of an intention to use Mr. Thomas as a witness.

"The Court: The court has always held if it is in rebuttal it is absolutely impossible to give the defendant notice of the witness. If that is the rule, that we have to give forty-eight hours' notice to the defendant of witnesses to be used in rebuttal, it would simply amount to a defeat of justice and a defeat of a trial altogether. The reason of the rule is very manifest, but when it comes to facts that are purely in rebuttal no notice can be given because it is impossible.

"Counsel for defendant: Of course I understand the position of the court, but we simply want to discharge what we thought our duty in this matter, and we except to any statement of what the witness will prove, and we except to the use of the witness. We do not think it is competent either in chief or rebuttal, and therefore we waive an exception to the whole pleading.

"The Assistant District Attorney: The facts I want to establish by Mr. Thomas are about these: That he, in attempting to capture the defendant, had a fight with him on the 16th of November. A witness for the defendant was on the stand, and the court remembers what he says about the time he saw the defendant, a week after the Frank Daniels fight. We propose to show the date of that fight, which will be the 16th of November, and also as to the kind of hat the defendant was wearing, and that he had at that time a wire cutter in his possession.

"Counsel for defendant: The wire cutter part would certainly not be rebuttal.

"The Assistant District Attorney: Yes, it is, because they have introduced evidence to show that this country was covered with wire fences."

Conceding that the facts as to which the witness was called to testify were matters of rebuttal, the absence of the notice *required [76 (Rev. Stat. § 1033) did not disqualify him. The provision of the statute is that "when any person is indicted for treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, . . . shall be delivered to him at least three entire days before he is tried for the same." The next sentence in the section makes the foregoing applicable to capital cases, but reduces the time to two entire days before the trial. The words "for proving the indictment," and the connection in which they are used, clearly refer to the witnesses relied upon by the prosecution to establish the charge made by the indictment. They do not extend to such witnesses as may be rendered necessary for rebuttal purposes resulting from the testimony introduced by the accused in his defense. Indeed, that they do not apply to rebuttal is obvious from the very nature of things, for if they did, as was well said by the trial judge, it would be impossible to conduct any trial. Upon state statutes containing analogous provisions the authorities are free from

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doubt. *State* v. *Gillick*, 10 Iowa, 98; *State* v. *Ruthven*, 58 Iowa, 121; *State* v. *Huckins*, 23 Neb. 309; *Gates* v. *People*, 14 Ill. 433; *Logg* v. *People*, 92 Ill. 598; *State* v. *Cook*, 30 Kan. 82; *Hill* v. *People*, 26 Mich. 496.

That the testimony as to the hat, sought to be elicited from the witness Thomas, was purely rebuttal, is equally clear. This is also the case with regard to the testimony as to the wire cutter. The defense in its attempt to make out the alibi introduced testimony tending to show that the defendant at a given time was many miles from the place of the murder, and that by the public road he could not have had time to reach this point, and have been present at the killing. In order to prove that he could not have reached there by any other more direct route than the public road, one of his witnesses had testified that the country was covered with wire fences. It was competent to show in rebuttal of this statement that the accused was in possession of a wire cutter, by which the jury could deduce that it was possible for him to travel across the country by cutting the fences. Of course the weight to be 77]*attached to the proof was a matter for the jury, but it was clearly rebuttal testimony, and its admissibility as such is covered by the ruling in *Moore* v. *United States*, 150 U. S. 61 [37:998].

The four errors assigned as to the charge of the court do not complain of the charge intrinsically, but are based upon the assumption that, although correct, it was misleading and tended to cause the jury to disregard the testimony offered by the defendant to establish an alibi. But the charge in substance instructed the jury to consider all the evidence and all the circumstances of the case, and if a reasonable doubt existed to acquit. If the accused wished specific charges as to the weight in law to be attached to testimony introduced to establish an alibi, it was his privilege to request the court to give them. No such request was made, and therefore the assignments of error are without merit. *Texas & P. R. Co.* v. *Volk*, 151 U. S. 73, 78 [38: 78, 80].

Affirmed.

WASHINGTON & IDAHO RAILROAD COMPANY, *Plff. in Err.*,
v.
CŒUR D' ALENE RAILWAY & NAVIGATION COMPANY and NORTHERN PACIFIC RAILROAD COMPANY (No. 1).

(See S. C. Reporter's ed. 77-101.)

Jurisdiction of circuit court—Federal corporation—party to the suit—mistake in map—survey of railroad location—equitable construction.

1. The United States circuit court for the district of Idaho had jurisdiction, under the act of July 3, 1890, of an action pending in the district court of Idaho territory when that territory became a state, between a corporation of Washington territory and a corporation of Montana territory, and removed to the former court after the two last-named territories had become states, by reason of such diversity of citizenship.
2. The fact that a corporation created by the laws of the United States is a party to an action gives jurisdiction to the United States circuit court on the ground that there is a Federal question involved.
3. Where a cause has been removed from a state court to a Federal court on the ground of diverse citizenship of the parties and that one of them is a Federal corporation, the fact that such party subsequently ceased to take an active part in the case does not deprive the Federal court of jurisdiction.
4. In case of conflicting claims to public lands by two railroad companies, one of them cannot take advantage of a mistake in a map, by which it was not prejudiced.
5. A survey of property to be taken for railroad purposes, made by the projectors of a railroad company before its incorporation, gives it no right to the location as against another company, under the act of March 3, 1875.
6. When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor.

[No. 585.]

Argued November 13, 14, 1895. Decided December 2, 1895.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Idaho in favor of the defendants, the Cœur d' Alene Railway & Navigation Company *et al.*, in an action of ejectment brought by the Washington & Idaho Railroad Company, plaintiff, for land in Shoshone county, Idaho territory, being the right of way of plaintiff's railroad. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

On May 15, 1889, the Washington & Idaho Railroad Company, describing itself as a corporation duly organized under the laws of Washington territory, brought an action of ejectment in the district court of the first judicial district of the territory of Idaho against the Cœur d' Alene Railway & Navigation Company, as a corporation duly organized under the laws of Montana territory, and the Northern Pacific Railroad Company, as a corporation duly organized under the laws of the United States. The complainant alleged that, on the 10th day of July, 1887, the plaintiff was lawfully possessed, as owner in fee simple, of

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NOTE.—*As to removal of causes, under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies,—see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 22: 524; and Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question,—see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes, when denied,—see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers, Rev. Stat. § 643, see note to Davis v. South Carolina, 27: 574.

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a certain tract of land situated in Shoshone county, Idaho territory, being the right of way of plaintiff's railroad, consisting of a strip of land 200 feet in width and about 4,000 feet in length; that the defendant, the Cœur d'Alene Railway & Navigation Company, on the 1st day of August, 1887, entered into possession of the demanded premises, and ousted and ejected the plaintiff therefrom; that the defendant, the Northern Pacific Railroad Company, claimed to be in possession of said premises as a tenant of the Cœur d'Alene Railway & Navigation Company, and was actually in possession of said premises at the time of the institution of the suit; that the value of the rents, issues, and profits of the said premises while the plaintiff was excluded therefrom is $5,000; that the plaintiff was still the owner in fee simple and entitled to the possession of said premises; and plaintiff demanded judgment against the said defendants for the possession of the demanded premises, and for the sum of $6,000 as damages.

A writ of summons against the defendants 79] was sued out, *and, on the 27th day of May, 1889, was returned as served on the said defendants, by the delivery of a copy thereof to their authorized agent. On May 31, 1889, the separate answer of the Cœur d'Alene Railway & Navigation Company was filed, denying the plaintiff's title, and claiming that defendant had, in good faith, and without any knowledge that the plaintiff claimed any interest therein, entered into possession of the described land and, in the belief that it was the owner thereof, had constructed thereon its railroad and its depot, at an expense exceeding $7,000; that the plaintiff knew that the defendant was constructing its railroad and depot as aforesaid, and permitted the same to be done without making any claim to said premises, wherefore defendant claimed judgment that the plaintiff should take nothing by the action; that the plaintiff should be declared to be estopped from claiming title to said premises; and that the defendant should have such other and further relief as should be just and equitable.

On the 3d day of July, 1890, by virtue of an act of Congress of that date, the said territory of Idaho became a state; and on August 27, 1890, the defendants filed a petition in the district court of the first judicial district of the state of Idaho, praying for the removal of said case to the circuit court of the United States, ninth circuit, in and for the district of Idaho; and the case was so proceeded in that, on December 6, 1892, a final judgment was entered, adjudging that the plaintiff, the Washington & Idaho Railroad Company, should take nothing by the action, and that the defendant, the Cœur d'Alene Railway & Navigation Company, should have judgment against the said plaintiff for its costs.

The trial in the circuit court was by the court, the jury having been waived by both parties. The court made the following findings of facts:

"First. That on the 6th day of July, 1886, the defendant, the Cœur d'Alene Railway & Navigation Company, filed its articles of incorporation in the office of the secretary of the territory (now state) of Montana, and also filed in the office of the county clerk and recorder of the county of Lewis *and Clarke, in [80 said territory, a certified copy of its said articles of incorporation, which articles of incorporation are, in words and figures, following, to wit:

"'Territory of Montana, } ss:
"'County of Lewis and Clarke, }

"'We, Daniel C. Corbin, Samuel T. Hauser, Anton H. Holter, of the city of Helena, in the counties of Lewis and Clarke, territory of Montana; Stephen S. Glidden, of Spokane Falls, Washington territory; James F. Wardner, of Wardner, in the territory of Idaho; James Monaghan, of Cœur d'Alene, Idaho territory; and Alfred M. Esler, of said Helena, Montana,—do by these presents, pursuant to and in conformity with Mont. Rev. Stat. chap. 15, art. 3, entitled "*Railroad Corporations*," and all acts supplemental thereto or amendatory thereof, associate ourselves together and form a corporation for the purpose of locating, constructing, maintaining, and operating railroads in the territories of Montana and Idaho, and to that end we do hereby certify as follows:

"'First. The name of such corporation by which it shall be known shall be "The Cœur d'Alene Railway & Navigation Company."

"'Second. The termini of said railroad are to be located in the county of Missoula, territory of Montana, and in the counties of Kootenai and Shoshone, in the territory of Idaho, and, if said corporation shall so determine, termini may also be located in the county of Nez Perces, in said territory of Idaho. Said railroad shall pass through said counties of Missoula, Kootenai, and Shoshone, and if said corporation shall so determine, then said railroad shall also pass through said county of Nez Perces, and the general route of said railroad shall be as follows: Commencing at or near the town of Thompson's Falls, in said county of Missoula, or at some convenient point between said Thompson's Falls and the western boundary line of said territory of Montana; thence running westerly or southwesterly to that certain tributary of Cœur d'Alene river known as the south fork; thence down the south fork and Cœur d'Alene river to Old Mission, connecting with steamboats or other water craft, to be owned and *operated by said corporation [81 said steamboats or other craft to ply between said Old Mission and the town of Cœur d'Alene; and, if said corporation shall so determine, then said railroad shall again commence at said town of Cœur d'Alene, and run northwesterly to Rathdrum, in said county of Kootenai, or such point on the line of the Northern Pacific railroad between Rathdrum and the western boundary of Idaho territory as said corporation may hereafter determine, with the right and privilege, if said corporation shall see proper, to run a branch or extension of said road in a southerly direction from said Shoshone county to the said county of Nez Perces; said steamboats or other water craft between the points in that behalf above specified to be used in connection with and as constituting a part of said railroad.

"'Third. The amount of capital stock necessary to construct such roads, including said connections, is $500,000 divided into 5,000 shares of $100 each.

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"'Fourth. The principal place of business of said corporation in the territory of Montana shall be at Helena, in the county of Lewis and Clarke, and principal place of business of said corporation in the territory of Idaho shall, until otherwise fixed by the board of directors of said corporation, be at Cœur d'Alene, in the said county of Kootenai.'

"Second. That the line of route of the railroad of the said Cœur d'Alene Railway & Navigation Company, as described in said articles of incorporation, passes over and includes the ground in controversy in this action.

"Third. That on the 20th day of July, 1886, the defendant, the Cœur d'Alene Railway & Navigation Company, filed in the office of the Secretary of the Interior, at Washington, D. C., a certified copy of its said articles of incorporation and proofs of its organization under the laws of the territory (now state) of Montana, which certified copy of articles of incorporation and proofs of organization were duly approved on that day by the honorable Secretary of the Interior.

"Fourth. That in the summer and fall of 1886, [82] the *defendant, the Cœur d'Alene Railway & Navigation Company, constructed its railroad over said line of route as described in said articles of incorporation, from the said Old Mission up to the main Cœur d'Alene river to the town of Kingston, and thence up the south fork of the Cœur d'Alene river to the town of Wardner Junction, a distance of about 14 miles; and that in the month of October, 1886, the said defendant, the Cœur d'Alene Railway & Navigation Company, for the purpose of extending its line of railroad, caused a survey to be made for its said line of railroad from said Wardner Junction, up the said fork of the Cœur d'Alene river, over the line described in its said articles of incorporation through the towns of Wallace and Mullen, and marked the center line of said road upon the ground by planting stakes at each station at 100 feet, and at such other points as there were angles in the line, so that the line of route of said road could be readily traced upon the ground, and that the said surveying and marking of said line were completed on the 31st day of October, 1886. That in making said survey the engineers of said Cœur d'Alene Railway & Navigation Company ran three lines through said town of Wallace, called lines 'A,' 'B' and 'C,' said lines 'A' and 'B' both being on the south side of the south fork of the Cœur d'Alene river, and the said line 'C' being on the north side of said river, and being the line upon which the railroad of the Cœur d'Alene Railway & Navigation Company was afterwards constructed, and upon the ground now in controversy in this action. That in the month of October, 1886, and about one week after the commencement of the said survey by the engineers of the said Cœur d'Alene Railway & Navigation Company, W. H. Burrage, an engineer, with a party of assistants claiming to be acting for the plaintiff, commenced surveying a line of route for a railroad from near the town of Wardner, up the south fork of the Cœur d'Alene river, to the said town of Mullen, and that, in making said survey, the said Burrage and the party assisting him were several days and several miles behind the engineers surveying for the defendant, the Cœur d'Alene Railway & Navigation Company; and that in surveying their line *through the town of Wal- [83] lace said Burrage surveyed the same on the north side of said river and over the ground in controversy; and that said Burrage and party also marked their line in a similar manner to what the engineers of the Cœur d'Alene Railway & Navigation Company had done, and that said Burrage and party completed their survey on the 5th day of November, 1886, and that said portion of said line run by said Burrage over the ground in controversy was run on the 28th day of October, 1886, and that said line 'C' run by the engineers of the said Cœur d'Alene Railway & Navigation Company over the land in controversy was run on the 29th day of October, 1886; and that all of the parts of the line of the Cœur d'Alene Railway & Navigation Company, except said line 'C,' was run and marked prior to the line run by the said Burrage, said line 'C' being run by the engineers of the Cœur d'Alene Railway & Navigation Company as an amendment after they had completed the survey to the town of Mullen.

"Fifth. That in the summer and fall of 1887 the defendant, the Cœur d'Alene Railway & Navigation Company, extended its road from the town of Wardner Junction over its line of survey, a point about one mile east of the town of Wallace, and over the said line 'C,' the ground in controversy in this action, through the town of Wallace; and at all times thereafter, up to and at the time of the commencement of this action, occupied and used the same as a railroad and for railroad purposes; and at the time of the commencement of this action had its roadbed and track, and side tracks and depot thereon, and was using the same exclusively for railroad purposes.

"Sixth. That at all the times above mentioned the lands in controversy, and all other lands along the line of said railroad of the defendant, the Cœur d'Alene Railway & Navigation Company, as described in its articles of incorporation, were unsurveyed public lands of the United States.

"Seventh. That on the 7th day of July, 1886, the articles of incorporation of the plaintiff, the Washington & Idaho Railroad Company, were filed in the office of the secretary of the territory (now state) of Washington; that by said articles *of incorporation so filed the plain- [84] tiff was authorized to construct a railroad from the town of Farmington, in Washington territory, by the most practical route in general northerly direction, to a point at or near the town of Spokane Falls (now Spokane) in said Washington territory, together with the following branch lines tributary thereto: From a junction with the said main line at the forks of Hangman Creek, near Lone Pine, in said Washington territory, in a general northeastern direction, across the Cœur d'Alene Indian reservation, to a point near the mouth of St. Joseph's river on Cœur d'Alene lake; thence in a northerly direction along the east side of Cœur d'Alene lake to the Cœur d'Alene river; thence in a general easterly direction to Cœur d'Alene river; thence in a general easterly direction to Cœur d'Alene mission; thence in a southeasterly direction, by the valley of the south fork of the Cœur d'Alene river to Ward-

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ner, in Idaho territory. Second. From a junction with said main line, at or near the town of Spangle, in Washington territory, in a generally northeasterly direction, to a point on Cœur d'Alene lake, about 5 miles north of the mouth of the Cœur d'Alene river, in said Idaho territory, and to maintain and operate such railroads and telegraph lines and branches thereof, carry freight and passengers thereon, and receive tolls therefor.

"Eighth. That the said line of railroad, as described in the said articles of incorporation of the plaintiff, nor any of the branches thereof, did not cover or include the ground in controversy, or any part thereof, or of the valley of the south fork of the Cœur d'Alene river adjacent thereto; that the eastern terminus of the said branch of railroad running in the direction of the town of Wallace, as described in said articles, was at the town of Wardner, a distance of about 15 miles westerly from the town of Wallace and from the land in controversy herein.

"Ninth. That afterwards, to wit, on the 10th day of November, 1886, and after the completion of said survey by said Burrage, and the said survey by the engineers of the defendant, the Cœur d'Alene Railway & Navigation Company, over the premises in controversy herein, 85 the plaintiff filed in *the office of the secretary of the territory (now state) of Washington supplemental articles of incorporation, which supplemental articles of incorporation provided for a branch line of its railroad from the town of Milo (which is near Wardner), in Shoshone county, Idaho, following the south fork of the Cœur d'Alene river to the town of Mullen, in said territory, a distance of about 20 miles, which extension would pass over the premises in controversy.

"Tenth. That on the 22d day of December, 1886, the plaintiff filed in the office of the Secretary of the Interior at Washington, D. C., a copy of its said articles of incorporation and a copy of the statute of the territory of Washington under which the plaintiff's incorporation was made and proof of its organization.

"Eleventh. That from the time of the making of the said survey by said Burrage over the land in controversy, on the 28th day of October, 1886, until long after the completion of the railroad, side tracks, and depot of the defendant, the Cœur d'Alene Railway & Navigation Company, upon the ground in controversy, neither the said Burrage nor the plaintiff, nor any person for them or either of them, ever made any other survey or did any other act upon the premises in controversy or took any possession thereof; and that the first act done by the said Burrage or the plaintiff upon said premises thereafter was the survey made thereon in the year 1888 by the plaintiff; and that at that time the railroad and the side track and depot of the defendant, the Cœur d'Alene Railway & Navigation Company, was fully constructed thereon, and had been so constructed and thereon since the fall of 1887, and the defendant, the Cœur d'Alene Railroad & Navigation Company, was in full and complete operation and possession thereof and of the grounds in controversy herein.

"Twelfth. That the public surveys of the government were not extended over the land through which said surveys were made until in the month of July, 1891.

"Thirteenth. That on the 9th day of November, 1886, the defendant, the Cœur d'Alene Railway & Navigation Company, filed in the United States land office at Cœur d'Alene, Idaho, *a map or profile of that portion of its [86 railroad running through the town of Wallace, which was approved by the Secretary of the Interior December 3, 1886, and that upon said map or profile said line 'B,' through said town of Wallace, was platted as the line of route of said road; that line 'C' was in fact and intended to be a definite line of location thereof, but that said line 'B' was so platted by a mistake, and that said mistake was not discovered until after the completion of said railroad and side track and depot upon and over the ground in controversy herein, and that the filing of said plat, showing said road to run over said line 'B' was not done for the purpose of in any manner deceiving the plaintiff or any one else, but was done by a mistake as aforesaid, and that the plaintiff was not in any manner misled or prejudiced by the filing of said plat or by said mistake."

The case was taken by a writ of error to the circuit court of appeals for the ninth circuit, where the judgment of the circuit court was, on February 12, 1894, affirmed. On February 4, 1895, by a writ of error of that date, the case was brought to this court.

Messrs. **Samuel Shellabarger, A. A. Hoehling,** *Jr.*, Jeremiah M. Wilson, and W. W. Cotton, for plaintiff in error:

The fact that the Northern Pacific Company united with the Cœur d' Alene Company in making the motion for the removal of the case to the circuit court of the United States did not make the Northern Pacific Company a party in the case.

Parrott v. *Alabama Gold L. Ins. Co.* 5 Fed. Rep. 391; *Atchison* v. *Morris*, 11 Fed. Rep. 582; *Small* v. *Montgomery*, 17 Fed. Rep. 685; *Miner* v. *Markham*, 28 Fed. Rep. 387; *Perkins* v. *Hendryx*, 40 Fed. Rep. 657; *Golden* v. *Morning News Co.* 42 Fed. Rep. 112; *Clews* v. *Woodstock Iron Co.* 44 Fed. Rep. 31; *Reifsnider* v. *American Imp. Pub. Co.* 45 Fed. Rep. 433; *Bentlif* v. *London & C. Finance Corp.* 44 Fed. Rep. 667; *Tallman* v. *Baltimore & O. R. Co.* 45 Fed. Rep. 156.

The fact of our demanding that this court shall reverse the judgment below, because the court below had no jurisdiction, does not result in depriving this court of the power and jurisdiction to reverse the said judgment below.

United States v. *Huckabee*, 83 U. S. 16 Wall. 435 (21: 464); *Cleveland Ins. Co.* v. *Globe Ins. Co.* 98 U. S. 379 (25: 205); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 384 (28: 464).

The United States circuit court for the district of Idaho had no jurisdiction to enter up judgment herein against the plaintiff in error, and in favor of the defendant in error.

Johnson v. *Bunker Hill & S. M. & C. Co.* 46 Fed. Rep. 417; *Back* v. *Sierra Nevada Consol. Min. Co.* 46 Fed. Rep. 673; *Strasburger* v. *Beecher*, 44 Fed. Rep. 209.

Two things are necessary to give a court of the United States jurisdiction over any par-

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ticular action: First, the action itself must be within the jurisdiction of the court; and second, the jurisdictional facts must affirmatively appear in the record.

Phœnix Ins. Co. v. *Pechner*, 95 U. S. 185 (24: 427); *Robertson* v. *Cease*, 97 U. S. 647 (24: 1058); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (28: 462); *Parker* v. *Ormsby*, 141 U. S. 81, 83 (35: 654,655); *Crehore* v. *Ohio & M. R. Co.* 131 U. S. 240 (33: 144); *Little York Gold Wash. & W. Co.* v. *Keyes*, 96 U. S. 199 (24: 656); *Gibbs* v. *Crandall*, 120 U. S. 105 (30: 590).

Failure to properly allege the jurisdictional facts in a suit originally commenced in the circuit court may be cured by amendment.

Continental L. Ins. Co. v. *Rhoads*, 119 U. S. 237 (30: 380).

But where the jurisdictional facts fail to appear at the time of the removal, in the record, of a cause undertaken to be transferred from a state court into the United States circuit court, then such defect is fatal to the jurisdiction, and cannot be corrected by amendment.

Crehore v. *Ohio & M. R. Co.* 131 U. S. 240 (33: 144).

The effect of § 18 of the Idaho enabling act was to confer jurisdiction on the state courts of all civil actions in which the United States was not a party, unless a proper written request showing the jurisdiction of the United States court was filed in the proper court as required by the act.

Such request for transfer, in order to oust the state court of jurisdiction and confer jurisdiction upon the United States court, must necessarily show that the United States court might have had jurisdiction of the action had such courts existed at the time of the commencement of such cases, as well as jurisdiction at the time when the action was undertaken to be transferred.

Johnson v. *Bunker Hill & S. M. & C. Co.* 46 Fed. Rep. 417; *Back* v. *Sierra Nevada Consol. Min. Co.* 46 Fed. Rep. 673; *Strasburger* v. *Beecher*, 44 Fed. Rep. 209.

Such request cannot be amended in the United States court, and a failure to properly allege therein the necessary jurisdictional facts is fatal to the jurisdiction of this court and of the court below.

Stevens v. *Nichols*, 130 U. S. 230 (32: 914).

The court below had no jurisdiction by reason of the Federal character of the Northern Pacific Railroad Company. Under the enabling act of Idaho the action undertaken to be transferred to the Federal court must be an action "pending" at the time the transfer is undertaken to be made.

Glaspell v. *Northern P. R. Co.* 144 U. S. 211 (36: 409).

The Northern Pacific Railroad company never was served and never appeared in the action. The Federal charter of a corporation can only give rise to a Federal question when the corporation is an actual party to the suit, actively present and actively engaged in the litigation.

Union P. R. Co. v. *Myers* ("*Pacific R. Removal Cases*") 115 U. S. 12 (29: 328); *Metcalf* v. *Watertown*, 128 U. S. 589 (32: 544).

It is only when an act of Congress is directly brought into consideration in an action that the cause can be said to arise under such act.

Gibbs v. *Crandall*, 120 U. S. 108 (30: 591); *Shirereport* v. *Cole*, 129 U. S. 41 (32: 591), and cases cited.

Jurisdiction will not be entertained in an action, even where the petition for removal states a clear Federal question, if the party at the time of filing such petition enters a special appearance for the purpose of setting aside the service of summons made in the state court.

Germania Ins. Co. v. *Wisconsin*, 119 U. S. 473 (30: 461).

The Northern Pacific Railroad Company never appeared and was never served in the action, therefore the only possible Federal question in the cause shown by the record was entirely eliminated.

There can be no jurisdiction of this action on the ground of diverse citizenship.

A corporation is a "citizen," and a "resident," and "an inhabitant" of the state or territory which created it, and cannot, by doing business in other states, become a "citizen," a "resident," or "inhabitant" of such other states or territories.

Ex parte Shaw ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 (36: 768); *Southern Pac. Co.* v. *Denton*, 146 U. S. 205 (36: 945).

At the time of the commencement of this action, the Washington & Idaho Railroad Company was therefore a resident, citizen, and inhabitant of the territory of Washington, and the Cœur d'Alene Railway & Navigation Company was a resident, citizen, and inhabitant of the territory of Montana, and no suit either by or against either of such corporations could have been removed, transferred, or commenced in a Federal court on the ground of diverse cieizenship.

New Orleans v. *Winter*, 14 U. S. 1 Wheat. 91 (4: 44); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 381 (28: 463); *Johnson* v. *Bunker Hill & S. M. & C. Co.* 46 Fed. Rep. 417; *Back* v. *Sierra Nevada Consol. Min. Co.* 46 Fed. Rep. 673; *Strasburger* v. *Beecher*, 44 Fed. Rep. 209.

The record in this action nowhere shows jurisdiction in the circuit court for the district of Idaho. Jurisdiction must affirmatively appear in the record.

Parker v. *Ormsby*, 141 U. S. 81, 83 (35: 654).

Also must be shown affirmatively to have existed at the time the action was commenced. This is plainly required by the language of the act.

Back v. *Sierra Nevada Consol. Min. Co. supra.*

The petition for removal nowhere states the existence of any jurisdictional fact as of the date when the action was commenced; but the allegations of the petition are all confined to the date on which the petition itself was filed. Such a petition does not state facts sufficient to confer jurisdiction upon the court.

Back v. *Sierra Nevada Consol. Min. Co. supra; Stevens* v. *Nichols*, 130 U. S. 230 (32: 914).

No Federal question is alleged with sufficient accuracy in the petition or elsewhere in the record to have authorized the court to have entertained jurisdiction of this action.

Gibbs v. *Crandall*, 120 U. S. 105, 109 (30: 590, 591); *Theurkauf* v. *Ireland*, 27 Fed. Rep. 769;

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Austin v. *Gagan*, 39 Fed. Rep. 626, 5 L. R. A. 476; *Crehore* v. *Ohio & M. R. Co.* 131 U. S. 240 (33: 144).

Messrs. **A. B. Browne** and *A. T. Britton*, for defendants in error:

Having joined the Northern Pacific as defendant and averred its possession of the premises whereof recovery was sought as a tenant of the Cœur d'Alene Company, it is manifest that the Northern Pacific Company was, at the commencement of this action, both a necessary and actual party defendant. Hence, under the clear terms of § 18 of the Idaho admission act, that company had then the right of removal to the Federal court in Idaho "had such court existed at the time of the commencement of such case."

Union P. R. Co. v. *Meyers* ("*Pacific R. Removal Cases*") 115 U. S. 1 (29: 319).

The controversy involved a civil suit arising under the laws of the United States,—to wit: conflicting claims under the right of way act of Congress of March 3, 1875; and, independent of all questions of citizenship, a United States circuit court then existing would, on that ground, have had jurisdiction thereover.

Doolan v. *Carr*, 125 U. S. 620 (31: 845).

At the time the petition for removal was filed the record showed service upon the Northern Pacific Company. The petition for removal, wherein the Northern Pacific Company joined, contains no special appearance by that company for that purpose. The general declaration is made that it is a defendant in the action, and it then proceeds to allege the facts on which the petition for removal is based. This was then a general appearance by that company in the action, amply sufficient to invest the court with jurisdiction over the corporation, and no service of process was necessary.

The Northern Pacific Company appeared in this case without suggesting any objection to the jurisdiction of the state court over it, or making any special appearance in connection with the petition for removal. It in effect conceded that it was rightfully in court, and, whether it had been served with the proper process or not prior thereto, its voluntary appearance in the action and petition for removal thereof made it a party thereto in every sense.

Wabash W. R. Co. v. *Brow*, 65 Fed. Rep. 941; *Edwards* v. *Connecticut Mut. L. Ins. Co.* 20 Fed. Rep. 452; *Tallman* v. *Baltimore & O. R. Co.* 45 Fed. Rep. 156; *Hinds* v. *Keith*, 57 Fed. Rep. 10, 13 U. S. App. 222; *New York Const. Co.* v. *Simon*, 53 Fed. Rep. 6; *Caskey* v. *Chenoweth*, 62 Fed Rep. 712.

The petition for removal distinctly avers that this is a suit of a civil nature arising under the laws of the United States within the values in dispute exceeding $2,000. As such, it was removable into the circuit court irrespective of the citizenship of the parties.

Doolan v. *Carr*, 125 U. S. 620 (31: 845).

Mr. Justice **Shiras** delivered the opinion of the court:

We are to answer the questions that arise on this record in the light of the findings of fact made by the circuit court to which no exceptions were taken.

Those questions are two: First, Had the circuit court jurisdiction to entertain the action? and, if so, second, Did the title set up by the plaintiff company show a right of possession of the land in dispute as against the title of the defendants?

It is claimed by the plaintiff in error that as, at the time when the action was originally brought in the district court of the territory of Idaho, the Washington & Idaho Railroad Company, the plaintiff, was a corporation organized under the laws of Washington Territory, and the Cœur d'Alene Railway & Navigation Company, defendant, was a corporation organized under the laws of Montana territory, and as the Northern Pacific Railroad Company was not really a party to the action, there was no right to remove the cause from the state court, whose jurisdiction over the case had attached under the terms of the act of July 3, 1890, providing for the admission of Idaho into the Union. The argument is based on the language of the 18th section of that act, wherein it is provided that "in respect to all cases, proceedings, and matters now pending in the supreme or district courts of the said territory at the time of the admission into the Union of the state of Idaho, and arising within the limits of such state, whereof the circuit or district courts by this act *established [91 might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory; and in respect to all other cases, proceedings, and matters pending in the supreme or district courts of said territory at the time of the admission of such territory into the Union, arising within the limits of said state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of the state shall be pending, in any territorial court in said territory, shall abate by the admission of such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be: *Provided, however*, That in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts." 20 Stat. at L. 215, § 18.

This language is interpreted by the plaintiff in error to mean that no case can be transferred to the Federal courts if the parties to it could not have gone into such courts at the time the action was brought, if such courts had then actually existed; and the contention is that as, at the time of the commencement of this action, the Washington & Idaho Railroad

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Company was a resident, citizen, and inhabitant of the territory of Washington, and the Cœur d'Alene Railway & Navigation Company was a resident, citizen, and inhabitant of the territory of Montana, no suit either by or against either of such corporations could 92] have been removed, transferred, or *commenced in a Federal court on the ground of diverse citizenship.

It should be observed that, while it is true that Montana and Washington were in a territorial condition when this suit was brought, they both had become states, the former on the 8th, the latter on the 11th, of November, 1889 (26 Stat. at L. 1552, 1553), before the filing of the petition for removal.

A similar question was presented in *Koenigsberger* v. *Richmond Silver Min. Co.* 158 U. S. 41 [39: 889]. That was a case where, at the time of the bringing of the action in a district court of the territory of Dakota, the plaintiff was a citizen of such territory, and when the territory became a state under a statute in terms precisely similar to those of the statute we are now considering, the cause was transferred to the circuit court of the United States, and it was there contended, as it is here, that the circuit court could not acquire jurisdiction of the case by reason of the diversity of citizenship between the parties, because at the time of the commencement of the case the plaintiff was a citizen of a territory. The subject was carefully considered, and the conclusion reached was thus expressed in the language of *Mr. Justice* Gray:

"Upon the whole matter, the reasonable conclusion appears to us to be that Congress, by the description 'whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases,' intended to designate cases of which those courts might have had jurisdiction under the laws of the United States had those courts, like the other circuit and district courts of the United States generally, existed, at the time in question, in a state of the Union, whose inhabitants consequently were citizens of that state. According to that hypothesis, the plaintiff would have been a citizen of the state of South Dakota, and the defendant a citizen of the state of New York, at the time of the commencement of the action, and the circuit court of the United States would have had jurisdiction by reason of such diversity of citizenship. The case was 93]therefore rightly *transferred, at the written request of the defendant, upon the admission of the state of South Dakota into the Union, to the circuit court of the United States."

This view sufficiently disposes of the objection made in this case to the jurisdiction of the circuit court of the United States, so far as that jurisdiction depended on adverse citizenship.

The circuit court of appeals maintained the jurisdiction of the circuit court, on the ground that there was a Federal question involved in the fact that the Northern Pacific Railroad Company, a corporation created by the laws of the United States, was a party to the action. We agree with that court in regarding such a fact as conferring jurisdiction on the circuit court. But it is urged that the fact did not exist, that the Northern Pacific Railroad was not a party to the action. This contention is, we think, disposed of by the record itself. That discloses that the original suit was brought against the Northern Pacific Railroad Company as well as against the Cœur d'Alene Railway & Navigation Company; that the summons included both of said defendants; that the complaint alleged that the Northern Pacific Railroad Company was in actual possession of the premises in dispute as a tenant of the Cœur d'Alene Railway & Navigation Company. The return of the summons alleged that service had been made upon both defendants. The petition for the removal or transfer of the case was joined in by the Northern Pacific Railroad Company, and in that petition it was not alleged that the latter company objected to the summons, or, for any reason, to the jurisdiction of the court, but alleged that the controversy was between citizens of different states, and that the suit was of a civil nature arising under the laws of the United States.

Upon the face of the record as it existed at the time of the removal, consisting of the writ, the return of service, the complaint, and the petition for such removal, it was therefore plain that the Northern Pacific Railroad Company, as a corporation created by the laws of the United States, was a party both nominally and actively. It is true that the subsequent *record discloses that the circuit court, [94 in rendering its opinion and judgment, speaks of the Northern Pacific Railroad Company as not having been served and as not appearing in the action. But, as was well said by the circuit court of appeals when dealing with this contention, "it cannot be said that the Northern Pacific Railroad Company was not an actual party to the litigation. It was not only made a party, but it was a proper party. It was the party in possession of the premises sought to be recovered by the action of ejectment. . . . At the time when the cause was removed the return of service was on file, but no default had been taken against the Northern Pacific Railroad Company, and no disposition had been made of the plaintiff's controversy against it; that defendant, in presenting its petition for removal to the circuit court, declared itself to be one of the defendants to the case, and recited the fact that the cause was pending in the state court, and was properly within the jurisdiction of the circuit court of the United States."

Whatever reason, therefore, the circuit court may have had for speaking of the Northern Pacific Railroad Company as a party not served and not appearing, it is incontrovertible, as against the record, that it was served, and whether served or not, it entered a general appearance by joining in the petition for removal. That it may have subsequently ceased to take an active part in the case is immaterial. The jurisdictional question must be determined by the record at the time of the transfer of the case.

Whether conflicting claims of railroad companies, under the right of way act of Congress, March 3, 1875, would give a circuit court of the United States jurisdiction independently of citizenship, under the doctrine of *Doolan* v.

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Carr, 125 U. S. 620 [31: 845], we do not find it necessary to consider.

If, then, the case fell within the jurisdiction of the circuit court, we have next to inquire whether that jurisdiction was properly exercised.

The controversy was between two railroad companies, one organized under the laws of Washington territory, the other organized under the laws of Montana territory, and was 95]as *to the right of possession of a tract of land situated in Shoshone county, in the territory of Idaho, and over which each company claimed a right of way under the act of March 3, 1875, entitled, "An Act Granting to Railroads a Right of Way through the Public Lands of the United States." This act provides that "the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road."

It was affirmatively found by the circuit court that the Cœur d'Alene Railway & Navigation Company, on the 6th day of July, 1886, filed its articles of incorporation in the office of the secretary of the territory of Montana, and also filed in the office of the county clerk and recorder of the county of Lewis and Clarke, in said territory, a certified copy of its said articles of incorporation; that the line of route of the railroad of the said company, as described in said articles of incorporation, passed over and included the land in controversy; that on the 20th day of July, 1886, the said company filed in the office of the Secretary of the Interior at Washington, D. C., a certified copy of its articles of incorporation and proofs of its organization under the laws of the territory of Montana, which certified copy of articles of incorporation and proofs of organization were duly approved on that day by the Secretary of the Interior; that in the summer and fall of 1886 the said company constructed its railway over said line of railroad, as described in said articles of incorporation, from the Old Mission up the main Cœur d'Alene river to the town of Kingston, and thence up the south fork of the Cœur d'Alene river to the town of Wardner Junction, a distance of about 14 miles; that in the month of October, 1886, the said company, for the purpose of extending its line of railroad, caused a survey to be made for said line of railroad from said Wardner Junction up the said fork of the Cœur d'Alene river, 96] over the *line described in its said articles of incorporation, though the towns of Wallace and Mullen, and marked the center line of said road upon the ground by planting stakes at each station at 100 feet, and at such other points as there were angles in the line, so that the line of route of said road could be readily traced upon the ground; that the said surveying and marking of said line were completed on the 31st day of October, 1886; that in making said survey the engineers of said company ran three lines through said town of Wallace, called lines "A," "B," and "C"—the two former being on the south and line "C" being on the north side of said river, the latter being the line upon which the railroad of said company was afterwards constructed, and upon the ground in controversy in this section; that in the summer and fall of 1887 the said company extended its road from the town of Wardner Junction over its line of survey, a point about 1 mile east of the town of Wallace, and over said line "C," the ground in controversy, through the town of Wallace, and at all times thereafter, up to and at the time of the commencement of this action, occupied and used the same as a railroad and for railroad purposes, and at the time of the commencement of this action had its roadbed, track, side tracks, and depot thereon and was using the same exclusively for railroad purposes; and that at all times above mentioned the lands in controversy, and all other lands along the line of said railroad of the Cœur d'Alene Railway & Navigation Company, as described in its articles of incorporation, were unsurveyed public lands of the United States.

If these facts stood unaffected by other evidence, the title of the Cœur d'Alene Railway & Navigation Company to the land in controversy would be clear.

It was, however, shown that on the 9th day of November, 1886, ten days after the completion of the survey of the three lines "A," "B," and "C," the said company filed in the United States land office at Cœur d'Alene, Idaho, a map or profile which was, December 3, 1886, approved by the Secretary of the Interior, and that on this map the line "B" through the town of Wallace was platted as the line of the said railroad. *As already stated, in the fall of[97 1887 the company constructed its railroad upon line "C" and across the land in controversy. But no amendment of the said map was made, nor was any approval of the Secretary of the Interior obtained to any new map covering line "C."

The plaintiff contends that the effect of the filing and approval of the map line "B" was to vest in the said company a right of way 100 feet wide on each side of the center line of its road, as indicated upon said map, which right could not be changed without the consent of the granting power first had and obtained. Regarding this question as one entirely between the Cœur d'Alene Railway & Navigation Company and the United States, it should be observed that the act of Congress, under which both parties claim the land in question, by its 4th section provides that, in case of unsurveyed lands of the United States, as these were, the plat need not be filed until twelve months after a survey thereof. It is, however, said that while the company might not have been required under the act to file its map at the time such filing was made, yet it had the right to do so under certain regulations of the Secretary of the Interior in force during the period of this controversy, and that when such map was approved by the Secretary the company had secured the benefit of the act upon the line there shown, and could not thereafter alter the same. We agree with the circuit court of appeals in thinking that, so far as the United States are concerned, there is nothing in the act forbidding a railroad company, having adopted one line of survey along the route

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provided for in its articles of incorporation, and having filed a plat thereof, to subsequently, and within the time allowed it by law for so doing, adopt another route, and that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened. Such an actual construction and appropriation of one line would preclude the company from asserting any claim to the other lines, and hence the contention that by running several lines through unsurveyed lands, the company 98] sought to obtain more than the *statute gave, namely one right of way, is met by the fact that it claimed and constructed but one line.

If the United States could not and do not complain, there is no foundation for the plaintiff company to do so, as it was found by the trial court that the platting of line "B," instead of line "C," was through a mistake, and that such mistake was not discovered until after the completion of the defendant's railroad and depot over and upon the ground in controversy, and that the filing of the plat showing line "B" was not done for the purpose of, in any manner, deceiving the plaintiff or any one else, and that the plaintiff was not, in any manner, misled or prejudiced by the filing of said plat or by said mistake.

Even if the Cœur d'Alene Railway & Navigation Company was duly organized as a railroad company, and, as such, was entitled to construct and maintain its road over the land in controversy without being estopped by having filed an inaccurate map, still the plaintiff contends that the right of way in question belongs to it by virtue of a prior survey made on its behalf. The facts relevant to this contention are that the articles of incorporation, under which the plaintiff claims the land in controversy, were not filed in the office of the secretary of the territory of Washington till the 10th day of November, 1886, and that a copy of such articles and proof of organization were not filed in the office of the Secretary of the Interior till December 22, 1886. It was, indeed, shown and found that, on October 28, 1886, W. H. Burrage, claiming to be acting for the plaintiff, surveyed a line up the Cœur d'Alene river, through the town of Wallace, and over the ground in controversy, which was the line described in the articles of incorporation subsequently filed by the plaintiff company in the offices of the secretary of the territory and of the Secretary of the Interior.

The conclusion of the courts below, on this state of facts, was that at the time of the making of said survey by W. H. Burrage over the lands in controversy, on October 28, 1886, the plaintiff was not a corporation organized for the purpose of constructing, or authorized to con-99]struct, a railroad over the *land in controversy; was not authorized to take possession of the said premises, or to locate a line of railroad thereon; and that the said survey on October 28, 1886, conferred no right whatever on it, the plaintiff, as against the defendant, the Cœur d'Alene Railway & Navigation Company.

The argument on behalf of the plaintiff is that when, on December 22, 1886, the Washington & Idaho Railroad Company had filed its articles of incorporation and proof of organization in the office of the Secretary of the Interior at Washington, D. C., it had a right to adopt the survey previously made by Burrage, as and for the location of its route under the general right of way act, and that when it so adopted said survey it related back to the date when the survey was made.

We are unable to accept such a view of the law, but concur in the conclusion of the court below that the language of the act of Congress, under which both parties claim, wherein it provides that "the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, which shall file with the Secretary of the Interior a copy of the articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road," plainly means that no corporation can acquire a right of way upon any line not described in its charter or in its articles of incorporation; that it necessarily follows that no initiatory step can be taken to secure such right of way by the survey upon the ground or otherwise; that until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff company, its acts of making surveys were of no avail; and that, so far as the conflicting rights of the parties to this controversy are concerned, the status of the plaintiff is the same as if its survey of October 28, 1886, had not been made.

The case of *New Brighton & N. C. R. Co.* v. *Pittsburg, Y. & C. R. Co.* 105 Pa. 14, was, like the present, one of a contest between two railroad companies for a right of way, and where the effect of a survey of a line before the legal organization of the company had to be considered; and it was held that *surveying, lo-[100 cating, and designating, by proper marks, the property to be taken for railroad purposes, cannot be done by the projectors of a railroad company before its incorporation, but only by the president and directors of a duly incorporated company, their engineers and employees, and that an unauthorized preliminary survey, though well marked by a line of stakes indicating the location of a railroad, cannot be regarded as sufficient notice of a prior legal appropriation of the land, nor will the subsequent adoption of such survey by the company, after its incorporation, give it any right to the location as against another company, which had surveyed and taken possession of the land before the first-mentioned company had passed the resolution of adoption.

The cases cited by the plaintiff in error do not sustain the position.

Morris & E. R. Co. v. *Blair*, 9 N. J. Eq. 635, was a case of a contest for a right of way between two railroad companies, both duly incorporated, and it was held that the prior right attached to the company which first actually surveyed and adopted a route and their survey in the office of the secretary of state, and also that the mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

The supreme court of Iowa in *Lower* v. *Chicago, B. & Q. R. Co.* 59 Iowa, 563, held that though a railroad company may not for

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some reason have the legal right to condemn a right of way for a lateral line, it may cause another company of its own stockholders to be so organized as to have that power, and that when such subsidiary company has condemned the right of way, it may lease its line to the former company, and in this there will be no fraud upon those whose lands have been condemned.

It is not perceived that these decisions, accepting them as sound, disclose any error in the ruling of the court below.

It is further made to appear, by the eleventh finding, that "from the time of making the said survey by Burrage over the land in controversy on the 28th day of October, 1886, until long after the completion of the railroad, 101] side tracks, and *depot of the defendant, the Cœur d'Alene Railway & Navigation Company, upon the ground in controversy, neither the plaintiff, nor any person for it, ever made any other survey, or did any other act upon the premises, or took any possession thereof.

While it may be that such a finding, standing alone, would not make out a case of estoppel, of which the defendant could avail itself in an action at law, it is entitled to consideration when we are asked to adopt a construction of the act of Congress which would enable the plaintiff company to take and enjoy the right of way enhanced in value by the improvements put thereon by the defendant. When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor.

The decree of the court below is affirmed.

WASHINGTON & IDAHO RAILROAD COMPANY, *Appt.*, *v.* CŒUR D' ALENE RAILWAY & NAVIGATION COMPANY ET AL. (No. 2).

(See S. C. Reporter's ed. 101-103.)

Res judicata.

Where a state judgment affirming a title to land in an action at law has been affirmed in this court, a state judgment in an equity action between the same parties, establishing the same title, will also be affirmed.

[No. 4.]

Argued November 13, 14, 1895. Decided December 2, 1895.

APPEAL from a judgment of the Supreme Court of the Territory of Idaho affirming the judgment, as modified, of the District Court of the First Judicial District of that territory in a suit in equity brought by the Washington & Idaho Railroad Company, plaintiff, against the Cœur d'Alene Railway & Navigation Company *et al.*, adjudging that the latter company was the owner and entitled to possession of land in Shoshone county, in that territory, which was claimed as a right of way by both railroad companies. *Affirmed.*

Messrs. **A. A. Hoehling, Jr.**, **Samuel Shellabarger**, *J. F. Dillon*, *W. W. Cotton*, and *J. M. Wilson* for appellant.

Messrs. **A. B. Browne** and *A. H. Garland* for appellees.

Mr. Justice **Shiras** delivered the [102 opinion of the court:

This was a suit in equity brought by the Washington & Idaho Railroad Company, a corporation of the territory of Washington, in the district court of the first judicial district of the territory of Idaho, against the Cœur d'Alene Railway & Navigation Company, a corporation of the territory of Montana, and George P. Jones. An inspection of the record discloses that the matter in dispute was a right of way 200 feet in width and about a mile in length, situated in Shoshone county in the territory of Idaho, and which was claimed by both railroad companies. By a bill in equity the plaintiff company sought to have its title to said strip declared paramount, and to restrain the defendant company from trespassing upon the same, and from interfering with the plaintiff's peaceful possession. The result of the suit, in the district court of the territory of Idaho, was a final decree adjudging that the Cœur d'Alene Railway & Navigation Company was the owner and entitled to the possession of the land in question. From this decree an appeal was taken by the plaintiff company to the supreme court of the territory of Idaho. That court was of opinion that, as it appeared by the findings of fact in the district court, at the time of the trial, the defendant had completed its line of road over the disputed ground and was in the actual use and occupation thereof, the plaintiff had an adequate remedy at law, and that the district court, while justified in refusing the injunction prayed for, should have dismissed the bill and left the plaintiff to its action at law, and, as thus modified, the judgment of the district court was affirmed.

From this judgment of the supreme court of the territory an appeal was taken to this court.

We do not find it necessary to enter into a discussion of the merits of the case, nor to decide whether a court of equity could take jurisdiction of such controversy, because we learn from our own records that the Washington & Idaho Railroad Company, without awaiting the result of the present appeal, but acting upon the view of the supreme court of the territory, *brought an action at law against [103 the Cœur d'Alene Railway & Navigation Company in the district court of the territory, which action was, after the admission of Idaho as a state, transferred to and tried in the circuit court of the United States. The result of that action was a final judgment in favor of the defendant company, and this judgment, having been taken to the circuit court of appeals for the ninth circuit, was there affirmed, and the judgment of the latter court has, at the present term, been by this court affirmed. See *Washington & I. R. Co.* v. *Cœur d'Alene R. & Nav. Co.* 160 U. S. 77 [*ante*, 346].

The judgment of the supreme court of the territory of Idaho is accordingly affirmed.

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WASHINGTON & IDAHO RAILROAD COMPANY, *Appt.*,
v.
S. V. WILLIAM OSBORN.

(See S. C. Reporter's ed. 103-110.)

Right of settler upon public lands—right of railroad company.

1. A settler upon public lands, who has inclosed and improved them with intention to obtain the title under the pre-emption laws, has a possessory right thereto paramount to the right of way over the same of a railroad company authorized to traverse the public lands, which it cannot take from him without compensation.
2. Congress in authorizing railroad companies to traverse the public lands did not intend thereby to give them the right to run the lines of their roads at pleasure, regardless of the rights of settlers.

[No. 5.]

Argued November 13, 14, 1895. Decided December 2, 1895.

APPEAL from a judgment of the Supreme Court of the Territory of Idaho affirming the judgment of the District Court of the First Judicial District of the Territory of Idaho dismissing a suit brought by the Washington & Idaho Railroad Company, plaintiff, against S. V. William Osborn, defendant, asserting a right to construct and maintain a railroad across lands in possession of the defendant. *Affirmed.*

Statement by *Mr. Justice* **Shiras**:

The Washington & Idaho Railroad Company, a corporation organized under the laws of Washington territory, on September 18, 1888, filed a bill of complaint in the district court of the first judicial district of the territory of Idaho against S. V. William Osborn, asserting a right to construct and maintain a railroad across lands in possession of the de-**104**]fendant. *The cause was put at issue by answer and replication, and the court made the following findings of facts:

"First. That on the 5th day of July, 1886, the plaintiff became a duly organized corporation under the laws of Washington territory for the purpose of constructing, equipping, operating, and maintaining a railroad from the town of Farmington, in Washington territory, by the most practical route in a generally northern direction to a point at or near Spokane Falls, in said territory, and by junction with said line near the forks of Hangman creek, in said territory, in a generally northeasterly direction across the Cœur d'Alene Indian reservation to a point near the mouth of the St. Joseph river, on Cœur d'Alene lake; thence in a northerly direction along the east side of the Cœur d'Alene lake to the Cœur d'Alene river; thence in a generally easterly direction to the Cœur d'Alene mission; thence in a southeasterly direction to the valley of the south fork of the Cœur d'Alene river, *via* the town of Milo, to Wardner, Idaho territory; and that, afterwards, to wit, on the 8th day of November, 1886, by amended articles of incorporation, the plaintiff became a corporation organized to construct a like railroad from said town of Milo, following the south fork of the Cœur d'Alene river to the town of Mullen, and that the premises in controversy herein are situated in the valley of the said south fork and between said towns of Milo and Mullen.

"Second. That each and all the allegations contained in the second, third, fourth, fifth, and sixth subdivisions of plaintiff's complaint are true.

"Third. That the defendant is a native-born citizen of the United States, over the age of twenty-one years, and has never had the benefit of the pre-emption or homestead laws of the United States, and is, in all respects, qualified in law to initiate proceedings to obtain title to 160 acres of the agricultural lands belonging to the United States, and that the lands and premises hereinafter described, and every part thereof, are a part of the unsurveyed public lands of the United States and agricultural in character, not reserved from sale, and subject to settlement under the laws of the United States.

*"Fourth. That in the year 1885 one [**105** Seth McFarren and one Samuel Norman settled upon the premises hereinafter described, who, in that year, erected a house and other buildings thereon, marked off the corners of the same, and partly fenced the same on its exterior boundaries as defined by their corner stakes, and that said McFarren and Norman resided constantly upon said premises, living in the dwelling house aforesaid, and constantly engaged in improving said premises, until the 18th day of March, 1886, at which date, by a deed of conveyance, in consideration of the sum of $2,000, they conveyed the said premises and all the improvements thereon to the defendant, and that the defendant at the time of said purchase caused the said premises to be surveyed by a surveyor and erected new corner posts at each corner thereof, and caused such posts to be plainly marked, so as to indicate the corners of said premises, and with the name of said Osborn as the claimant, and that, after said purchase, the defendant filed in the office of the county recorder of Shoshone county, Idaho, his declaration to hold said premises under the pre-emption law, under the possessory land act of said territory, and that said premises contain less than 160 acres, and are described as follows, to wit:

"Fifth. That during all the time since the 18th day of March, 1886, the defendant has resided upon said premises and still resides thereon, making the same his home, and has made improvements thereon to the value of $8,000, consisting of a hotel, barn, stables, ice house, cellar, fences, clearing and cultivating 60 acres of the land, etc.; and that, prior to the making of any survey for a railroad by plaintiff over the same in the year 1886, the defendant enclosed all of said premises by a substantial fence, excepting a portion of the line on the south side thereof where the base of

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsay, 5: 423.

As to land grants to railroads, see note to Kansas *P. R. Co. v.* Atchison, T. & S. F. R. Co. 28: 794.

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the mountain and the fallen timber made a natural barrier sufficient to turn stock, and with the exceptions of a few places on the north line of said premises where the steep bank of the river formed a natural barrier sufficient to turn stock; and that at the time said defendant settled thereon he intended, and ever since has intended and now intends to obtain title to said premises under the 106]*pre-emption laws of the United States as soon as the same shall be surveyed by the government; and that the defendant is not the proprietor of 320 acres of land in any state or territory, and did not quit or abandon a residence on his own land to reside upon the public lands in this territory; and that the defendant has not settled upon or improved the said premises to sell the same on speculation, but in good faith to appropriate the same to his own exclusive use; and that he has not directly nor indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he may receive from the government shall inure in whole or in part to the benefit of any person except himself."

The conclusions of law found by the court were, in substance, that Osborn, the defendant, was, and at all times since the 18th day of March, 1886, had been, the owner of, as against all persons except the United States, and in possession of, the land in dispute; that the title and right of possession of defendant in and to said premises were prior and paramount to the right of way of the plaintiff over the same; and that the defendant was entitled to a judgment. A judgment dismissing the bill was entered on October 4, 1888, and this judgment was, on appeal to the supreme court of the territory of Idaho on March 19, 1889, affirmed.

Messrs. **A. A. Hoehling, Jr., Samuel Shellabarger,** *J. F. Dillon, W. W. Cotton,* and *J. M. Wilson* for appellant.

No counsel for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

This case is before us on appeal from a judgment of the supreme court of the territory of Idaho affirming a decree of the district court 107]of that territory, which decree *dismissed a bill of complaint brought by the Washington & Idaho Railroad Company against William Osborn.

The railroad company was organized under the laws of the territory of Washington, and was constructing its road from a point in that territory, by a route through the territory of Idaho, to the town of Missoula in the territory of Montana. In constructing its road through the territory of Idaho the plaintiff company encountered, in Shoshone county, a tract of land in possession of Osborn, across which the company desired to run the line of its road. Osborn refusing to grant permission, the railroad company instituted, under the laws of the territory of Idaho, proceedings in condemnation to condemn a right of way for its railroad over and through the land of Osborn. Under these proceedings, damages were assessed in favor of Osborn in the sum of $6,670. The railroad company then filed its bill, alleging that prior to the commencement of said proceedings for condemnation the company did not know nor could obtain sufficient information to advise it of the nature and character of Osborn's title, and that, from the testimony in those proceedings, the company was advised and believed that Osborn had no title or right to the possession of the premises and right of way sought to be condemned, and that in equity and good conscience it should not be compelled to pay Osborn any compensation for said right of way.

Conceding, but not deciding, that it was competent for the railroad company to abandon its condemnation proceedings, and to challenge the defendants' title by a bill in equity, we shall now consider the merits of the case as disclosed in the findings of facts.

The plaintiff's side of the controversy is substantially this: The Washington & Idaho Railroad Company, as a corporation of the territory of Washington, having filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, was entitled, under the act of March 3, 1875, entitled "An Act Granting to Railroads the Right of Way through the Public Lands of the United States" (18 Stat. at L. 482), to a right of way through the public lands of the United States to the extent of 100 *feet on each side of the central line of its[108 road; and as the trial court found that the land claimed by Osborn was a part of the unsurveyed public domain of the United States, and that Osborn had never filed or entered the said land in any United States land office under any existing law of the United States, the company claims that it is within the doctrine of the many decisions of this court, which holds that a party, by mere settlement upon the lands of the United States, although with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to devest it by a grant to another party. *Frisbie* v. *Whitney,* 76 U. S. 9 Wall. 187 [19: 668]; *Hutchings* v. *Low* ("*The Yosemite Valley Case*") 82 U. S. 15 Wall. 77 [21: 82]; *Buxton* v. *Traver,* 130 U. S. 232 [32: 920].

In brief, the plaintiff claims that, having been incorporated and organized under a law of the territory of Washington, and having complied with the provisions of the act of March 3, 1875, the company became vested with a right of way through the public lands of the United States, subject only to the exception contained in the 5th section of said act, wherein it is enacted that the act shall not apply "to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale," and within which exception the defendant's claim does not come.

It is claimed on the side of the defendant that while it is true that his rights, arising out of mere prior possession and cultivation of public lands, cannot prevent Congress from conferring these very lands to other parties by a grant, yet that Congress has not, in the present case, so conferred these lands to the plaintiff company, but has, on the contrary, recognized and preserved the defendant's rights by

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the provisions of the 3d section of the act of March 3, 1875.

In the case of *Buxton* v. *Traver*, 130 U. S. 235 [32: 921], this court said: "A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys and the return of the township 109]plat, *the settler takes certain steps, that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of pre-emption to the land. . . . He has been permitted by the government to occupy a certain portion of the public lands, and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to pre-empt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him: If you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them."

It must therefore be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant.

On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers.

Accordingly, when we examine the act of March 3, 1875, upon which the plaintiff rests its claim of right to appropriate to its use, without compensation, the land and improvements of Osborn, we find in the 3d section an express provision saving the rights of settlers in possession. That section is in the following terms: "That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned, 110]and where such provision shall *not have been made, such condemnation may be made in accordance with section 3 of the act entitled, 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes, Approved July 1, 1862,' approved July 2, 1864."

The legislature of the territory of Idaho, in pursuance of said 3d section, did provide a law for the condemnation by railroad companies of the right of way over possessory claims (Id. Rev. Stat. tit. 7), and undoubtedly the defendant's claim was a possessory one, within the meaning of the legislation of Congress. Indeed, as we have seen, the plaintiff company recognized the applicability of this section and instituted proceedings of condemnation under the Idaho act before it occurred to it to ask the aid of a court of equity in taking possession of the defendant's land and improvements without compensation.

We find no error in the judgment of the supreme court of the territory of Idaho, and it is accordingly affirmed.

HARRY C. McCARTY ET AL., *Appts.*, *v.* LEHIGH VALLEY RAILROAD COMPANY.

(See S. C. Reporter's ed. 110-120.)

Element in patent—floating bolster for cars—McCarty patent—estoppel.

1. An element not mentioned in a claim for a patent cannot be read into the claim for the purpose of making out a case of novelty or infringement.
2. Turning a bolster previously in use into a floating bolster for cars, by adding a guide plate and resting its ends upon the springs, which had been used before, is, if anything more than mechanical skill or the aggregation of familiar devices, invention of such a limited character as to require a narrow construction.
3. The novelty of claims 3 and 4 of the McCarty patent, 339,913, consists, not in resting the ends of bolsters generally upon springs by means of a guide plate, but in so locating the ends of a bolster of a particular construction; and the employment of a different means of locating it avoids the charge of infringement.
4. Testimony on behalf of a patentee that he did not proceed with interference proceedings

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NOTE.—*For what patents are granted; when declared void,*—see note to Evans v. Eaton, 4:433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76; and Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,—see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor,—see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms,—see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join,—see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13: 824.

As to notes given for patent rights; purchaser before maturity,—see note to Mandeville v. Welch, 5: 87.

That prior use or sale of invention renders patent void, see note to French v. Carter, 34: 664.

As to anticipation of patents; their construction and effect; licenses to use patents; royalties,—see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

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in the patent office because he had no orders from his superior officers of a railroad company, is insufficient to show that the company had knowledge of the proceedings and assented to the action of the patentee, so as to constitute an estoppel against the company.

[No. 9.]

Argued November 14, 15, 1895. Decided December 2, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania dismissing a suit in equity for the infringement of two letters patent issued to McCarty for improvements in car trucks, brought by Harry C. McCarty *et al.* against the Lehigh Valley Railroad Company. Upon the hearing in this court complainants abandoned their claims under one of the patents, and asked for a decree only upon the third and fourth claim of the second patent No. 339,913. *Affirmed.*

Statement by *Mr. Justice* **Brown**:

This was a bill in equity for the infringement of two letters patent issued to McCarty for improvements in car trucks, *viz.:* patent No. 314, 459, dated March 24, 1885, and patent No. 339,913, dated April 13, 1886. The application for the first patent was filed June 5, 1884, and for the second patent, August 31, 1883, so that, in reality, the second patent represents the prior invention. Upon the hearing in this court, complainants abandoned their claims under the first patent, No. 314,459, and asked for a decree only upon the third and fourth claims of the second patent, No. 339,-913.

The invention covered by this patent consists of a metallic bolster for car trucks, upon which the whole body of the car is carried by a swinging pivot, as shown in the following drawings:

ends of the bolster resting upon the side irons A of this truck. Figure 2 represents the bolster, *formed of a top iron bar, F, and a lower [112 iron bar, G, the bar F being arched and bolted at its ends to the bar G. Between the bars are the supporting metallic columns H, which rest on the bar G. The crown or central portion of the bar F rests upon these columns, the bars and columns being firmly bolted together. J represents the side bearings, which rest on and are bolted to the bar F, and have connected with them the ends of the truss rods K, which are of inverted arch form. These side bearings and truss rods, however, are immaterial in the present case. On the under side of the ends of the bar G are screwed the plates P, whose sides are notched or grooved, as at *a*, to receive the columns B of the side irons, the plates thus forming the end guides or supports of the upper bolster. The ends of the bar G are turned upwardly, forming the flanges Q, against which the ends of the bar F abut.

The third and fourth claims, the only ones in issue, were as follows:

"3. The lower bar G having flanges Q turned up on its ends, in combination with the arched upper bar F, having its ends bearing against said flanges, the guide plates P, bolted to the ends of said bars under the same, the stops or blocks M inserted between bars F and G, near their ends, and the pillars H, also interposed between said bars, as stated."

"4. The upper bolster, composed of the bent bar F, straight bar G, and interposing columns M, in combination with the plates P, secured beneath the bars F G at their ends, and notched or grooved on their sides at *a*, to receive the columns B of the side irons, substantially as and for the purpose set forth."

The answer of the defendants denied that McCarty was the original inventor of the alleged improvements; averred that said im-

Fig. 1.

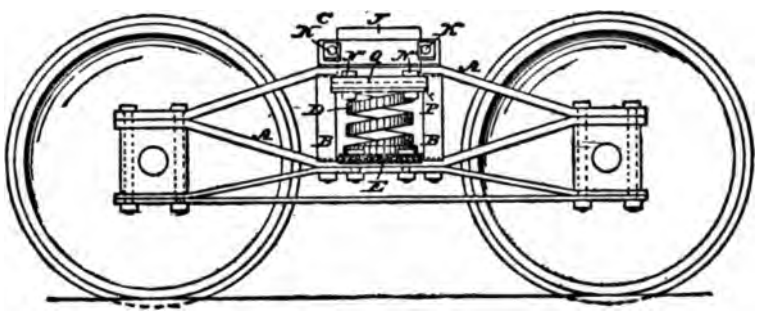

Fig. 2.

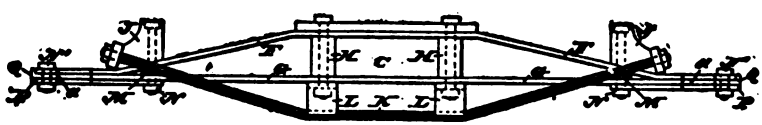

Figure 1 of these drawings represents a side view of the car truck between the wheels, the

provements were not of any advantage to the public; that the inventions were not patent-

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able, had been described in prior publications, and had been publicly used elsewhere.

Upon a hearing upon pleadings and proofs, the bill was dismissed, and complainants appealed to this court.

Messrs. **Jerome Carty** and **R. A. Parker** for appellants.

Mr. **Robert J. Fisher** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The specification of the patent in this case does not, as specifications ordinarily do, state the peculiar functions of the patented device, the defects it is designed to remedy, or the features that distinguish it from other similar devices. This omission, however, is supplied by the testimony, which shows that the invention was due to the frequent breaking of wooden bolsters, of the form in common use, in what were termed the "diamond truck," and other forms of car trucks. After some fruitless experiments, McCarty conceived the idea of using two iron plates, thereby forming a strong bolster, without the disadvantage found in the use of wood alone or wood in connection with the iron plates. This resulted in the application for patent No. 339,913, for a bolster partly supported by truss rods. It soon appeared, however, that the form shown in the drawings of 339,913 possessed the requisite strength without the truss rods, which were accordingly dispensed with, and patent No. 314,459 subsequently applied for.

A few days after McCarty applied for his first patent, *viz.*, September 10, 1882, one William H. Montz made application for a similar device, upon which a patent was granted, apparently by mistake of the Patent Office, and an interference then declared between them. Priority in invention was awarded to McCarty, February 24, 1886, neither party taking any testimony. In this connection there was much evidence tending to show that in October, 1882, a convention of master car builders was held at Niagara Falls, at which McCarty's model was exhibited and examined by car builders, among whom was Mr. Lentz, master car builder of the Lehigh company, defendant in this case. Shortly after this Mr. Lentz wrote an official letter in behalf of the defendant, requesting McCarty to send a blue print of his truck, as shown at Niagara Falls the week before. A blue print was accordingly sent to 114]him on October 24, which *corresponded with the drawing annexed to patent No. 339,913, soon after which the defendant company began the manufacture of bolsters for use in their cars substantially after the form of the blue print, and in the following year Montz made application for the patent upon which the interference was declared between him and McCarty, which resulted in awarding priority of invention to McCarty. But this question of priority, if not settled conclusively by the interference, becomes immaterial in this case in view of the anticipating device set up as a defense, which, if sustained, would probably apply as well to the one patent as to the other.

Freight cars are generally, if not universally, constructed so as to ride upon two four-wheeled trucks, upon which the cars are supported by means of devices called bolsters. One of these devices is attached to the bottom of the car body and is called a body bolster. The other is attached to the truck and is called the truck bolster. The body bolster rests upon the truck bolster, and at the point of contact there is a device called the center bearing plate, which, acting in connection with a king bolt, permits the truck to conform to inequalities and curvatures in the track, regardless of the direction of the axis of the car body. Side supports, shown as J in figure 2, are also furnished, to secure stability of the car upon the truck and prevent any tendency to upset, by limiting the rocking of the car body. Ordinarily, though, the weight is carried upon the center bearing plate, that the swivelling may be done as easily as possible, in order to avoid friction between the car and the side bearings, especially in hauling a heavy train around a curve.

Truck bolsters are sometimes set rigidly upon the truck frame. These, however, were found defective, since, in case of inequalities in the track, the sinking of bad joints, the unevenness of side tracks and their approaches, and more especially in cases of derailment, the trucks were subjected to a severe torsional strain, which racked them, loosened their bolts, and weakened their entire structure. To obviate this, it had become common to rest the ends of the bolster upon springs in the side trusses between the wheels, as shown in figure 1, and *also in several prior patents. [115 These are termed floating blosters, the object of which is to relieve the car from shocks caused by any unevenness of the track or roadbed.

Bolsters made of wood, which were formerly used and found to be sufficient under light loads, especially when trussed, were, when used to carry the heavy loads of modern cars, which are double and even triple the weight formerly carried, found insufficient, and have largely given place to bolsters of iron.

The bolster in question consists of two bars of metal, F and G, placed one upon the other, the lower one, G, being horizontal, and the upper one, F, arched so as to form the truss. The lower bar is made longer than the upper, and its ends are turned up into flanges, Q, so as to form abutments or bearing surface for the ends of the upper bar, and thus to receive the end thrust caused by the weight imposed upon the bolster. Between the two bars, at their central point, are supports or columns, H H, which rest at their lower ends upon the lower bar and hold upon their upper ends the upper bar, fastening bolts being passed through the bars and the columns. Similar short columns, M M, are placed between the bars at the point where the arch of the upper bar begins. To the under side of the bolster so formed is bolted a plate, P, which serves to guide the bolster between the columns of the truck frame, the sides of this plate being notched, as shown at *a*, so as to fit around the columns of the truck frame. In connection with this truck bolster, there are truss rods, K, which pass diagonally through castings placed upon the upper side of the truss, and are supported upon seats under the lower bar, and

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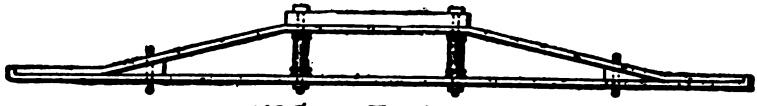
provided with the usual screw threads and nuts for giving them the proper degree of tension. These truss rods, however, form no part of the third and fourth claims in dispute.

These claims differ from each other principally in the fact that the flanges Q at the ends of the lower bar G, as well as the pillars H, constituting elements in the third claim, are not found in the fourth; while the fourth describes the plates P, which are stated in the third claim to be "bolted to the ends of said bars under the same," as "secured beneath the 116] bars *F G at their ends, and notched or grooved on their sides at *a*, to receive the columns B of the side irons, substantially as and for the purpose set forth." There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that if we once begin to include elements not mentioned in the claim in order to limit such claim and avoid a defense of anticipation, we should never know where to stop. If, for example, a prior device were produced exhibiting the combination of these claims *plus* the springs, the patentee might insist upon reading some other element into the claims, such, for instance, as the side frames and all the other operative portions of the mechanism constituting the car truck, to prove that the prior device was not an anticipation. It might also require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too obviously untenable to require argument.

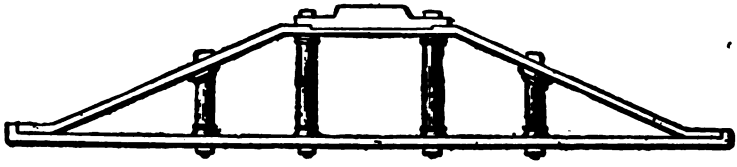
The court below dismissed the bill upon the ground that the patent had been substantially anticipated by prior devices, which required nothing more than mechanical skill to adapt them to the purposes of this patent. In this connection, defendant introduced a device known as the "Old Metal Transom," which appears to have existed prior to 1882, and probably before the date of the McCarty invention, which he fixes as in June, 1881, although from his correspondence with the Patent Office it appears very doubtful whether he perfected it before July, 1882. This transom was used, not as a truck bolster, but as a body bolster, and consisted of a straight bar corresponding to the bar G, having the flanges Q at the end, a bent bar corresponding to F, and interposed columns *corresponding to the columns M. It is[117 in fact the McCarty bolster turned upside down, with the plates P, which are only necessary in a floating bolster, omitted. The only object of these plates, fitted as they are with notches to embrace the columns of the side trusses, is to serve as a guide for the ends of the bolster as they rise and fall upon the springs.

Defendant also exhibited the Naugatuck truck, which appeared to have been used upon the Naugatuck Railroad, in the state of Connecticut, as early as 1862, and was still in actual use upon the New York, New Haven, & Hartford Railroad, the present owner of the Naugatuck. This contains a truck bolster having all the substantial elements of the McCarty combination, including the straight bar and flanges, the bent bar and the intervening columns, although, like the Old Metal Transom, it contained nothing corresponding to the plates P, which, as before observed, are only required in connection with a floating bolster. The ends of this bolster were fitted rigidly to the side trusses. The springs, instead of supporting the ends of the bolster, were placed over the journal bearings, and imparted a limited motion to the carriage. The guide plates are obviously unnecessary in this construction.

The following drawings exhibit the McCarty bolster so far as the combinations of the third and fourth claims are concerned, and the corresponding features of the Naugatuck bolster:



McCarty Truck Bolster.



The Naugatuck Truck Bolster.

118] *The invention, then, of McCarty consisted in taking the Naugatuck truck or bolster, turning it into a floating bolster, by adding the guide plate, P, and resting its ends upon the springs in the side trusses, which springs, however, are not made an element of either the third or fourth claims. Even if they had been claimed, they would not of themselves constitute a novel feature, as they are admitted to have been used long before, and are described in several prior patents in connection with bolsters of the old pattern. The wedge-shaped

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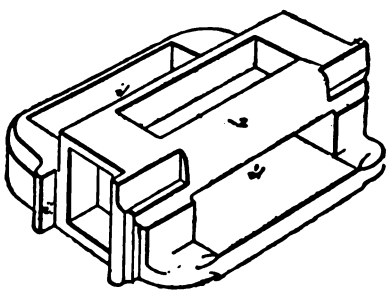
blocks or columns M are unimportant, as angle irons in analogous positions are well known in the art, and are shown in prior patents. In addition to that, it does not appear that defendant used them. The Naugatuck truck was doubtless improved by the changes made by McCarty; but if there were anything more in this than mechanical skill or the aggregation of familiar devices, each operating in its old way to produce an aggregated result, it was invention of such a limited character as to require a narrow construction. The case is not unlike that of *Pennsylvania R. Co.* v. *Locomotive Engine S. Truck Co.* 110 U. S. 490 [28: 222], where a patent for employing a particular car truck already in use on railroad cars, on the forward end of a locomotive, was held void for the want of novelty, the court referring to the familiar principle that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.

There is another consideration which leads to the same conclusion. The original application made by McCarty contained, among other things, a broad claim for "a truck bolster provided on its ends with supporting and guiding plates, substantially as and for the purpose set forth." This claim, being obviously too broad in view of the prior patents, was amended so as to read as follows: "A truck bolster provided at its ends with plates which are notched to fit upon vertical parts of the frame so as to serve as guides and supports for said bolster, substantially as set forth." This **119**]claim having been apparently *rejected, the patentee abandoned his broad claim for a notched plate, and claimed only a plate in combination with the other features of his bolster, which was finally allowed. His acquiescence in the rulings of the Patent Office in this particular indicates very clearly that he should be restricted to the combination claimed, and that the case is not one calling for a liberal construction.

In view of these limitations upon the McCarty patent, was there any infringement in defendant's device? This device contained the bars F and G, and the pillars H of the McCarty patent, but instead of having the flanges Q upon the ends of the lower bar, and the guide plates P, there was substituted a cap shown in the patent to Montz, of which the following is a drawing:



This cap contains a recess, *i*, for the reception of the ends of the bolster bar, which are thereby maintained in proper position with respect to each other, and is secured to the ends of the bolster bar by means of two bolts passing vertically through them. The cap, which fits between the posts of the side frame and rests upon a spring, is provided at each side with flanges, *i'*, which embrace the outer and inner faces of the posts, and prevent a longitudinal motion of the bolster, while permitting the same to move freely in a vertical direction. Now, as, in view of the Naugatuck truck, there was nothing which could be called novel in the third and fourth claims of the McCarty patent, except the guide plates P, which were used to adapt this bolster to the purposes of a floating bolster by resting its ends on springs; and as the cap in question is an obvious departure *from the device in this particular,—[**120** we cannot say that it is an infringement, although it accomplishes practically the same purpose as the flanges Q and plate P of the McCarty patent. Had it been wholly novel to rest the ends of the bolster upon springs, by means of guide plates, it is possible we might have been able to hold this cap to be an infringement; but as the novelty consists, not in resting the ends of bolsters generally upon springs by means of a guide plate, but in so locating the ends of a bolster of a particular construction, we think the employment of a different means of locating it avoids the charge of infringement.

It is further claimed that the defendant is estopped to question the novelty of the McCarty patent and its priority of invention by the interference proceedings in the Patent Office. Aside from the fact that the issues in those proceedings included the truss rods, which are not used by the defendant, the evidence that the defendant was a party in privity to Montz's application for the patent which was awarded to him, or that he made his application in their interest, is too inconclusive to justify us in holding that the company was bound by the result of this proceeding. It practically rests upon Montz's reply to the question why he did not proceed with the interference, that he had no orders from his superior officers of the road. This we think is insufficient, in the absence of affirmative evidence that the company had knowledge of the proceeding, and assented to the action taken by Montz. There is not that certainty to every intent, which Lord Coke held necessary to constitute an estoppel, and as observed by this court in *Russell* v. *Place*, 94 U. S. 606, 610 [24: 214, 215]: "If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

The decree of the court below dismissing the bill is therefore affirmed.

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121]STEPHEN M. FOLSOM, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 121-127.)

Jurisdiction of circuit court of appeals.

The circuit court of appeals has not jurisdiction of a writ of error to review the judgment and proceedings of the supreme court of a territory in the case of a conviction of an infamous crime.

[No. 550.]

Argued and Submitted November 19, 1895. Decided December 2, 1895.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit certifying a question to be answered in a criminal action tried in the District Court of the Second Judicial District of the Territory of New Mexico, in which Stephen M. Folsom, plaintiff in error, was adjudged guilty of making certain false entries in violation of U. S. Rev. Stat. § 5209, and adjudged to be imprisoned in the penitentiary for the period of five years. *Question answered in the negative.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a certificate from the United States circuit court of appeals for the eighth circuit, which, omitting the formal parts, reads as follows:

"First. At a regular term of the district court of the second judicial district of the territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States, held at Albuquerque, in said district, the plaintiff in error, Stephen M. Folsom, was, on the 15th day of March, 1894, indicted by the grand jury in said court for making certain false entries in violation of the provisions of U. S. Rev. Stat. § 5209.

"Second. He was thereafter arraigned. He pleaded not guilty. He was tried by the said district court and a jury, was found guilty of making certain of the false entries charged in said indictments in violation of the provisions of section 5209, and was thereafter, on the 14th day of April, 1894, ordered and adjudged by the said court to be confined at hard labor in the territorial penitentiary at Santa Fé, New Mexico, for the term and period of five years upon each of the seven separate and distinct offenses, as laid and charged in the fourteen counts of the indictments upon which the jury had theretofore returned a verdict of guilty; and it was further ordered and adjudged by 122]the said court that said term *upon each of the said offenses should run concurrently each with the others, and that the defendant pay the costs to be taxed, and that execution issue therefor.

"Third. The said Stephen M. Folsom then appealed from said judgment to the supreme court of the territory of New Mexico, and his case upon said appeal was heard and tried by the said supreme court August 27, 28, and 29, 1894; was on the latter day submitted to and taken under advisement by said court, which, on September 4, 1894, adjudged that the judgment of the district court of the second judicial district aforesaid be affirmed, and that said Folsom be confined in the New Mexico penitentiary at Santa Fé, New Mexico, for the full term of five years, pursuant to the said judgment of the district court.

"Fourth. On the 9th day of November, 1894, a writ of error was duly issued out of the United States circuit court of appeals for the eighth judicial circuit to the supreme court of the territory of New Mexico, commanding the said court to send the records and proceedings and the judgment in said case between the United States of America, plaintiff and appellee, and Stephen M. Folsom, defendant and appellant in said supreme court, with all things concerning the same, to this circuit court of appeals for the eighth circuit, together with said writ, so that the same should be filed in the office of the clerk of this court on or before the first day of January, 1895, to the end that, the records and proceedings aforesaid being inspected, the United States circuit court of appeals for the eighth circuit might cause further to be done therein to correct the error of which the said Folsom had complained what of right and according to the law and custom of the United States should be done, and pursuant to that writ the clerk of the supreme court of the territory of New Mexico made due return and transmitted to this court a true copy of the record, bill of exceptions, assignment of errors, and of all proceedings in said case before January 1, 1894, and the said case is now pending in this court.

"Fifth. January 7, 1895, the United States of America filed a motion to dismiss the writ of error, on the ground *that this circuit [123 court of appeals has no jurisdiction to hear and determine the issue raised thereby or to review the said judgment of the supreme court of the territory of New Mexico, and the said motion has been argued and submitted to this court for decision.

"Sixth. The errors in the judgment and proceedings of the supreme court of the territory of New Mexico which are assigned by Stephen M. Folsom, the plaintiff in error, in his complaint, upon which the said writ of error was issued from this court, are such that if, upon due consideration upon the merits, they should be sustained, the judgment of the said supreme court ought to be reversed.

"And the said United States circuit court of appeals further certifies that, to the end that it may properly decide this and other questions arising in this case which are duly presented by exceptions and assignments of error properly taken and filed, the said court desires the instruction of the Supreme Court of the United States upon the following question:

"Has the United States circuit court of appeals for the eighth judicial circuit any jurisdiction to hear and determine the issue presented by said writ of error, and to review the

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,*—see note to Schunk v. Moline, M. & S. Co. 37: 256.

As to jurisdiction of state and United States courts as to territory and offense,—see note to United States v. Bevans, 4: 404.

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judgment and proceedings of the supreme court of the territory of New Mexico?"

Messrs. **Charles A. Willard,** *Neill B. Field,* and *F. W. Clancy* for plaintiff in error.

Mr. **Holmes Conrad,** Solicitor General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The offense denounced by U. S. Rev. Stat. § 5209, is punishable by imprisonment not less than five nor more than ten years, and is therefore an infamous crime. *ReClaasen,* 140 U. S. 200 [35: 409], and cases cited.

The question, then, is whether the circuit court of appeals for the eighth circuit has juris-
124] diction of a writ of error to *review the judgment and proceedings of the supreme court of the territory of New Mexico in the instance of a conviction of an infamous crime.

By section 5 of the judiciary act of March 3, 1891, it was provided that appeals or writs of error might be taken from the district courts or from the circuit courts direct to the supreme court in six classes of cases, one of which classes was "cases of conviction of a capital or otherwise infamous crime;" and by section 6, that the circuit courts of appeals should exercise appellate jurisdiction to review by appeal or writ of error final judgments of the district courts and the circuit courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law. And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, the revenue laws, or under the criminal laws, and in admiralty cases."

In harmony with previous legislation (25 Stat. at L. 784, chap. 323; 26 Stat. at L. 81, chap. 182, § 42), section 13 of the act of March 3, 1891, provides: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States under this act."

Obviously this section was designed to give a review of the decisions of the court of original jurisdiction by an appellate tribunal, and the same reason would not obtain in respect of cases where such review could already be had; nevertheless section 15 was added, although Congress did not see fit, in relation to appeals or writs of error from and to the supreme courts of the several territories, to make the same provision thereby as that in section 13, except so far as the circuit courts of appeals were concerned, and as to them only in cases in which their judgments were made final by the act.

125] *Section 15 is as follows: "That the circuit court of appeals in cases in which the judgments of the circuit courts of appeals are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district courts and circuit courts; and for that purpose the several territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits."

By U. S. Rev. Stat. § 702, and the act of March 3, 1885 (23 Stat. at L. 443, chap. 355), the final judgments and decrees of the supreme courts of the territories where the matter in dispute, exclusive of costs, exceeded the sum of $5,000, might be reviewed, reversed, or affirmed in this court upon a writ of error or appeal in the same manner and under the same regulations as the final judgments or decrees of a circuit court.

In *Shute* v. *Keyser,* 149 U. S. 649 [37: 884], which was a case not falling within either of the classes in which the judgments of the circuit courts of appeals were made final by the act of March 3, 1891, we held that as there was no provision by the 15th section of that act for appeals or writs of error except to the circuit courts of appeals in cases in which their judgments were made final, and no express repeal of the provisions of the prior acts regulating appeals or writs of error from the supreme courts of the territories in other cases, that an appeal or writ of error lay to this court from the judgments or decrees of those courts in such other cases.

In *Aztec Min. Co.* v. *Ripley,* 10 U. S. App. 383, the circuit court of appeals for the eighth circuit held that it had no jurisdiction under the 15th section, because the case at bar did not come within any one of the classes of cases wherein the judgments of that court were declared to be final, and its judgment dismissing the writ of error on that ground was affirmed by this court, while it was at the same time pointed out that, as the value of the matter in dispute did not reach $5,000, we could not take jurisdiction of *the particular case. [126
151 U. S. 79 [38: 80].

It was urged that Congress could not have intended that such cases should be brought to this court by reason of the discrimination in the 15th section, but we were constrained to the conclusion reached in view of all the legislation on the subject, and the specific language of the section which we were not at liberty to disregard.

The result was rendered inevitable, in our opinion, by the restriction of the jurisdiction of the circuit courts of appeals to cases in which their judgments were made final by the act, and the same rule seems applicable in the disposal of the question under consideration.

By the 6th section the circuit courts of appeals are vested with appellate jurisdiction "to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and their judgments are made final in, among others, cases arising under the criminal laws.

By the preceding section, appeals or writs of error may be taken from the district courts or the existing circuit courts directly to this

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court "in cases of conviction of a capital or otherwise infamous crime."

The criminal cases in which the judgments of the circuit courts of appeals are made final by section 6 do not embrace, therefore, capital cases or cases of infamous crimes.

The 15th section confers appellate jurisdiction on the circuit courts of appeals to review the judgments of the supreme courts of the territories, but it is in terms the same appellate jurisdiction as conferred by the 6th section in respect of the judgments of district and circuit courts, and this being so, is limited to those cases in which, if decided by the district and circuit courts, the judgments of the circuit courts of appeals would be final.

Sections 5 and 6 relate to appellate jurisdiction over the judgments and decrees of district and circuit courts; section 13 gives the same appellate jurisdiction over the decisions of the 127]*United States court in the Indian territory distributed in accordance with sections 5 and 6; section 15 gives the same appellate jurisdiction over the territorial courts, but confines it to the courts of appeals and to particular cases as specified in section 6. The grant of jurisdiction is not general, but specific and limited, and we see no escape from the conclusion that it is not conferred on the circuit courts of appeals over territorial judgments in capital cases and cases of infamous crimes.

It is said that this involves the absurdity that convictions for minor offenses are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, but where the intention is plain, it is the duty of the court to expound the statute as it stands. As far as Congress went in conferring this right to a second appeal, the intention is clear and the language used unambiguous. The objection really is that Congress should have gone farther and given by this act a second review in this court in cases of convictions of capital and infamous crimes in the territories.

It may be that there was an oversight in that particular, but if there were, we certainly cannot supply it by construing the 15th section as carrying appellate jurisdiction over such cases to the circuit courts of appeals, and so enlarging that jurisdiction into something other and different from "the same appellate jurisdiction" as is exercised in reviewing the judgments of district and circuit courts under section 6 of the act.

We answer the question in the negative, and it will be so certified.

LOUIS F. STREEP, *Plff. in Err.*, [128
v.
UNITED STATES.

(See S. C. Reporter's ed. 128-136.)

Proof under indictment—fleeing from justice.

1. Where the indictment charged, not a scheme to defraud, but a scheme to sell counterfeit obligations of the United States, by means of communication through the mails, under U. S. Rev. Stat. § 5480, as amended by the act of March 2, 1880, chap. 393, no proof of a scheme to defraud is necessary to support it.
2. To constitute "fleeing from justice," which, under U. S. Rev. Stat. § 1045, extends the time for finding an indictment, it is not necessary that there should be an intent to avoid the justice of the United States; but it is sufficient that there is an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act.
3. A flight with the intention of avoiding being prosecuted is a fleeing from justice within the meaning of said § 1045, whether a prosecution has or has not been actually begun.

[No. 623.]

Argued October 30, 31, 1895. Decided December 2, 1895.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment adjudging Louis F. Streep guilty of the offense of devising a scheme to sell counterfeit obligations and securities of the United States by means of circulars through the postoffice, and sentencing him to imprisonment. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an indictment in the circuit court of the United States for the southern district of New York, on U. S. Rev. Stat. § 5480, as amended by the act of March 2, 1880, chap. 393, and copied in the margin,* for devising a scheme to sell counterfeit obligations and securities of the United States by means of circulars through the postoffice. The indictment was found October 10, 1892, and contained two *counts, one charging the offense to have[129 been committed on May 13, and the other on May 20, 1889.

By U. S. Rev. Stat. §§ 1043, 1044, as amended by the act of April 13, 1876, chap. 56, "no person shall be prosecuted, tried, or punished" (except for murder, or under the revenue laws, or

*If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply or furnish, or procure for unlawful use, any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any state, territory, municipality, company, corporation, or person, or anything represented to be, or intimated or held out to be, such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle" or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside of the United States, by

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the slave trade laws of the United States), "unless the indictment is found or the information is instituted within three years next after such offense shall have been committed." 19 Stat. at L. 32. But, by § 1045, "nothing in the two preceding sections shall extend to any person fleeing from justice."

At the trial of this indictment, the United States introduced evidence tending to prove the commission of the offense at the times alleged in the indictment; and also testimony that the defendant was indicted June 20, 1889, for the same transaction, in a court of the state of New York, under the Penal Code of the state; and was arrested by the police and gave bail upon that indictment; that on October 10, 1889, his case was called in that court and his bail forfeited by order of the court; that the officers afterwards made unsuccessful attempts to find him; that in August, 1890, being in New York, he stated to Anthony Comstock (who was called as a witness for the government) that he went to Europe in the fall of 1889, because his counsel advised him to do so and told him to go abroad so that they could not call him as a witness against one Bechtold, [130] by whom the bail had been put up; *that in October, 1890, he made an affidavit and testified in a prosecution in behalf of the United States against Bechtold; and that the first charge made against him for a violation of the laws of the United States was a complaint charging the same offense as in this indictment and upon which he was arrested October 2, 1891.

The defendant offered no evidence; and, at the close of the evidence for the government, moved the court to direct an acquittal, because the indictment was found more than three years after the offenses alleged and given in evidence, and because the words "fleeing from justice," in U. S. Rev. Stat. § 1045, meant a fleeing from the justice of the United States, and not from the justice of any state. The motion was denied and the defendant excepted.

The court instructed the jury that if they found that the defendant was fleeing from justice between the times of the commission of the offenses and of the finding of the indictment, they might find him guilty, notwithstanding the indictment was found more than three years after the commission of the offenses. The further instructions of the court to the jury, together with the requests and exceptions of Mr. Hess, the defendant's counsel, and a request of Mr. Mott, the attorney for the United States, were stated in the bill of exceptions as follows:

"The Court: 'The evidence as to his fleeing from justice, as I understand it, was that there was a prosecution against the accused in the state courts; that he gave bail to answer to the charge; that when the time for trial came he did not appear and his bail was forfeited, and afterwards, when he had returned, he told the witness Comstock that the reason why he was away was that he had gone away because of the prosecution, under the advice of his counsel, and that his bail had been paid by somebody else. If you find that true, I charge you that he was fleeing from justice, in the meaning of the statute of the United States, during the period of his absence, notwithstanding the fact that that was a prosecution in the courts of the state, and that there was then no prosecution of him pending in any court of the United States.' Mr. Hess: 'And to that I except.'

*"The Court: 'For the purpose of this [131] trial, I charge that if the jury are satisfied of the main charge in this indictment, and are likewise satisfied that during the three years mentioned he was fleeing from justice, having gone from the country to Europe to avoid the prosecution in the state courts, then you can convict him, notwithstanding the fact that it is conceded that the indictment is found more than three years after the offense.' Mr. Hess: 'To the latter part of your honor's charge I except. I ask your honor to charge the jury that the forfeiture of the bail by the state courts is not presumptive evidence of a fleeing from justice.' The Court: 'It is not conclusive evidence, but it is a circumstance which the jury may consider.'

"Mr. Hess: 'I ask your honor to charge the jury that before they can convict this defendant under the indictment they must be satisfied from the evidence that there was a scheme to defraud.' The Court: 'No; the statute says a scheme to defraud and likewise a scheme to sell counterfeit money. This indictment charges a scheme to sell counterfeit money. It is a scheme to sell counterfeit money that the jury must find to have been devised by the accused.' Mr. Hess: 'They must be satisfied, before they convict, from the evidence in the case, that there was a scheme on the part of this defendant to sell counterfeit money.' The Court: 'I charge that.'

"Mr. Hess: 'I also ask your honor to charge the jury that they cannot infer a scheme to defraud from the circulars themselves. They must be satisfied from the evidence that there was such a scheme.' The Court: 'I do not accede to the request.' Exception by defendant.

"Mr. Hess: 'I also ask the court to charge the jury that it must appear from the evidence that the defendant fled from justice of the United States, and not from the justice of the state.' The Court: 'That is declined.' Exception by defendant.

"Mr. Mott: 'I ask your honor to charge that if the jury find that the defendant was absent from the country, as stated, for six months at any time between the commission of this act *and the time of the filing of this in- [132] dictment, then they can convict, notwithstanding the lapse of three years.' The Court: 'I will give that charge.' Exception by defendant."

The court also, at the request of the defendant's counsel, instructed the jury that the fail-

means of the postoffice establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet or advertisement, in any postoffice, branch postoffice, or street or hotel letter box of the United States, to be sent or delivered by the said postoffice establishment, or shall take or receive any such therefrom, such person so misusing the postoffice establishment shall, upon conviction, be punishable by a fine of not more than $500 and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. 25 Stat. at L. 873.

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ure of the defendant to testify should not raise a presumption against him; and that if they had a reasonable doubt they must acquit the defendant.

The jury returned a verdict of guilty; the court sentenced the defendant to be imprisoned in a penitentiary for eighteen months; and he sued out this writ of error.

Messrs. **Charles C. Lancaster** and *Frank W. Angel*, for plaintiff in error:

In determining whether a person is a fugitive from justice, the rule laid down in the case of *Roberts* v. *Reilly*, 116 U. S. 80 (29: 544), is applicable. In that case the court says: "To be a fugitive from justice" is that a person "having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."

State v. *Harvell*, 89 Mo. 588; *Re Griffith*, 35 Kan. 377; *State* v. *Vines*, 34 La. Ann. 1078.

In *State* v. *Harvell* it was held that one is a fugitive from justice within the exception in the statute where he conceals himself to avoid arrest, even though he does not leave the state, or even his own premises.

In *Re Griffith* it was held that "filing a complaint on which no warrant is issued nor arrest made is not a commencement of a prosecution sufficient to take the case out of the bar of the statute."

In this case no complaint was made against the defendant nor was a warrant issued of any kind either by the commissioner or by the court on indictment, and consequently no arrest was made.

In *State* v. *Vines* it is said that "prescription in criminal cases is interrupted where the criminal has absconded or fled from justice."

Fleeing from justice under this statute can only mean a fleeing from justice of the United States, and not from justice of a state. Before the plaintiff in error could be deprived of the benefits of the statutes of limitation, the defendant in error must prove that he was fleeing from some crime against the United States.

It has been held in some cases that although a warrant was issued within the time when the defendant could have been indicted, nevertheless, if there is no indictment after the prosecution is barred, the statute begins to run.

Re Griffith, 35 Kan. 377; *Com.* v. *Sheriff*, 3 Brewst. 394, 395; *United States* v. *Slacum*, 1 Cranch, C. C. 485; *United States* v. *Ballard*, 3 McLean, 469; *Com.* v. *Haas*, 57 Pa. 443.

The language of the court in *Com.* v. *Aslop*, 1 Brewst. 343, as to the defendant's concealment of his person within the jurisdiction can have no application here, for the object of that reason was to show that the statute was not a protection if the bill were brought and exhibited within the two years.

A statute of limitation, being an act of grace on the part of the government, is to be liberally construed in favor of a defendant.

People v. *Lord*, 12 Hun, 288.

Mr. **J. M. Dickinson**, Assistant Attorney General, for defendant in error:

The letters and counterfeit money were found under circumstances to connect defendant with the crime. This made his confession admissible.

People v. *Badgley*, 16 Wend. 59; *United States* v. *Williams*, 1 Cliff. 5, 25, 27; 1 Whart. Crim. Law, § 683; 3 Rice, Ev. § 296; Bishop, Crim. Proc. § 1058.

Whether a question is one of fraudulent intent or not, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate and establish his intent or motive in the particular act directly in judgment.

Wood v. *United States*, 41 U. S. 16 Pet. 342, 360 (10: 987, 994); *Taylor* v. *United States*, 44 U. S. 3 How. 197 (11: 559); *Castle* v. *Bullard*, 64 U. S. 23 How. 172 (16: 424); *Lincoln* v. *Claflin*, 74 U. S. 7 Wall. 132 (19: 106); *Butler* v. *Watkins*, 80 U. S. 13 Wall. 456 (20: 629); *Mutual L. Ins. Co.* v. *Armstrong*, 117 U. S. 591 (29: 997); *Moore* v. *United States*, 150 U. S. 57 (37: 996); *McKinney* v. *Dingley*, 4 Me. 172.

The relation between the justice of a state and that of the United States in respect of fugitives from justice has been directly passed upon in *United States* v. *O'Brian*, 3 Dill. 384. In that case the learned judge said:

"The criminal codes of the general government and of the states are entirely distinct, as was held by this court in *United States* v. *Hawthorne*, 1 Dill. 422, and in my opinion it cannot be supposed that Congress intended to make any provision in respect to persons fleeing from the justice of the states."

This decision is based upon a view of the relations between the United States and the several states, that is entirely too narrow.

While the sovereignties are distinct, and in the administration of law are, with some limitations, exclusive within their respective spheres, nevertheless the legislation of the United States cannot be regarded as made without reference to the laws of the states and ignoring the conditions incident to the dual administration of justice in the states.

The view of the founders of the government was that the relation in the administration of laws would be intimate, and legislation and the decisions of the courts have repeatedly confirmed this understanding.

The Federalist, No. 82.

The judiciary act of September 24, 1789, in distributing jurisdiction among the various courts, constantly exercises the authority of including and excluding the state courts therefrom. Concurrent jurisdiction was given by it in certain cases to the state courts.

Under the first patent law, passed in 1793, damages for infringement were made recoverable in state courts.

The naturalization act, passed in 1790, gave jurisdiction to the state courts. So the act of 1802 (2 Stat. at L. 153).

U. S. Rev. Stat. §§ 5428, 5429, pronounced a penalty for fraud committed in procuring a naturalization paper, though the fraud was committed in a state court.

By 2 Stat. at L. 354, 489, jurisdiction was given the state courts for the recovery of fines and penalties under the revenue laws of the United States.

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In 3 Stat. at L. 244, cognizance was given to state courts of suits for taxes, penalties, etc., arising under the laws imposing direct taxes and internal duties.

Claflin v. *Houseman*, 93 U. S. 140 (23: 839); *Com.* v. *Schaffer*, 4 U. S. 4 Dall. Appx. XXVI. (1: 926); *Teal* v. *Felton*, 53 U. S. 12 How. 292 (13: 993); *Houston* v. *Moore*, 18 U. S. 5 Wheat. 1 (5: 19); *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 420 (5: 295); *Ex parte Coy*, 127 U. S. 751 (32: 278); *Ex parte Clarke*, 100 U. S. 399 (25: 715); *Robb* v. *Connolly*, 111 U. S. 624 (28: 542); *United States* v. *Rauscher*, 119 U. S. 430 (30: 432); *Ex parte Brown*, 28 Fed. Rep. 653; *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153 (25: 903); *Moores* v. *Citizens' Nat. Bank*, 104 U. S. 625 (26: 870); *Amy* v. *Dubuque*, 98 U. S. 470 (25: 228); *Moore* v. *Illinois*, 55 U. S. 14 How. 13 (14: 306); *Tennessee* v. *Davis*, 100 U. S. 271, 272 (25: 653).

It has been repeatedly recognized that the same act may be an offense against both the state and United States law.

Ex parte Siebold, 100 U. S. 389 (25: 723); *Fox* v. *Ohio*, 46 U. S. 5 How. 410 (12: 213); *United States* v. *Marigold*, 50 U. S. 9 How. 569 (13: 261); *Moore* v. *Illinois*, 55 U. S. 14 How. 13 (14: 306); *Cross* v. *North Carolina*, 132 U. S. 139 (33: 290).

Congress will not be presumed to have ignored the fact that a person may be a fugitive from state justice, nor with this knowledge to have passed a law which contemplated giving a criminal immunity because he was not prosecuted within a certain period, when during that period he had withdrawn himself from the country on account of a prosecution in a state court.

Lau Ow Bew v. *United States*, 144 U. S. 47, 59 (36: 340, 344); *Church of the Holy Trinity* v. *United States*, 143 U. S. 457 (36: 227); *Henderson* v. *Wickham*, 92 U. S. 259 (23: 543); *United States* v. *Kirby*, 74 U. S. 7 Wall. 482 (19: 278); *Oates* v. *First Nat. Bank*, 100 U. S. 239 (25: 580).

To constitute an absence a "fleeing from justice," no prosecution need have been begun.

Ex parte Brown, 28 Fed. Rep. 653; *United States* v. *Smith*, 4 Day, 121; *United States* v. *White*, 5 Cranch, C. C. 39; *Roberts* v. *Reilly*, 116 U. S. 97 (29: 549).

To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.

Ex parte Brown, 28 Fed. Rep. 655; *Re Adams*, 7 Law. Rep. 386; *Ex parte Reggel*, 114 U. S. 651, 652 (29: 253); *Roberts* v. *Reilly*, 116 U. S. 95 (29: 549); Church, Habeas Corpus, § 472*a*.

It is a cardinal rule of statutory construction that significance and effect shall if possible be accorded to every word.

Washington Market Co. v. *Hoffman*, 101 U. S. 215 (25: 783).

Mr. Justice **Gray** delivered the opinion of the court:

Only two of the questions argued in this court are presented by the exceptions taken at the trial.

One subject of exception was the refusal of the court to instruct the jury, as requested by the defendant, that they could not infer a scheme to defraud from the circulars themselves, but must be satisfied from the evidence that there was such a scheme. That instruction was rightly refused as immaterial. The court had already instructed the jury, without exception by the defendant, that they need not, under this indictment, be satisfied that there was a scheme to defraud; that the statute spoke of a scheme to defraud and also of a scheme to sell counterfeit money; that the indictment charged a scheme to sell counterfeit money, and it was a scheme to sell counterfeit money that the jury must find to have been devised by the accused. The statute, in very words as well as in manifest intent, applies to any person who devises either a scheme to defraud, or a scheme to sell counterfeit money or counterfeit obligations of the United States, provided the scheme is intended to be effected and is effected *by commu- [133 nications through the postoffice. This indictment charged, not a scheme to defraud, but a scheme to sell counterfeit obligations of the United States; and therefore no proof of a scheme to defraud was necessary to support it.

Upon the question whether there had been such a "fleeing from justice" by the defendant as to take the case out of the statute of limitations, the only point taken at the trial was that there must have been a fleeing from the justice of the United States, and not from the justice of any state. No exception was taken to the sufficiency of the whole evidence to prove that there had been a fleeing from the justice of the state of New York, or to the statement of that evidence in the instructions of the court to the jury.

By U. S. Rev. Stat. § 1045, it is provided that "nothing in the two preceding sections" (one of which, as amended in 1876, requires the indictment, in such a case as this, to be found within three years after the commission of the offense) "shall extend to any person fleeing from justice."

The statute, while laying down the general rule that charges of crime shall be formally presented within a limited time after the act complained of, expressly excepts from that rule the case of "any person fleeing from justice." It is unnecessary, for the purposes of the present case, to undertake to give an exhaustive definition of these words; for it is quite clear that any person who takes himself out of the jurisdiction with the intention of avoiding being brought to justice for a particular offense can have no benefit of the limitation, at least when prosecuted for that offense in a court of the United States.

In order to constitute a fleeing from justice, it is not necessary that the course of justice should have been put in operation by the presentment of an indictment by a grand jury, or by the filing of an information by the attorney for the government, or by the making of a complaint before a magistrate. It is sufficient

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that there is a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not been actually begun. Chief Jus-
134]tice Ellsworth so held. *Williams' Case, cited in *United States* v. *Smith* (1809) 4 Day, 121, 125. And there can be no doubt that, in this respect, U. S. Rev. Stat. § 1045, must receive the same construction that has been given to § 5278 by this court, saying: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another. *Roberts* v. *Reilly*, 116 U. S. 80, 97 [29: 544, 549].

Nor is it necessary, in order to satisfy the terms of the statute now before us, that the fugitive should have the intention of fleeing from justice as administered by any particular court or system of courts having criminal jurisdiction over the territory where the act supposed to have been criminal was committed.

The statute speaks generally of "fleeing from justice," without restriction either to the justice of the state or to the justice of the United States. A person fleeing from the justice of his country is not supposed to have in mind the object of avoiding the process of a particular court, or the question whether he is amenable to the justice of the nation or of the state or of both. Proof of a specific intent to avoid either could seldom be had; and to make it an essential requisite would often defeat the whole object of the provision in question.

In the Constitution, laws, and treaties of the United States, the words "fleeing from justice," or "fugitive from justice," have not been used as of themselves implying a flight from the justice of the nation only.

U. S. Rev. Stat. § 1045, is a re-enactment of the corresponding proviso in the first crimes act of the United States: "*Provided*, That
135]nothing herein contained *shall extend to any person or persons fleeing from justice." Act of April 30, 1790 (1 Stat. at L. 119, chap. 9, § 32).

At the time of the passage of that act, the only use, in the Constitution or statutes of the United States, of the words "flee from justice," was in U. S. Const. art. 4, § 2, concerning persons charged with crime in one state and found in another state of the Union. And the earliest act passed by Congress in execution of that provision of the Constitution used, both in the title and in the enacting clause, the general words "fugitive from justice," as applicable to that class of cases. The whole title of that act, so far as it related to this subject, was "An Act Respecting Fugitives from Justice." Act of February 12, 1793 (1 Stat. at L. 302, chap. 7). And that part of the act is re-enacted in U. S. Rev. Stat. § 5278.

The treaties made by the United States with foreign countries, for the extradition of persons accused of crime, make no distinction between crimes against one of the states of the Union and crimes against the United States. By successive treaties between the United States and Great Britain, for instance, each nation engages to "deliver up to justice all persons" who, being charged with certain crimes committed within the jurisdiction of either nation, seek an asylum in the country of the other. Treaties of 1794, art. 27; Treaties of 1842, art. 10 (8 Stat. at L. 129, 576). There can be no doubt that these treaties apply to all offenses of the kind specified, committed within the territorial jurisdiction of the United States, even if cognizable only in the courts of the several states. *United States* v. *Rauscher*, 119 U. S. 407, 430 [30: 425, 432].

From these considerations, our conclusion is that, in order to constitute "fleeing from justice," within the meaning of U. S. Rev. Stat. § 1045, it is not necessary that there should be an intent to avoid the justice of the United States; but it is sufficient that there is an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act.

The only case cited at the bar which restricts the effect of this section to persons fleeing from the justice of the United States is *United States* v. *O'Brian*, 3 Dill. 381, which appears *to us to have proceeded upon too narrow[136
a construction of the section, inconsistent alike with its words and with its purpose.

Judgment affirmed.

UNITED STATES, *Appt.*,
v.
BENJAMIN HEALEY.

(See S. C. Reporter's ed. 136-149.)

Act of 1877—construction of act of Congress—repeal of act—price of public land.

1. The act of 1877, fixing the price of "desert lands" at $1.25 per acre, does not embrace the alternate sections reserved by Congress in a railroad land grant, but their price is fixed at $2.50 per acre by the proviso of U. S. Rev. Stat. § 2357.
2. This court will determine the true intention of an act of Congress respecting the public lands, without reference to a practice of the land department, which has not been uniform.
3. Where two statutes cover, in whole or in part, the same matter, and are not wholly irreconcilable, no purpose to repeal being clearly expressed or indicated, effect is to be given to both.
4. Land entered under the act of 1877, when the price was $2.50 per acre, cannot be patented, after the passage of the act of 1891, upon paying only $1.25 per acre.

[No. 378.]

Argued October 22, 23, 1895. Decided December 2, 1895.

APPEAL from a judgment of the Court of Claims in favor of Benjamin Healey, plaintiff, against the United States, defendant, for the amount paid by plaintiff for a tract of

NOTE.—*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

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public land in excess of what the receiver was entitled to demand of him. *Reversed with directions to dismiss.*

The facts are stated in the opinion.

Messrs. **J. E. Dodge,** Assistant Attorney General, and *George H. Gorman* for appellant.

Mr. **Harvey Spalding** for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 5th day of February, 1889, the appellant, Benjamin Healey, filed in the local land office at Visalia, California, a declaration of his intention to reclaim a tract of land containing 639.20 acres and belonging to the United States.

The declaration stated all the facts required in the cases embraced by the act of Congress of March 3, 1877, chap. 107, providing for the sale of "desert lands" in certain states and territories. 19 Stat. at L. 377; Rev. Stat. Supp. (2d ed.) 187. That act fixed $1.25 per acre as the price of such lands.

137] *The lands described in the declaration constituted one of the alternate reserved sections of public lands reserved to the United States, along the line of the railroad extending from the states of Missouri and Arkansas to the Pacific coast, for the construction of which provision was made by the act of Congress of July 27, 1866. 14 Stat. at L. 292, 294, chap. 278.

At the time of filing his declaration the plaintiff, "being so required, without protest and without taking any steps for relief against the demand of the receiver," paid the sum of $319.60, or 50 cents per acre, for the lands described. He made, Sept. 21, 1891, satisfactory proof of the reclamation of the tract in question, and, without protest, paid for the land reclaimed, in addition to the amount paid at the time of filing his declaration, the sum of $1,278.40, or $2 per acre; in all, $2.50 per acre. A patent was thereupon issued to him.

This action was brought against the United States to recover the sum of $799, which amount, it is claimed, was in excess of what the receiver was entitled to demand from the appellee,—his contention being that the statute only required the payment of 25 cents per acre at the time of filing his declaration, and $1 per acre more when making his final proof; in all, $1.25 per acre.

The court of claims sustained this demand and gave judgment in favor of the appellee for $799.

An examination of the statutes regulating the sale of the public lands is necessary in order to determine the question now presented. That question is whether the act of 1877, providing for the sale of "desert lands," embraces alternate sections reserved to the United States, along the line of railroads for the construction of which Congress made a grant of lands.

By the act of April 24, 1820, making further provision for the sale of the public lands (3 Stat. at L. 566, chap. 51), it was provided that from and after the 1st day of July thereafter no lands should be sold, either at public or private sale, for less than $1.25 an acre.

The next act referred to in the opinion of the court of claims is that of Sept. 4, 1841, appro-**138]**priating the *proceeds of the sales of the public lands and granting pre-emption rights. 5 Stat. at L. 453, 455. That act allowed every person of the class described in it to enter not exceeding 160 acres or one quarter-section of public land, upon paying the minimum price therefor, subject, however, to certain limitations and exceptions, one of which was that "no sections of land reserved to the United States alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement" should be liable to entry under that act. § 10.

By the act of March 3, 1853, chap. 143, the pre-emption laws of the United States as they then existed were extended over the alternate reserved sections of public lands along the lines of all railroads for the construction of which public lands had been or might thereafter be granted by acts of Congress. But that act contained a proviso declaring that "the price to be paid shall in all cases be $2.50 per acre, or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted." 10 Stat. at L. 244.

Other enactments show that Congress steadily held to the policy of requiring double the minimum price for alternate sections of public lands reserved to the United States in grants to aid in the construction of railroads. In the first grant of this character—that of Sept. 20, 1850, to the states of Illinois, Mississippi, and Alabama of alternate even-numbered sections in aid of the construction of a railroad from Chicago to Mobile—it was provided "that the sections and parts of sections of land which, by such grant, shall remain to the United States, within 6 miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands when sold." 9 Stat. at L. 466, chap. 61, § 3. A similar provision will be found in nearly all, if not in all, subsequent acts making grants of public lands for the construction of railroads.*

*An examination of these acts makes it **[139]** clear that up to the revision of the statutes of the United States it was the settled policy of the government to hold for sale, at a price not less than double the minimum price of public lands, all alternate reserved sections on the lines of railroads constructed with the aid of the United States.

That policy was recognized in U. S. Rev. Stat. § 2357, which provides that "the price at which the public lands are offered for sale shall be $1.25 an acre; and at every public sale the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than $1.25 an acre; and all the public lands which are hereafter offered at public sale, according to

*1852, 10 Stat. at L. 8, chap. 45, § 2; 1853, 10 Stat. at L. 155, chap. 59, § 3; 1856, 11 Stat. at L. 9, chap. 28, § 2; 11 Stat. at L. 15, chap. 31, § 16; 11 Stat. at L. 17, chap. 41, § 2; 11 Stat. at L. 18, chap. 42, § 2; 11 Stat. at L. 20, chap. 43, § 2; 11 Stat. at L. 21, chap. 44, § 2; 11 Stat. at L. 30, chap. 83, § 2; 1857, 11 Stat. at L. 195, chap. 99, § 2; 1863, 12 Stat. at L. 772, chap. 98, § 2; 1864, 13 Stat. at L. 66, chap. 80, § 4; 13 Stat. at L. 72, chap. 84, § 2; 13 Stat. at L. 365, chap. 217, § 6; 1865, 13 Stat. at L. 526, chap. 105, § 4; 1866, 14 Stat. at L. 83, chap. 165, § 3; 14 Stat. at L. 87, chap. 168, § 2; 14 Stat. at L. 94, chap. 180, § 5; 14 Stat. at L. 210, chap. 212, § 2; 14 Stat. at L. 236, chap. 241, § 2; 14 Stat. at L. 239, chap. 242, § 2; 1867, 14 Stat. at L. 548, chap. 289, § 5; 1870, 16 Stat. at L. 94, chap. 79, § 4.

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law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the Land Office, at $1.25 an acre, to be paid at the time of making such entry: *Provided*, That the price to be paid *for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress* shall be $2.50 per acre."

It is to be observed, in passing, that this proviso applies to all alternate reserved lands described in any act of Congress, and makes no exception of any lands of that class on account of their fitness or unfitness, in their natural condition, for agricultural purposes.

Thus the law stood at the date of the act of March 3, 1877, chap. 107, providing for the sale of "desert lands" in certain states and territories. 19 Stat. at L. 377, chap. 107. That act is as follows:

"That it shall be lawful for any citizen of the United States, or any person of requisite age who may be entitled to become a citizen, and who has filed his declaration to become such 140] and upon payment of 25 cents per acre, to file a declaration under oath with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter: *Provided, however*, That the right to the use of water by the person so conducting the same on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding 640 acres to any one person, a patent for the same shall be issued to him: *Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed 640 acres which shall be in compact form.

"Sec. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the Land Office in which said tract of land may be situated.

"Sec. 3. That this act shall only apply to and 141] take effect in the states of California, Oregon, and Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

It is said that the administration of this act by the Interior Department for many years succeeding its passage was upon the theory that "desert lands" (unless they were timber and mineral lands) included all public lands in the states and territories named, that required irrigation, even if they were alternate reserved sections along the lines of land-grant railroads. The object of this suggestion is to bring the present case within the rule, often announced, that when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution, where that construction has, for many years, controlled the conduct of the public business. *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206 [6: 603]; *United States* v. *Philbrick*, 120 U. S. 52, 59 [30: 559, 561]; *Robertson* v. *Downing*, 127 U. S. 607, 613 [32: 269, 271].

Let us see what has been the practice in the Interior Department in cases arising, or which have been treated as having arisen, under the act of 1877.

As soon as that act was passed, the Commissioner of the Land Office issued a circular addressed to the registers and receivers of land offices, in which he said that, after the applicant for a patent for "desert lands" had made the required proof, the officer should receive from him the sum of 25 cents per acre for the land applied for, and after the expiration of the period named in the statute, and upon proof that water had been conducted upon the land, he should receive the additional payment of $1 per acre. But it does not appear that the Commissioner intended to make any ruling upon the specific question whether the act of 1877 embraced alternate reserved sections along the line of land-grant railroads. No reference is made by him to the proviso of U. S. Rev. Stat. § 2357. Nevertheless, for many years after the passage of the act of 1877 it was held in the Department [142 that "lands entered under that act should be paid for at the rate of $1.25 per acre without regard to railroad limits." 14 U. S. Land Dec. 75.

But the precise question before the court was considered by the Land Office at a later date, and a new policy was inaugurated. In a circular from that office, of date June 27, 1887, it was distinctly stated that "the price at which lands may be entered under the desert land act is the same as under the pre-emption law, *viz.*, single minimum lands at $1.25 per acre, and double minimum lands at $2.50 per acre,"—the Commissioner referring, in his circular, to U. S. Rev. Stat. § 2357, as his authority for that regulation. That circular received the approval of Secretary Lamar. 5 U. S. Land Dec. 708, 712.

In *Tilton's Case*, decided March 25, 1889, the point was made that the desert land act of 1877, being subsequent in point of time to § 2357, must control as to *all* lands that required irrigation. Secretary Noble, after observing that these statutes were parts of one general system of laws regulating the disposal

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of the public domain, and therefore to be regarded as explanatory of each other and to be construed as if they were one law, said: "Under such construction, U. S. Rev. Stat. § 2357, and the desert land act do not conflict, but each has a separate and appropriate field of operation; the former regulating the price of desert lands reserved to the United States along railway lines; and the latter, the price of other desert lands not so located. There is nothing in the nature of the case which renders it proper that desert lands be made an exception to the general rule any more than lands entered under the pre-emption laws. Lands reserved to the United States along the line of railroads are made double minimum in price because of their enhanced value in consequence of the proximity of such roads. Desert lands subject to reclamation are as much liable to be increased in value by proximity to railroads as any other class of lands, and hence the reason of the law applies to them as well as to other public lands made double minimum in price. To hold desert lands an exception to the general 143] rule regulating *the price of lands reserved along the lines of railroads, would be to make the laws on this subject inharmonious and inconsistent." 8 U. S. Land Dec. 368, 369. The same ruling was made by the Interior Department July 2, 1889, in *Knaggs' Case*, the Secretary saying that "the Department construes the desert land act as fixing the price of desert land within railroad limits at $2.50 an acre." 9 U. S. Land Dec. 49, 50. A like decision was made in *Wheeler's Case*, August 16, 1889, and in *Reese's Case*, May 9, 1890. 9 U. S. Land Dec. 271; 10 U. S. Land Dec. 541.

This brings us to the act of Congress of March 3, 1891, entitled "An Act to Repeal Timber Culture Laws, and for Other Purposes." 26 Stat. at L. 1095, chap. 561.

The 2d section of that act provides that the above act of 1877, providing for the sale of desert lands in certain states and territories, "is hereby amended by adding thereto the following sections." Then followed five sections, numbered 4 to 8 inclusive, which were added to the statute of 1877. Sections 6 and 7 of the sections so added to the act of 1877 are in these words:

"Sec. 6. That this act shall not affect any valid rights heretofore accrued under said act of March 3, 1877, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented, under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

"Sec. 7. That at any time after filing the declaration and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the *additional sum of $1 per acre for said [144 land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than 320 acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act."

In *Gardiner's Case* (1894), 19 U. S. Land Dec. 83,—which was the case of an entry made in 1889, the final proof, however, not being furnished until after the passage of the act of 1891, —the present secretary referred to the above 7th section of the act of 1891, and to the decision of Secretary Noble in 14 U. S. Land Dec. 74, and said:

"This section operates upon entries then existing, as well as upon subsequent entries of desert land. It contains the following language: 'But no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act.' The words 'but this *section*' do not, in my opinion, relate to the provisions of the entire section, but do relate simply to the quantity of lands which one person could thereafter enter, and the word 'section,' in the above act quoted, should be construed to mean 'provision.' It would then read: 'But this *provision* shall not apply to entries made prior to the passage of this act.' This is manifest, in my judgment, from the fact that the act of 1891 is similar to the act of 1877—of which the act of 1891 was amendatory—in reference to the price to be paid for desert lands, and it amends the act of 1877 as to the quantity of land that could be entered by any one person or association of persons. Evidently the words above quoted, taken from the act of 1891, were intended by Congress to limit the operation of the act to entries *thereafter* to be made, as to the quantity of land, and saved all entries *theretofore* made, as to the quantity of land; but it was not intended to limit the benefits as to price to such entries as might be made subsequently to the date of the passage of the act. The *declaration in [145 this case was made March 11, 1889, and before reclamation was completed as required by the statute, the act of 1891 was passed, which, as construed by Secretary Noble, fixed the price at $1.25 per acre, regardless of location. Construing the act as I do, as to the price the entryman should be required to pay for desert land, I am of opinion that this entryman should be allowed to purchase at $1.25 per acre."

A similar ruling was made (1895) in *Organ's Case*, 20 U. S. Land Dec. 406.

From this review of the administration by the Interior Department of the act of 1877, it appears that, for ten years after the passage of that act, "desert lands," even if they were alternate reserved sections along the lines of land-grant railroads, could be obtained from the government at the price of $1.25 per acre; that after June 27, 1887, and until the passage of the act of March 3, 1891, chap. 561, the act of 1877 was administered upon the theory that it did not modify or conflict with U. S. Rev. Stat. § 2357, and therefore did not include al-

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ternate sections reserved to the United States along the line of land-grant railroads, the price for which was fixed at $2.50 per acre; that the act of 1891 was interpreted to mean *all* desert lands, those within as well as those without the granted limits of a railroad, and to authorize their sale at $1.25 per acre; and that cases *initiated* under the act of 1877 should, in respect to price per acre of lands, be completed according to the terms prescribed by the act of 1891.

If, prior to the passage of the act of 1891, the Interior Department had uniformly interpreted the act of 1877 as reducing the price of alternate reserved sections of land along the lines of land-grant railroads, being desert lands, from $2.50 to $1.25 per acre, we should accept that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure. But as the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the act of 1877, without reference to the practice in the Department.

Did the act of 1877 supersede or modify the 146] proviso of *U. S. Rev. Stat. § 2357, which expressly declared that the price to be paid for alternate reserved lands along the line of railroads, within the limits defined by any act of Congress, should be $2.50 per acre?

The principal, if not the only, object of the requirement that the alternate reserved sections along the lines of land-grant railroads should not be sold for less than double the minimum price fixed for other public lands, was to compensate the United States for the loss of the sections given away by the government.

The act of 1877 and the proviso of U. S. Rev. Stat. § 2357, both relate to public lands; the former, to desert lands, that is, such lands —not timber and mineral lands—as required irrigation in order to produce agricultural crops, and the price for which was $1.25 per acre; the latter, to such lands, along the line of railroads, as were reserved to the United States in any grant made by Congress, and the price for which was $2.50 per acre. As the statute last enacted contains no words of repeal, and as repeals of statutes by implication merely are never favored, our duty is to give effect to both the old and new statute, if that can be done consistently with the words employed by Congress in each. We perceive no difficulty in holding that the desert lands referred to in the act of 1877 are those in the states and territories specified, which required irrigation before they could be used for agricultural purposes, but which were not alternate sections reserved by Congress in a railroad land grant. It is as if the act of 1877, in terms, excepted from its operation such lands as are described in the proviso of U. S. Rev. Stat. § 2357. Thus construed, both statutes can be given the fullest effect which the words of each necessarily require. In the absence of some declaration that Congress intended to modify the long-established policy indicated by the proviso of U. S. Rev. Stat. § 2357, we ought not to suppose that there was any purpose to except from that proviso any public lands of the kind therein described, even if, without irrigation, they were unprofitable for agricultural purposes. To hold that alternate sections along the lines of a railroad *aided by a[147 grant of public lands, being also desert lands, could be obtained, under the act of 1877, at $1.25 an acre, would be to modify the previous law by implication merely. In *Frost* v. *Wenie*, 157 U. S. 46, 58 [39: 614, 619], we said: "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."

Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of U. S. Rev. Stat. § 2357, and therefore did not embrace alternate sections reserved to the United States by a railroad land grant.

It results that prior to the passage of the act of 1891, lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than $2.50 per acre. Was a different rule prescribed by that act in relation to entries made previously to its passage?

If it be true, as seems to have been held by the Interior Department, that the act of 1877, as amended by that of 1891, embraces alternate reserved sections along the lines of land-grant railroads that require irrigation in order to fit them for agricultural purposes,—upon which question we express no opinion,—it is necessary to determine whether a case begun, as this one was, prior to the passage of the act of 1891, is controlled by the law as it was when the original entry was made. This question is important in view of the fact that the appellee's entry was made under the act of 1877 before it was amended, and his final proof was made after the act of 1891 took effect.

*The present Secretary of the Interior,[148 as we have seen, held that entries initiated under the act of 1877 and prior to the act of 1891 could be completed upon the terms fixed by the latter act as to price of desert lands. If that construction be correct, and if the plaintiff is not precluded from recovering money voluntarily paid by him, with full knowledge of all the facts, then the judgment below was right. Otherwise, it must be reversed.

We are of opinion that the act of 1891 did not authorize the lands in dispute to be sold at $1.25 per acre, where, as in this case, the proceedings to obtain them were begun before its passage.

Although the act of 1891 was, in some particulars, clumsily drawn, it is manifest that the words "this act," in the section added by it to the act of 1877 and numbered 6, refer to the act of 1891, and that the words "said act" refer to the act of 1877. It is equally clear that the purpose of that section, thus added to the former act, was to preserve the right to

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perfect all bona fide claims "lawfully initiated" under the act of 1877, and "upon the same terms and conditions" as were prescribed in that act. It is true that the claimant, at his option, could perfect his claim, thus initiated, and have the lands patented under the act of 1877, as amended by that of 1891, so far as the latter act was applicable to the case. But this did not mean that land entered under the act of 1877, when the price was $2.50 per acre, could be patented, after the passage of the act of 1891, upon paying only $1.25 per acre.

If any doubt could exist as to the object of section 6, added by the act of 1891 to the act of 1877,—to which section the attention of the present Secretary seems not to have been drawn,—that doubt must be removed by the explicit language of added section 7. The latter section fixes the price of desert lands at $1.25 per acre, and declares that "this *section* shall not apply to entries made or initiated prior to the approval of this act"—that is, to entries made prior to the approval of the act of 1891. The Secretary construed the word "section" to mean "provision," and as referring, not to the entire section, but only to the clause or 149] provision relating *to the quantity of desert lands that any person or association of persons might appropriate. We cannot assent to this view. The words "section" and "provision" frequently occur in the act of 1891, and there is no reason to suppose that Congress, when using the words, "but this section shall not apply to entries made or initiated prior to the approval of this act," intended that only one provision or clause of that section should apply to such entries.

We are of opinion that cases initiated under the original act of 1877, but not completed by final proof until after the passage of the act of 1891, were left by the latter act—at least as to the price to be paid for the lands entered—to be governed by the law in force at the time the entry was made. So far as the price of the public lands was concerned, the act of 1891 did not change, but expressly declined to change, the terms and conditions that were applicable to entries made before its passage. Such terms and conditions were expressly preserved in respect of all entries initiated before the passage of that act.

The judgment of the court of claims is reversed, with directions to dismiss the claimant's petition. Reversed.

BAMBERGER, BLOOM, & COMPANY, *Plffs. in Err.*,

v.

W. H. SCHOOLFIELD and G. H. MILLER, Surviving Partners of SCHOOLFIELD, HANAUER, & COMPANY.

(See S. C. Reporter's ed. 149-169.)

Law of Alabama—state decision—preference to creditor—proof of fraud—instructions—securing indorsement—business of corporation—fraud upon creditor—error in charge.

1. Under the law of Alabama a debtor has the right to prefer a creditor by a real sale of property made in good faith for a fair price, to extinguish the debt, and containing no reservation of benefit to the vendor, although the vendor was insolvent to the knowledge of the vendee, and although the vendor intended thereby to defraud his other creditors, and the necessary effect was to prevent other creditors from obtaining payment of their debts.
2. The decisions of the state supreme court construing a state law as to preferences of creditors, will be followed by this court in cases arising in that state.
3. Where a sale of property by a debtor to a creditor was valid by the law of the state, the making of a general assignment by the former on the same day will not render it illegal.
4. As against creditors of an insolvent debtor, one claiming as a purchaser from the latter must prove that he paid a valuable and adequate consideration, but is not bound to negative the reservation of a benefit to the debtor.
5. Instructions to the jury that if the debtor made a valid sale of his stock of goods to a creditor, the latter had a legal right to employ the former as a clerk to assist in winding up the business, and also the right to give or sell the goods to the debtor's wife, are not erroneous as causing the jury to disregard these facts in passing upon the bona fides of the sale to the creditor, where the question of reservation of a secret benefit to the debtor in the sale was particularly called to the attention of the jury.
6. An indorser of a note has a right to protect his indorsement by a sale of goods by the insolvent maker to himself.
7. A corporation of one state does not carry on business in another state by discounting a note sent to it from the other state.
8. Where a creditor writes a letter to another creditor to give an extension to a debtor, and expresses a willingness to grant the extension if the other creditor will, and the other creditor does not accept the proposition but grants an extension in conflict with the letter, the obtaining of preference by the former in the payment of his debt by a sale to him of the debtor's property is not a fraud upon the other creditor.
9. Where the entire charge is not in the record, reversible error will not be inferred from the part given, where the rest of it, if given, might explain the alleged error.

[No. 48.]

Submitted April 11, 1895. Decided December 9, 1895.

IN ERROR to the Circuit Court of the United States for the Northern District of Alabama, to review a judgment in favor of W. H. Schoolfield *et al.*, in an intervening suit which grew out of an attachment proceeding instituted by Bamberger, Bloom, & Company against one Henry Warten, in which there was a judgment for the claimants, W. H. Schoolfield *et al.* *Affirmed.*

The facts are stated in the opinion.

Mr. **Milton Humes**, for plaintiffs in error:

To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but

NOTE.—*As to assignments for benefit of creditors, with preferences, when valid, when not,*—see note to Marbury v. Brooks, 5. 522.

As to assignments for benefit of creditors; validity; assignment laws have no extraterritorial efficacy; preferences in assignments; void assignments,—see note to May v. Tenney, 57: 368.

As to assignment void for want of change of possession,—see note to Brooks v. Marbury, 6: 423.

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in most cases it is the only proof that can be adduced.

Rea v. *Missouri*, 84 U. S. 17 Wall. 543 (21: 709); *Rochester* v. *Armour*, 92 Ala. 439.

In the race of diligence the creditor who seeks to become preferred must do no more than by fair methods obtain payment of his own claim.

Seaman v. *Nolen*, 68 Ala. 466; *Bank of Montgomery* v. *Ohio Buggy Co.* 100 Ala. 626; *Fenner* v. *Dickey*, 1 Flipp. 34; *Buswell* v. *Davis*, 10 N. H. 413; *Campbell* v. *Hopkins*, 87 Ala. 179; 1 Wade, Attachm. ¶ 221.

Fraud may be proved by circumstances.

Harrell v. *Mitchell*, 61 Ala. 281.

When a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it, his estate being involved.

Clements v. *Nicholson*, 73 U. S. 6 Wall. 299 (18: 786); *Hubbard* v. *Allen*, 59 Ala. 296.

Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.

Marion County Comrs. v. *Clark*, 94 U. S. 284 (24: 61); *Foster* v. *Goodwin*, 82 Ala. 384; *Moore* v. *Penn*, 95 Ala. 208; *Hodges* v. *Coleman*, 76 Ala. 105; *Seamen* v. *Nolen*, 68 Ala. 466; *Levy* v. *Williams*, 79 Ala. 177; Wait, Fraud. Conv. § 390.

If by the transaction the failing debtor secured to himself a paying employment which but for the sale he would not have had, this was a benefit reserved, which renders the transaction fraudulent.

Lukins v. *Aird*, 73 U. S. 6 Wall. 78 (18: 750); *Harmon* v. *McRae*, 91 Ala. 411; *Page* v. *Francis*, 97 Ala. 382; *Stephens* v. *Regenstein*, 89 Ala. 561.

The acts, conduct, and declarations of the grantor at or about the time of the making of the transaction assailed is a part of the *res gestæ*, and admissible as evidence, whether made or occurring in the presence of the grantee or not.

Masterson v. *Phinizy*, 56 Ala. 336; *Lincoln* v *Claflin*, 74 U. S. 7 Wall. 132 (19: 106); *Rea* v. *Missouri*, 84 U. S. 17 Wall. 532 (21: 707); *Jones* v. *Simpson*, 116 U. S. 609 (29: 742); *Durr* v. *Jackson*, 59 Ala. 203; 2 Rice, Ev. 950, 960.

The advantage by one creditor over another which the law condemns is an undue and unfair advantage, an advantage obtained by unfair methods, such as concealment, deceit, etc. The charge makes any advantage, whether fair and open, or unfair and concealed, to be condemned by the law. For the error alone of giving this charge, so radically wrong both in its hypothesis of the facts and its statement of the law, this case should be reversed.

Ayers v. *Watson*, 118 U. S. 594, 608, 609 (28: 1098, 1098); *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206 (6: 603).

If the claimants have knowledge of the fraud, or information in regard to it, and with such knowledge or information become the voluntary beneficiaries of the fraud of the debtor thus committed, this is sufficient in law to vitiate the transaction.

Bank of Montgomery v. *Ohio Buggy Co.* 100 Ala. 626; *Clements* v. *Nicholson*, 73 U. S. 6 Wall. 299 (18: 786); *Perkins* v. *Lockwood*, 100 Mass. 249, 1 Am. Rep. 103.

Instructions which limit and restrict the inquiry of the jury to the investigation of the existence of the debt, the value of the goods, and the reservation of a benefit by Warten, and do not embrace the additional proposition as to whether the preference given to the claimants by the transaction was obtained by fair methods, or was undue advantage taken by them of the plaintiffs, are erroneous.

City Nat. Bank v. *Jeffries*, 73 Ala. 183; *Campbell* v. *Hopkins*, 87 Ala. 184; *Bank of Metropolis* v. *New England Bank*, 47 U. S. 6 How. 212 (12: 409); *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1 (7: 327); *Greenleaf* v. *Birth*, 34 U. S. 9 Pet. 292 (9: 132).

When, as in this case, strong and undisputed circumstances of suspicion and badges of fraud exist, then, the presumption of fraud arising legally from these circumstances, the law imposes the burden upon the creditor preferred of explaining.

Moore v. *Penn*, 95 Ala. 204; *Roswald* v. *Hobbie*, 85 Ala. 73; *Pollak* v. *Searcy*, 84 Ala. 259; *Smith* v. *Collins*, 94 Ala. 394; *Chipman* v. *Glennon*, 98 Ala. 263.

Messrs. **Lawrence Cooper** and *F. P. Poston*, for defendants in error:

Under the laws of Alabama, Warten had the right to prefer Schoolfield, Hanauer, & Company over other creditors.

Moog v. *Farley*, 79 Ala. 246.

The evidence is irresistible that Schoolfield, Hanauer, & Company did not participate in any fraudulent intent on the part of Warten, if any such intent he had. The goods were taken in payment of an honest debt, at a fair and adequate price, and no interest was reserved by Warten.

These concurrent facts absolutely rebut all inferences that might be drawn from attendant badges of fraud and impart validity to the conveyance as an allowable preference of the particular creditor.

Hodges v. *Coleman*, 76 Ala. 103; *Meyer* v. *Sulzbacher*, 76 Ala. 120; *Levy* v. *Williams*, 79 Ala. 171; *Carter* v. *Coleman*, 82 Ala. 177; *Wood* v. *Moore*, 84 Ala. 253; *Carter* v. *Coleman*, 84 Ala. 256; *Dollins* v. *Pollock*, 89 Ala. 351; *Hornthall* v. *Schonfeld*, 79 Ala. 107.

A sale of his property by an insolvent debtor at a fair and adequate price in absolute payment of an honest debt, without reserving any benefit whatever to himself, will be sustained by *Stewart* v. *Dunham*, 115 U. S. 61 (29: 329); *Tompkins* v. *Wheeler*, 41 U. S. 16 Pet. 106 (10: 903); *Brooks* v. *Marbury*, 24 U. S. 11 Wheat. 78 (6: 423); and *Clarke* v. *White*, 37 U. S. 12 Pet. 178 (9: 1046).

An absolute sale in payment of an honest debt is not a part of a general assignment.

Heyer v. *Bromberg*, 74 Ala. 524.

An absolute unconditional sale and conveyance of his property by a debtor, free from all reservation, in payment and satisfaction of

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antecedent debts, cannot be declared a general assignment.

Otis v. *Maguire*, 76 Ala. 295; *Danner* v. *Brewer*, 69 Ala. 191.

The sale was not as security for the payment of debts, but was an absolute payment of a debt. The sale, therefore, was not a general assignment, and is not within the purview or purpose of the state.

Harkins v. *Bailey*, 48 Ala. 376; *Crawford* v. *Kirksey*, 55 Ala. 282, 28 Am. Rep. 704; *Danner* v. *Brewer*, *supra*.

A failing debtor may prefer one creditor to the exclusion of others, and it is immaterial whether the preference be given by payment, conveyancing, mortgage, by delivery of goods, by confession of judgment, or by suffering an attachment.

Claflin v. *Sylvester*, 99 Mo. 276; *Cason* v. *Murray*, 15 Mo. 378; *Gilbert* v. *McCorkle*, 110 Ind. 215; *Sweetzer* v. *Higby*, 63 Mich. 13; *Fuller Electrical Co.* v. *Lewis*, 101 N. Y. 674; *Richardson* v. *Marqueze*, 59 Miss. 80, 42 Am. Rep. 353.

Upon the question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors, the decisions of the highest court of the state are of controlling authority in this court.

Union Nat. Bank v. *Bank of Kansas City*, 186 U. S. 223 (34: 341); *Peters* v. *Bain*, 133 U. S. 670 (33: 676).

As to the employment of Warten as a clerk, we find nothing inconsistent with fair dealing. There was no reservation in the bill of sale looking to his employment; it was not then contemplated.

Smith v. *Craft*, 123 U. S. 436 (31: 267).

This employment of Warten was not only not an evidence of a fraudulent intent, but was essential to the vigilant preservation and collection of the property.

Tompkins v. *Wheeler*, 41 U. S. 16 Pet. 106 (10: 903); *Olney* v. *Tanner*, 10 Fed. Rep. 101; *Hitchcock* v. *St. John*, Hoffm. Ch. 511; *Wilbur* v. *Fradenburgh*, 52 Barb. 476; *Murray* v. *McNealy*, 86 Ala. 234.

The acts and declarations of Warten, made out of the presence of the grantee, are not evidence against the latter.

Moses v. *Dunham*, 71 Ala. 173.

It was permissible to show the business character of Warten as illustrating the reason of his employment.

Smith v. *Craft*, 123 U. S. 436 (31: 267).

The charge of the court was in keeping with the authorities cited.

Hodges v. *Coleman*, 76 Ala. 103; *Meyer* v. *Sulzbacher*, 76 Ala. 120; *Levy* v. *Williams*, 79 Ala. 171; *Hornthall* v. *Schonfeld*, 79 Ala. 107; *Stewart* v. *Dunham*, 115 U. S. 61 (29: 329); *Tompkins* v. *Wheeler*, 41 U. S. 16 Pet. 106 (10: 903).

Mr. Justice **White** delivered the opinion of the court:

The controversy below was what is known in the jurisprudence of Alabama as a statutory claim suit, and grew out of an attachment proceeding instituted by plaintiffs in error against one Henry Warten. Under the writ a levy was made on certain merchandise treated as belonging to Warten. The defendants in error intervened and claimed the things seized, and thereby an issue was formed as to whether they were owned by the defendant in attachment or were the property of the claimants. The undisputed facts are as follows: Henry Warten embarked in trade at Athens, Ala., in 1881; his business consisted of a general country merchandise store, of *advancing to [151 farmers money or provisions wherewith to cultivate and market a crop of cotton, of buying and selling cotton on his own account and as agent for others. Almost at the opening of his career at Athens, Warten began a course of dealings with the commercial firm of Schoolfield, Hanauer, & Company, of Memphis, Tenn. (whom we designate hereafter as the Memphis firm). They became his general factors, selling him merchandise, loaning him money, cashing his sight drafts given to others in payment of merchandise bought by him or for debts due, he consigning them cotton for sale, the proceeds passing to the credit of his account. This course of dealing continued until April, 1889, when the Memphis firm went into liquidation. There was then formed, under the laws of Tennessee, a corporation styled the Schoolfield-Hanauer Company, designated hereafter as the Memphis company, with whom Warten carried on business of the same general nature as that previously conducted with the firm.

The cotton crop of 1889, in the region of country where Warten dealt, was a disastrous failure, and in consequence of this fact, by the month of December of that year Warten had a large amount of outstanding debts due him by unsecured accounts, which were either permanently lost or were unavailable as quick realizable assets. At this time he owed a large amount of money for merchandise and for money borrowed during the course of his business. This condition of things produced disorder in his affairs and a state of actual, if not ultimate, insolvency. By the 20th of December, 1889, Warten owed the Memphis firm a considerable debt, evidenced by four notes, three of which were dated May 22, 1889, two for $5,000 each were past due, one for $3,794 was to become due on January 1, 1890, the other for $2,500 was dated June 10, 1890, and had also matured.

The last-mentioned note (dated June 10, 1890) had been made by Warten to the order of the Memphis house, was by it indorsed, and had been discounted by the Memphis company, who put the proceeds to the credit of Warten, he thereafter drawing against the credit to the full extent thereof. Warten at that time also owed the firm of Bamberger, Bloom, *& Company, of Louisville, hereafter [152 called the Louisville firm, a past-due note amounting to $4,719.36, and an open account, both together making the total of his indebtedness to that firm between $6,500 and $7,000. The embarrassed condition of Warten's affairs was known to the Memphis and the Louisville firm. Late in December, after conferring with his creditors in Memphis, Warten went to Louisville for the purpose of asking an extension from the Louisville firm, and delivered to them the following letter:

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"Memphis, Tenn., Dec. 27, 1889.
"Messrs. Bamberger, Bloom, & Company,
"Louisville, Ky.

"Dear Sirs: Our mutual friend and customer, Mr. Henry Warten, through, we believe no fault of his own, but owing to disastrous failure of crops in his own section, finds himself forced to ask for extension, of his particular friends, and he recognizes you among that number and from whom he can ask that favor. Having confidence in his honor and integrity and business qualifications, we have agreed to give him extension, provided you will do so. He informs us that one of his creditors has agreed to give him extension, and he will only ask it of three houses,—*viz.*, yourselves, ourselves, and the party who has agreed to.

Yours very truly,
"The Schoolfield-Hanauer Co."

After arriving at Louisville, Warten telegraphed the Memphis company that the Louisville firm refused the extension unless he paid $3,000 in cash, and the company replied that they could not give him the money. A settlement was made on the 30th of December between Warten and the Louisville firm, by which the outstanding past-due note was taken up, and Warten furnished an acceptance due on the 15th of January for $1,000, and four other acceptances of $500 each, maturing on the 1st and 15th of February and 1st and 15th of March following, and the balance of the debt, ex-[153]cept an item *of about $200, was settled by acceptances maturing the following November and December. At the time of making this settlement or thereafter (up to the 13th of January) the Louisville firm made no reply to the letter from the Memphis firm. From January 1 the embarrassment of Warten became rapidly more flagrant, in consequence of the results of the crop disaster becoming absolutely assured. On the 13th of January, 1890, at about 6 o'clock in the morning, Warten sold to the Memphis firm his stock of goods, safe and store fixtures at Athens, with also a small stock and store fixtures owned by him at Elkmont, and certain accounts, a lot of mules, and an interest in real estate, for the price of $17,032.40, this being the amount of the principal and interest of the notes held by the firm, which have been already mentioned. The sale was accepted in full acquittance and discharge of the debt. A member of the firm, who had come from Memphis, took possession of the property. On the same day Warten sold to the Memphis company certain assets in full payment of an open account due by him, and other transfers of assets in payment of other debts to various creditors were also made at or about that time. On the same day as the sale to the Memphis firm (13th of January, 1890), between 11 and 12 o'clock, Warten made a general assignment of all but his exempt property in favor of his general creditors; the assets covered by this assignment being open accounts due him, and the remaining avails of his business, amounting to the face value of about $50,000; the claim of the creditors in whose favor this assignment was made, including that of the Louisville firm, aggregating about $15,000. Of the accounts assigned, about $30,000 were debts due Warten for business of the current crop year.

A few days after this sale the Louisville firm attached the stock of goods in the Athens store as being yet the property of Warten. The Memphis firm claimed the property seized and bonded it, thus raising the issue to which we have in the outset referred. After the sale by Warten to the Memphis firm, he acted as an employee in the store generally assisting *in[154] the conduct of the business, continuing to do so until the 10th of June, 1890, when what remained of the stock and some other of the property which had been sold to the Memphis firm was resold to the wife of Warten. Although there is no dispute as to the foregoing facts, on every other question of fact there is conflict. The claimants' evidence tended to show that the sale by Warten to them was real, was made for a just price, and that it absolutely extinguished their debt, and that no benefit or expected benefit was expressly or impliedly reserved to the seller; that actual delivery was made of the property sold, and that they were in possession as owners at the time of the attachment; that the employment of Warten was simply in a clerical capacity and was rendered advisable from his knowledge of the business and consequent ability to assist the vendors in converting the stock and assets into cash. On the other hand, the evidence of the attaching creditor (the Louisville firm) tended to show by a mass of circumstances that the sale was intended to and did reserve a benefit to Warten; that his presence in the store after the sale, while ostensibly in the capacity of an employee, was really in that of an owner or of one having an expectancy of ownership. As to the facts connected with the settlement made by the Memphis firm, there was also much conflict in the evidence, Warton swearing that when he presented the letter from the Louisville firm the extension to the next crop year asked by him was refused, unless he paid $3,000 cash, and that it was in consequence of this demand that he telegraphed the Memphis company that the Louisville firm refused the extension and asked $3,000; that when he could not procure the amount of the cash payment demanded, then the settlement was effected, the short term acceptances for $3,000 having been given by him as an equivalent of the cash demanded; the remainder of the debt, except a small sum, having been extended to the next crop season. On the other hand, the testimony of a member of the Louisville house was that no demand of cash was made and that the extension asked by Warten was granted without objection, and was evidenced by the acceptances.

*There was a verdict for the claimants [155] (the Memphis firm), and the seizing creditor (the Louisville firm) prosecutes this writ of error, on which he assigns thirty-six errors, twelve of which are predicated on erroneous rulings asserted to have been made in admitting or rejecting testimony, and the others are directed to the charge of the court to the jury. Only a fragment of the general charge is in the record. Each party, however, presented a series of requests stating the propositions of law which they respectively deemed applicable to the facts, and all the errors assigned growing out of the charge of the court involve the correctness of the court's action in having sub-

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stantially given the special charges asked by the claimants (the Memphis firm) and rejecting those presented by the attaching creditor (the Louisville firm). In the discussion at bar the plaintiff in error has devoted much of the argument to demonstrate that the trial court erred in declining a request by him made to instruct the jury to render a verdict in his favor, if they believed the testimony, but this request was manifestly rightly refused. It involved a finding by the court as to weight of evidence and practically asked it to usurp the province of the jury, by determining the proper inference to be drawn from the evidence and deciding on which side lay the preponderance of proof. In so far as this request asked the court to instruct that under any hypothesis of fact, as a matter of law, the attaching creditor was entitled to a verdict, it can be more properly considered in reviewing the exceptions taken to the instructions given at the request 158] of *the one, and the consequent refusal to give the converse propositions asked by the other party. It would lead only to confusion and repetition to follow the various assignments of error and review them separately. They group themselves under six headings: First, assertion of error in the charges given as to the legal effect of the sale to the Memphis firm; second, error in the instructions as to the general assignment; third, error as to the ruling with reference to the burden of proof to establish fraud; fourth, error in the charge as to the effect of the employment of Warten after the sale and the resale to Mrs. Warten; fifth, error as to the effect of having included in the debt for which the sale was made the note dated June 10 for $2,500; and, sixth, error as to the bearing on the rights of the parties, of the letter written by the Memphis firm to the Louisville firm, and the settlement had by the latter with Mr. Warten after the letter was received. The consideration of the controversies under these various headings will embrace all the errors assigned, and will dispose of every question in the case, except the twelve errors asserted to have been committed in the admission or rejection of testimony.

First. The validity of the sale to the Memphis firm.

The court charged that, under the law of Alabama, a debtor had the right to prefer a creditor, and that, if the sale was real and was made in good faith for a fair price,—was honestly executed to extinguish the debt, and did extinguish it, and contained no reservation of any interest or benefit in favor of the vendor,—it was valid and passed the property to the vendee; that the sale, if it possessed these enumerated qualities, would be legal, although any of the following facts might be found by the jury to have existed: (*a*) that the vendor was insolvent to the knowledge of the vendee; (*b*) even although there was a fraudulent intent on the part of the vendor to defeat his other creditors, because, if the sale possessed the attributes necessary to make it valid, as the law permitted the preference under the conditions stated, the mere intention of the vendor to defraud his other creditors by giving a preference to one would not render the sale invalid; and (*c*) although its known effect and necessary 159] *consequence were that the remaining creditors of the vendor would be unable to obtain the payment of their debts.

The correctness of these instructions depends necessarily upon the law of Alabama as interpreted and construed by the supreme court of that state, whose rulings in this regard will be followed here. *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 233 [34: 344]; *Peters* v. *Bain*, 133 U. S. 670 [33: 696]. It was in consonance with this rule that in a given case we enforced the law of the state of Illinois (*White* v. *Cotzhausen*, 129 U. S. 329 [32: 677]), and in another that of the state of Iowa (*Etheridge* v. *Sperry*, 139 U. S. 267 [35: 173]). The instructions given as above recited were in direct accord with the settled law of Alabama. In *Pollock* v. *Meyer*, 96 Ala. 172, it was held that:

"If the property conveyed by an insolvent debtor in payment of pre-existing debts does not materially exceed in value the amount of indebtedness actually owing and paid by the conveyance, and no benefit is reserved to the grantor, the conveyance is lawful as against his other creditors, regardless of the motives of the parties to the conveyance or of badges of fraud in the transaction."

On page 175 the court cites approvingly from the decision in *First Nat. Bank of Birmingham* v. *Smith*, 93 Ala. 97, as follows:

"An insolvent debtor may select which of his creditors, one or more, he will pay, and pay them in full, and thus disable himself to pay the others anything; and it makes no difference if the one or more preferred creditors know the effect of the transaction will be to deprive the debtor of all means with which to pay his other debts. Nor is the wish, motive, or intention of the debtor a material inquiry, if the requisite conditions exist. Those conditions, in a case like the present, are: First, the debt must be bona fide and enforceable, not simulated. Second, the payment must be absolute, and, if made in property, must not be materially in excess of the debt. Third, no pecuniary benefit or consideration of value, other than the liquidation of the debt, must inure or be secured to the debtor. . . . *The true inquiry at last was and is, Did [160 the creditor bargain for and receive overpayment or payment in excess of his just demand?"

The court further observed, on page 176, as follows:

"The principle of law settled by the decisions of this court is that the payment of an antecedent debt by an insolvent debtor, by a conveyance of his property, rests upon entirely different grounds than when a cash or present consideration is paid. It matters not whether the grantor alone, or grantor and grantee both, devised and intended to get the advantage of other creditors, if, in fact, the effect of the transaction was solely to pay a debt honestly due, and the property was received by the creditor in payment of his debt at a fair and adequate price, and no interest or benefit reserved to the grantor debtor. 'If the transaction is not assailable on one of these grounds, fraud has no room for operation.' As was said in *Hodges* v. *Coleman*, 76 Ala. 103: 'What injury can the motive do to a nonpreferred creditor? The act, we have seen, is lawful. Can human tribunals set aside a transaction,

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lawful in itself, because the actors had an evil mind in doing it? Can there be fraud in doing a lawful act, even though it be prompted by an evil malice or badges of fraud?'"

Second. The effect of the general assignment.

The error alleged to exist in the charge of the court as to the legal consequences of the general assignment and its effect on the sale to the Memphis firm, which was made a few hours before the general assignment, is equally unfounded. The instruction given substantially was that if the sale to the Memphis firm was valid, the making of the general assignment on the same day did not render it illegal. The decision of the supreme court of Alabama in *Ellison* v. *Moses*, 95 Ala. 221, is decisive of the correctness of this instruction. In that case creditors of a partnership sought to have several conveyances which had been executed by the partnership declared parts of a general assignment subsequently executed. The court held, however, that:

"An insolvent debtor having, under repeated decisions of this court, the right to sell and con-[161]vey property in absolute *payment of an existing debt, provided the price is fair and reasonable, and no use or benefit is reserved to himself, such absolute sale and conveyance will not, at the instance of other creditors, be declared and treated as part of a general assignment executed soon afterwards (Code, § 1737), though executed in anticipation of it, and with notice on the part of the creditor that the debtor intended to make a general assignment."

In its opinion the court further said (p. 224):

"The law of this state permits an insolvent debtor to make preferences among his creditors in the payment of his debts, by an absolute sale or transfer of his property in discharge of such debts. He may convey the whole or any part of his property in payment of an antecedent debt, and if the price is reasonably fair, and there is no reservation of a benefit or trust in his favor, the sale is valid and will be sustained, whatever may have been the debtor's intentions, and though the preferred creditor knew of such intentions, and that the sale would leave the debtor unable to pay his other debts. That such preferences are allowable is settled by numerous decisions of this court. *Chipman* v. *Stern*, 89 Ala. 207; *Hodges* v. *Coleman*, 76 Ala. 103; *Crawford* v. *Kirksey*, 55 Ala. 282, 28 Am. Rep. 704; 3 Brick. Dig. 517. The statutory prohibition against preferences in general assignments (Code, § 1737) does not operate upon an absolute and unconditional sale of a debtor's property to his creditors in payment of the debts due to them. This question, also, is well settled by the former decisions of this court. The general assignment, in which preferences or priorities of payment given to one or more creditors over the others are prohibited, implies the idea of a trust, under the operation of which there is a possibility of a reversion to the debtor of some interest in the proceeds of a sale of the property assigned. No such idea is involved in an unconditional sale of property in absolute payment and discharge of a debt. Here the debt is extinguished, and the debtor is stripped of all interest in the property sold. Such a sale is not within the purview of the statute, and if a preference is thereby effected, it is not such a preference as the statute prohibits. *Otis* v. *McGuire*, 76 Ala. 295; *Danner* *v. *Brewer*, 69 Ala. 191; *Comer* v. *Constan-*[162]*tine*, 86 Ala. 492. The result is, that the law as it now stands permits an insolvent debtor to prefer one or more of his creditors over the others in the payment of debts by a sale of property in satisfaction thereof, and prohibits preferences or priorities of payment in a general assignment by the debtor for the benefit of his creditors. Only the legislature can make the prohibition against preferences equally operative in both classes of cases. The courts must recognize and enforce the law as it exists. They cannot ignore distinctions created by the lawmaking power."

By recent legislation in Alabama the provisions of Ala. Code, § 1737, upon which these rulings were made, have been amended, so that a conveyance substantially of all a debtor's property in payment of prior debts is put upon the same footing with conveyances for the security of debts. *Strickland* v. *Gay* (Ala.) 16 So. 77, 78. The questions, however, here are obviously to be determined by the law of Alabama existing at the time the transactions occurred.

Third. Burden of proof to establish fraud.

The instruction complained of on this subject was that if the proof showed that the Memphis firm had an honest debt, and they purchased the stock at a fair and reasonable price in payment of that indebtedness, the burden was on the plaintiffs to show that a benefit or interest in the sale was reserved to Warten; in other words, that the transfer was fraudulent. It is urged that this instruction ignored the rule of evidence as to the presumption of law which arises from proof of circumstances of suspicion and badges of fraud, which, it is asserted, were shown in this case by the evidence offered in behalf of the Louisville firm. In *Curran* v. *Olmstead*, 101 Ala. 692, it was said (p. 694):

"When the transaction is assailed by an antecedent creditor, the burden rests on the creditor who has been preferred to prove the existence, amount, and justness of his claim; and when paid in property he must also prove that the property was taken at a price not materially below its fair market value."

The burden of proof to show fraud and notice of fraud was *on the party alleging [163] fraud. *Hodges* v. *Coleman*, 76 Ala. 103; *Pollak* v. *Searcy*, 84 Ala. 259. See also *Jones* v. *Simpson*, 116 U. S. 609, 615 [29: 742, 744]. In *Pollak* v. *Searcy*, *supra*, the court said:

"If the fact of indebtedness and that the goods were sold in payment of such indebtedness at their reasonable fair value are established to the satisfaction of the jury, and if it be contended, in avoidance thereof, that the trade was simulated, that there was a secret trust or benefit reserved to the debtors, the burden was then on the contesting creditor to establish it."

So in *Roswald* v. *Hobbie*, 85 Ala. 78, 79, it was held that:

"As against creditors of an insolvent debtor, one claiming as a purchaser must prove that he paid a valuable and adequate consideration,

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but is not bound to negative the reservation of a benefit to the debtor."

Fourth. As to the effect of the employment of Warten after the sale and the resale to Mrs. Warten.

The charges given by the court on this subject were as follows:

"If the jury find from the evidence, under the instructions given by the court, that Schoolfield, Hanauer, & Co. made a valid purchase of the stock of goods in controversy from Henry Warten, then Schoolfield, Hanauer, & Co. had a legal right to employ Warten for their benefit to assist in winding up the business, and turning the goods into money as promptly and economically as possible."

"If the jury find from evidence that prior to the 18th day of January, 1890, Henry Warten had been engaged for several years in an established and extensive business at Athens, Ala., and that he sold his stock of goods to Schoolfield, Hanauer, & Co. in a valid way, it is but reasonable that Warten might be employed by Schoolfield, Hanauer, & Co. as a clerk to assist in the winding up of the business for the benefit of Schoolfield, Hanauer, & Co. Such circumstance is not of itself fraudulent."

"If the jury find from the evidence in this cause, under the instructions given by the court, that the sale by Henry Warten to **164**] *Schoolfield, Hanauer, & Co. is valid, then Schoolfield, Hanauer, & Co. had the legal right to give the stock of goods to Mrs. Warten or sell the same to her on such terms as they desired."

In considering the correctness of these instructions, we necessarily assume the bona fides of the sale made to the Memphis firm and its validity, except in so far as its legality may have been affected by the employment of Warten and the subsequent sale to his wife. But the proof on the subject of the circumstances which gave rise to the employment of Warten and the resale to Mrs. Warten was conflicting. The fact of the employment and resale, no question being made as to the reality of the transfer, could at best have been only competent evidence to be considered by the jury in determining whether or not a secret benefit was reserved to the debtor in the original transaction, which was the issue on this branch of the case. Certainly, if nothing else appeared but the mere employment of Warten, subsequent to the sale, to assist in the disposition of the goods and the getting in of the book accounts, such fact would not be a circumstance in itself sufficient to prove, within the meaning of the Alabama law, that the transaction was fraudulent. Even if, at the time of the sale, there had been an agreement to employ, such fact would not, of itself, have necessarily implied a reservation of benefit in favor of the seller so as to have rendered the sale invalid under the Alabama law. *Murray* v. *McNealy*, 86 Ala. 234. Such also is the general rule. *Smith* v. *Craft*, 128 U. S. 436 [31: 267]; Burrill, Assignments (6th ed.) p. 471, § 843, and authorities there cited. Indeed, under the rule as announced in Alabama, the court could have affirmatively instructed that the employment of the vendor in a clerical capacity could not affect the validity of the sale. *Richardson* v. *Stringfellow*, 100 Ala. 416, 422.

The instruction that if the original sale by Warten was valid, the purchasers had a legal right to dispose of the property to Mrs. Warten, is within the principle of the decision in *Young* v. *Dumas*, 39 Ala. 60, 62, where the court said—speaking of a gift by a father to his daughter, of property *which the fa- [**165** ther had received from his son-in-law in payment of an indebtedness due from the son-in-law to the father—as follows:

"Mr. Horn had the clear right to collect his demand, which we have seen was just, from his son-in-law, Mr. Dumas; and after he thus became the owner of the property, his right to give that property to the sole and exclusive use of his daughter, Mrs. Dumas, cannot be successfully controverted by the creditors of Mr. Dumas. As to them, the gift was harmless. That the effect may have been to delay, and possibly defeat, all other creditors in the collection of their demands, cannot, of itself, avoid the sale."

It is argued that whilst these charges may not have been intrinsically erroneous they were yet illegal, because they singled out some of the strongest badges of fraud upon which the plaintiff relied and weakened, impaired, or destroyed their force and weight as evidence; that they were argumentative deductions, the necessary effect of which was to obscure the force of the inferences of fraud which the jury might have deduced from the fact of the employment and the resale, and therefore practically prevented the jury, in drawing its conclusions, from giving due consideration to these matters. But it nowhere appears that the court instructed the jury that they might not, in reaching a determination upon the bona fides of the sale by Warten to the Memphis firm and the question whether a secret benefit was reserved in his favor, consider such facts as the subsequent employment of Warten and the sale thereafter to his wife. As a matter of fact, the portions of the general charge of the court set forth in the record make it clear that the question of reservation of a secret benefit to Warten in the sale was particularly called to the attention of the jury, as necessary to be considered by them in arriving at a conclusion as to the validity of the transfer. We are unable to see that the charges in question had a tendency to cause the jury to regard the fact of the employment of Warten and the sale to his wife as not important to be weighed by them in passing upon the bona fides of the sale to the Memphis firm.

Fifth. Error as to the effect of having* [166** *included in the debt for which the sale was made the note dated June 10, for $2,500.*

The three following instructions on the subject were asked and refused:

"33. If any part of the debt claimed by Schoolfield, Hanauer, & Company against Warten as the consideration of the transfer of the goods to them is simulated or pretended, that fact would vitiate the whole transaction. If the jury find from the evidence that part of the consideration is composed of the note of Warten for $2,500, which was due and payable to the Schoolfield-Hanauer Company, a corporation under the laws of Tennessee, and that

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said note was taken from the account of said corporation and placed upon the account of the claimants for the purpose of increasing the account of Schoolfield, Hanauer, & Company, that account, to the extent of said $2,500, would be simulated, and this would vitiate the transaction, and if the jury so find, their verdict should be for the plaintiffs.

"34. If part of the consideration of the transfer from Warten to the claimants is a note for $2,500, payable to the Schoolfield-Hanauer Company and owned by them, and if the said note was transferred to the account of Schoolfield, Hanauer, & Company, and if said transfer was made for the purpose of increasing the firm's debt against Warten, so as to make it equal in amount to the value of the goods and property transferred by Warten to the claimants, the consideration for such transfer to the extent of said note for $2,500 would be simulated, and this would vitiate the transfer, and if the jury so find the facts, their verdict must be for the plaintiffs."

"36. If the jury believe from the evidence that the promissory note for $2,500, made by Henry Warten on June 10, 1889, payable to the order of Schoolfield, Hanauer, & Company, at the office of the Schoolfield-Hanauer Company, four months after date, and indorsed 'The Schoolfield-Hanauer Company, p'r W. W. Schoolfield, treasurer,' was taken and indorsed by said corporation, and it let said Warten have the amount thereof, less discount being $——, 167]by crediting his*account with said corporation for $——, as shown by said statements of said accounts in evidence in this case, then said draft became the property of said corporation, and it was an indebtedness due by said Warten to it; and if the jury further believe from the evidence that said indebtedness was transferred from the account of said Warten with said corporation to the account of said Warten with said firm on or about the 11th day of January, 1890, for the purpose of evading the law of the state of Alabama, which prohibits foreign corporations from doing business in the state of Alabama without known place of business and authorized agent therein, the jury would be authorized to find that said indebtedness was the property of and due to said corporation, and not said firm, when said alleged transfer of the stock of goods in dispute in this suit to said firm by said Warten was made, and should they so find, in that event their verdict should be for the plaintiffs."

They were rightly refused. There was no proof of any kind even tending to show the simulation of the note. It was certainly, under the undisputed proof, due by Warten; it was drawn to the order of the Memphis firm, who were, as indorsers, necessary parties to its negotiation. That firm had an obvious right, with the consent of the company by whom the paper had been discounted, to use it as a debt due them and thus protect their indorsement. Nor was the sending of a note to Tennessee for discount and its discounting in that state by the Memphis company, carrying on business in Alabama by the Memphis company. The 2d section of the 14th article of the Constitution of Alabama, and the act of the legislature of 1886-87, pp. 102, 104, relied on by the plaintiff in error, have been held by the courts of Alabama not to have been intended to (as of course they could not) interfere with matters of commerce between the states, and to have no application to transactions such as that here under consideration. *Ware* v. *Hamilton Brown Shoe Co.* 92 Ala. 145; *Cook* v. *Rome Brick Co.* 98 Ala. 409.

Sixth. Error as to the bearing, on the rights of the parties, of the letter written by the Memphis firm, and the settlement had by the latter with Warten after the writing of the letter.

*Much stress is placed by counsel on this[168 proposition. The contention is that the Louisville firm having been induced to give an extension on the faith of the letter written them by the Memphis firm, the latter could not receive payment by sale, from the debtor, which created a preference, without operating a fraud upon the Louisville firm. To support this contention authorities are cited, holding that when creditors have jointly agreed, each upon the faith of the other's promises, to extend the indebtedness of their codebtor for a fixed and definite period, a party to such an agreement who secures an advantage to himself out of the mutual debtor's property, during such extended period, may be compelled to account for the property received and permit the other creditors to share *pro rata* with him. But the fallacy is not in the legal proposition but in its application to the facts here considered, and consists in treating the Memphis firm as consenting to and being bound by the terms of the extension granted to Warten by the firm in Louisville. There was no evidence even tending to so prove. The only connection of the Memphis firm with the settlement, even if all the disputed questions of fact were determined in favor of the firm at Louisville, was the letter from the Memphis firm presented by Warten when the extension was made. But the letter could not give rise to the obligations contended for, since the extension granted by the Louisville firm was in conflict with the obvious intent of the letter. It stated that Warten, "through, we believe, no fault of his own, but owing to disastrous failure of crops in his own section, finds himself forced to ask for extension," and expressed a willingness to grant the extension, provided the Louisville firm would do likewise. The extension referred to must necessarily have meant an extension to the next crop year, otherwise the letter was meaningless. The disaster calling for the extension was the crop failure, and, the substantial results of the crop being realized by the end of December, it was self-evident that the extension proposed, and which the Memphis firm was willing to give, in conjunction with the Louisville firm, was one which would carry the debtor to another crop. This becomes more manifest when it is considered *that the extension was only to be[169 asked of three creditors, the Louisville firm, the Memphis firm, and one other, leaving the other debts unextended. But the extension granted by the Louisville firm did not accede to this proposal, since it embraced short-time acceptances for $3,000, which they could only hope to be paid out of the avails of the disastrous failure of the crop which had, by the terms of the letter, given rise to the necessity for the extension. Doubtless it was this view of the

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relation of the parties which caused the court to instruct the jury that if the Louisville firm took short-time paper from Warten in the hope of obtaining an advantage over the Memphis firm, they would have no right to complain because the Memphis firm overtook them in the race of diligence. Whether, however, this instruction was given because the court took this view of the letter and the legal effect of its unaccepted proposal, is immaterial. The entire charge is not in the record. The court may have expressed itself in this matter to the jury, in connection with observations possibly advanced in argument by counsel for plaintiffs in error upon their claim that the Memphis firm in the letter in question had sought to gain an advantage. And if such were the case, it was not error for the court to call the attention of the jury to the opposing view of the transaction.

These conclusions dispose of all the errors assigned which relate to the instructions given by the court, and leave only the exceptions taken to rulings admitting or rejecting testimony. They are twelve in number. We have examined them all, and content ourselves with saying that we find them either not well taken or of such a character, on account of their immateriality, as to create no reversible error.

Affirmed.

170] BOARD OF FLOUR INSPECTORS for the Port of New Orleans ET AL., *Appts.*,

v.

BOOTH F. GLOVER and FREDERICK J. ODENDAHL, Composing the Firm of GLOVER & ODENDAHL, ET AL.

(See S. C. Reporter's ed. 170.)

When appeal will be dismissed.

An appeal from a decree for an injunction against enforcing a law will be dismissed, if the law itself has been repealed.

[No. 88.]

Argued November 22, 1895. Decided December 9, 1895.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, enjoining the Board of Flour Inspectors for the Port of New Orleans *et al.* from enforcing against Booth F. Glover *et al.* an act of the general assembly of Louisiana of 1870. *Dismissed.*

The facts are stated in the opinion.

Mr. **J. R. Beckwith** for appellants.

The court declined to hear *Mr.* **Wm. Wirt Howe** for appellees.

THE CHIEF JUSTICE: The decree below enjoined appellants from enforcing against appellees act No. 71 of the extra session of the general assembly of Louisiana of 1870. La. Sess. Laws (Extra Sess. 1870) 156. This act was repealed June 28, 1892 (No. 23 of 1892, La. Acts 1892, 84), and the appeal is dismissed on the authority of *Mills* v. *Green*, 159 U. S. 651 [*ante*, 293].

Appeal dismissed.

PETER DOUGHERTY, *Plff. in Err.*, **[171**

v.

NEVADA BANK of San Francisco.

(See S. C. Reporter's ed. 171).

Jurisdiction of this court.

The construction of a state statute by a state court as to the power of a board of supervisors to extend the time for the performance of a street contract does not present a Federal question which this court can review.

[No. 98.]

Argued and Submitted December 6, 1895. Decided December 9, 1895.

IN ERROR to the Supreme Court of California to review a judgment of that court. *Dismissed.*

Statement from brief of defendant in error:

This writ was brought to reverse a judgment of the supreme court of California, affirming a judgment against the plaintiff, plaintiff in error here, in a suit to foreclose an assessment on a lot of the defendant, defendant in error here, levied to pay for street work in San Francisco under a contract made pursuant to the act of April 1, 1872. The contract was made January 15, 1873, and required the completion of the work in 150 days from that date, which time was subsequently extended for forty days by admittedly valid orders of the board of supervisors, and expired on July 24, 1873. Nearly two years afterwards, on March 29, 1875, a further extension of 645 days, dating from such prior expiration of the time, was granted by the board, and there were numerous like extensions afterwards, before the work was done, granted, in almost every instance, after the time previously allowed had expired. The assessment was made April 11, 1877, shortly after the work was completed. One Charity Hayward, then owner of the defendant's lot, appealed from said assessment to the board of supervisors on the ground, among others, of the alleged invalidity of the aforesaid extensions, granted after expiration of the time, and on such appeal the board confirmed the assessment. The judgment here in question held: (1st) that the extensions above mentioned were unauthorized and invalid, and that the assessment was void for failure to perform the work in time; and (2d) that the decision of the board on said appeal of Charity Hayward did not conclude or estop the defendant on this point.

The plaintiff in error contends that the judgment as to the first point above mentioned impaired the obligation of his contract, which, as he alleges, was made and performed on the faith of *Taylor* v. *Palmer*, 31 Cal. 246, decided under the acts of 1862 and 1868, which, as he

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NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution,—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

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claims, were the same, in this respect, as the act of 1872, and that said judgment, as to the second point, denied him "the equal protection of the laws."

Mr. **J. C. Bates** for plaintiff in error.

Messrs. **Jas. G. Maguire,** *John Garber, John H. Boalt,* and *Thomas B. Bishop* for defendant in error.

MR. JUSTICE FIELD: The writ of error is dismissed on the authority of *Wood* v. *Brady,* 150 U. S. 18 [37: 981].

Writ dismissed.

EDDY B. TOWNSEND, *Appt.,*

v.

MARY C. VANDERWERKER.

(See S. C. Reporter's ed. 171-184.)

Equity jurisdiction—specific performance—statute of frauds—laches—multifariousness.

1. A court of equity has jurisdiction of an action which, in addition to the recovery of money, seeks to establish a trust in favor of the plaintiff and to obtain a sale of the property to satisfy his claim.
2. Where defendant has only partially disabled himself from carrying out his contract, the plaintiff may be entitled to specific performance so far as it can be enforced, and may receive compensation in damages for the deficiency.
3. Payment of the consideration, accompanied by an entry into the possession of land, under a verbal contract, is such part performance as will remove the bar of the statute of frauds and support an action for specific performance.
4. The question of laches depends upon whether, under all the circumstances, plaintiff is wanting in due diligence in commencing his action. That a party to an agreement has died and his testimony is thereby lost is not conclusive of laches, on demurrer.
5. A bill is not multifarious, although one paragraph sets out a verbal agreement to convey an interest in land, and the prayer is for the payment of money, where, in view of a trust deed, a decree for the interest in land will not satisfy plaintiff's claim, and his lien is claimed to extend to the whole property to satisfy a promise to convey half of its unencumbered value.

[No. 73.]

Argued November 20, 1895. Decided December 16, 1895.

APPEAL from a decree of the Supreme Court of the District of Columbia affirming the decree of the Special Term of said Court sustaining a demurrer and dismissing a suit in equity to establish a trust and to recover one half the value of land in Washington with the house standing thereon, and on the rent of said house and lot. *Reversed, with directions for further proceedings.*

See same case below, 20 D. C. 197.

Statement by *Mr. Justice* **Brown:**

This was a bill in equity to recover one half the value of a certain piece of real estate in Washington, with the house thereon standing, of which one Julia R. Marvin died seised, together with a like proportion of the rents of the said house and lot received by Mrs. Marvin during her lifetime, or due and unpaid since her death.

The amended bill, which was brought against the heirs at law of Julia R. Marvin, the administrator of her estate, and the trustee named in a deed of trust of the property in question, averred in substance that said Julia R. Marvin was seised in fee and possessed of a certain lot of land upon Sixteenth street in the city of Washington; that she died on February 8, 1889, intestate as to her real estate; and that letters of administration were granted by the probate court to the defendant Hood.

After several immaterial averments as to the relationship of the several defendants, the execution of a trust deed to secure the payment of $10,000, the collection of rents by the intestate Marvin and her administrator, the bill averred in substance as follows:

That in March, 1879, an agreement was entered into *between the plaintiff and Mrs. Mar- [173 vin by which he agreed to contribute in money and in labor one half of the original cost of the said parcel of land and a dwelling house to be erected thereon, and in consideration thereof Mrs. Marvin agreed to convey to him a half interest in the land and dwelling house, so that the same should be owned jointly by himself and Mrs. Marvin; "that at the time of making said agreement there was no note or memorandum thereof in writing, but in performance of the same on his part the plaintiff gave his personal attention and supervision to the selection and purchase of the materials for the said dwelling house and the erection of the same," and also expended the sum of $4,000 in defraying the cost of the house; that this agreement, although not reduced to writing, on account of the intimate personal relations existing between the parties and the entire confidence they reposed in each other, had been fully performed by the plaintiff, the amount of money contributed by him, and the value of his services in selecting and purchasing the materials for the dwelling house and in superintending the erection of the same being equal altogether to one half the cost of the land and house; that Mrs. Marvin died without having executed her part of the agreement by conveying to the plaintiff the half interest in the land and house, although she had repeatedly recognized the claim in her lifetime, and had declared to plaintiff and others that she had made adequate provisions for the same in her last will and testament; that the services of the plaintiff were rendered in the years 1879 and 1880, and the money paid by him in defraying the cost of the house and land was paid during the years 1879, 1880, 1881, 1882, 1883, and 1884 in various sums to Mrs. Marvin, and sent to her

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NOTE—*As to when specific performance decreed and when refused,*—see notes to Hepburn v. Dunlop, 4: 65; Colson v. Thompson, 4: 253; and Brashier v. Gratz, 5: 322.

That plaintiff must show performance or readiness to perform and offer to perform; decree against subsequent purchaser,—see notes to Colson v. Thompson, 4:253; and Pratt v. Carroll, 3: 627.

As to laches, when a good defense, see note to Felix v. Patrick, 36: 720.

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in drafts by mail, as is evidenced by her repeated acknowledgments to him and others during her lifetime and by certain checks indorsed by her.

That from the time of the rendition of the said services and the payment of the said money by the plaintiff in performance of his said agreement, until the day of the death of the said Julia R. Marvin, the plaintiff constantly and repeatedly urged her to come to a settle 174]ment with him and to perform her part *of the agreement by conveying tohim a one-half interest in the parcel of land and the dwelling house erected thereon; that she always, whenever the subject was referred to, recognized and acknowledged the validity and justice of the claim, and assured the plaintiff that she had provided for the same in her last will and testament; that on the 4th day of January, 1888, she "admitted to a mutual friend that the house never would have been built but for the fact that she and the plaintiff had built it together, and that he had taken the management of it all, as she never could have done and never would have attempted; that he had paid her in all $4,000, which she had used; that such was her feeling towards him that she intended the house should be his when she was done with it, and should belong to them jointly while she lived; that on the 14th day of November, 1887, she acknowledged to the same mutual friend that the plaintiff had, since 1878, when the lot was bought and they began planning for the house, up to 1888, paid her $4,000; that she had always regarded the house as belonging to them jointly; that she intended it should be his at her death, and that her will, then written, had so provided;" that on account of her repeated and constant acknowledgment of the validity of his claim by her, and on account of the representations hereinbefore referred to as having been made to the said mutual friend and others, which representations were communicated to the plaintiff, and on account of the intimate personal relations always existing between them, and the unlimited confidence he reposed in her, they having lived together for a long time in the same dwelling house, and she having treated and spoken of him as a foster child, the plaintiff failed and omitted to take such measures for the enforcement of his rights as under other circumstances he would have taken. The plaintiff averred that by the course adopted by her and without any fault on his part he had been lulled into a false security, and that he would have instituted his suit during her lifetime for the specific performance of her contract but for the assurance, repeatedly made to him and to others, that she had by her will devised the entire property to him; 175]that the *plaintiff did not know until the death of Mrs. Marvin of her failure to carry out her agreement, when he learned to his surprise that she had died intestate as to her real estate.

The prayer of the bill was that an account might be taken of the debt claimed by the plaintiff to be due him; an account of the debt due to White, in whose favor the trust deed had been executed, and of other debts and demands against the estate; an account of the value of the lot and house and of other real estate of which Mrs. Marvin died seised; an account of the rents received by Mrs. Marvin during her lifetime and since her death; and for a decree directing payment to the plaintiff of a sum equal to half the value of the house and lot and of the rents received or due, for a sale of the house and lot for the purpose of paying the same, and for a distribution of the residue of the proceeds among those entitled thereto as next of kin or heirs at law.

A demurrer was interposed to this amended bill, which was sustained by the supreme court, and an appeal taken to the general term, by which the decree of the special term was affirmed and the bill dismissed. 20 D. C. 197. Plaintiff thereupon took an appeal to this court.

Messrs. **John Goode, Benjamin Butterworth,** and *Julian C. Dowell,* for appellant:

If there be any part of the bill that entitles the plaintiff to relief, the demurrer must be overruled.

Gunton v. *Carroll,* 101 U. S. 428 (25: 985).

A resulting trust arises where several pay the consideration and take title to one of their number.

Shoemaker v. *Smith,* 11 Humph. 81; *Edwards* v. *Edwards,* 39 Pa. 369; *Letcher* v. *Letcher,* 4 J. J. Marsh. 590; *Reese* v. *Murnan,* 5 Wash. 373; *Dow* v. *Jewell,* 18 N. H. 340, 45 Am. Rep. 371.

He who purchases at the time and pays after is as much a purchaser as if he bought for cash.

Blodgett v. *Hildreth,* 103 Mass. 484.

The most common cases of proof by parol of arrangements for joint purchase of land are those of partners. There it has always been held the statute of frauds did not apply.

Fouster v. *Hale,* 5 Ves. Jr. 309; *Dale* v. *Hamilton,* 5 Hare, 369; *Essex* v. *Essex,* 20 Beav. 442.

All trusts which arise by operation of law are excepted from the requirements of the statute of frauds.

2 Pom. Eq. § 1030.

There is no arbitrary rule as to laches; if the delay was caused by bad faith and misrepresentation on the part of Julia R. Marvin, no imputation of laches can be made against plaintiff.

Gunton v. *Carroll,* 101 U. S. 426 (25: 985); *Loring* v. *Palmer,* 118 U. S. 231 (30: 211); *Ayres* v. *Morehead,* 77 Va. 586.

When defendant has all along recognized plaintiff's right, delay on part of plaintiff will be excused.

Callender v. *Colegrove,* 17 Conn. 1; *Dickerman* v. *Burgess,* 20 Ill. 266.

Lapse of time alone is not a test of staleness.

Paschall v. *Hinderer,* 28 Ohio St. 568.

Mr. **Jacob H. Lichliter,** for appellees:

The suit as for recovery of a debt or of damages for a breach of an oral agreement for the sale of land is barred by the statute of limitations.

Shepherd v. *Thompson,* 122 U. S. 234 (30: 1157); D. C. Comp. Stat. p. 360, § 6.

The appellant's remedy was plain, adequate, and complete at law.

Kempshall v. *Stone,* 5 Johns. Ch. 193.

The alleged agreement, if made, for a conveyance of a half interest in the lot and house mentioned in the bill, comes within the statute of frauds, and not being in writing no action can be brought upon it.

Purcell v. *Coleman,* 71 U. S. 4 Wall. 518 (18:

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435); *Williams* v. *Morris*, 95 U. S. 444 (24: 360); *Randall* v. *Howard*, 67 U. S. 2 Black, 589 (17: 271); *Dunphy* v. *Ryan*, 116 U. S. 496, 498 (29: 704, 705); *May* v. *Rice*, 101 U. S. 237 (25: 799); *Repetti* v. *Maisak*, 6 Mackey, 366; *Wristen* v. *Bowles*, 82 Cal. 87; *Fortesque* v. *Crawford*, 105 N. C. 31; *Ryan* v. *Wilson*, 56 Tex. 38; *Tilton* v. *Tilton*, 9 N. H. 390; *Brown* v. *Lord*, 7 Or. 309.

A mere refusal (or a failure) to perform a parol agreement void under the statute of frauds is in no sense fraud, either in law or equity.

Wheeler v. *Reynolds*, 66 N. Y. 227, 234; *Crabill* v. *Marsh*, 38 Ohio St. 338; *Harris* v. *Harris*, 70 Pa. 174.

The least act that constitutes part performance to take a verbal contract for the sale of land out of the statute of frauds is possession taken of the land in pursuance of the contract.

Purcell v. *Coleman*, 71 U. S. 4 Wall. 518 (18: 436); *Williams* v. *Morris*, 95 U. S. 456 (24: 362); *Moore* v. *Small*, 19 Pa. 461; *Ackerman* v. *Fisher*, 57 Pa. 457; *Cuppy* v. *Hixon*, 29 Ind. 522; *Dugan* v. *Gittings*, 3 Gill, 139, 157, 43 Am. Dec. 306; *Gangwer* v. *Fry*, 17 Pa. 491, 55 Am. Dec. 578; *Sage* v. *McGuire*, 4 Watts & S. 229; *Heflin* v. *Milton*, 69 Ala. 354; *Owings* v. *Baldwin*, 8 Gill, 356; *Drury* v. *Conner*, 6 Harr. & J. 236; *Brown* v. *Lord*, 7 Or. 312; *McKee* v. *Phillips*, 9 Watts, 86; *White* v. *Watkins*, 23 Mo. 428; *Anderson* v. *Simpson*, 21 Iowa, 404; *Neal* v. *Neal*, 69 Ind. 423.

The payment of the purchase money—whether in money or services the value of which can be estimated—is not of itself an act of part performance to take a verbal agreement for the sale of land out of the statute of frauds.

Glass v. *Hulbert*, 102 Mass. 28-30, 3 Am. Rep. 418; *Blodgett* v. *Hildreth*, 103 Mass. 486; *Temple* v. *Johnson*, 71 Ill. 16, 17; *Forrester* v. *Flores*, 64 Cal. 26; *Carlisle* v. *Brennan*, 67 Ind. 19, 20; *Peckham* v. *Balch*, 49 Mich. 181; *Ex parte Storer*, 2 Ware, 294; *Humbert* v. *Brisbane*, 25 S. C. 510; *Crabill* v. *Marsh*, 38 Ohio St. 338; *Eaton* v. *Whitaker*, 18 Conn. 229, 44 Am. Dec. 586; *Kidder* v. *Barr*, 35 N. H. 255; *Cole* v. *Potts*, 10 N. J. Eq. 69; *Jackson* v. *Cutright*, 5 Munf. 316, 318; *Green* v. *Jones*, 76 Me. 567; *Ham* v. *Goodrich*, 33 N. H. 32; *Myers* v. *Byerly*, 45 Pa. 368, 372, 84 Am. Dec. 497; *Townsend* v. *Fenton*, 30 Minn. 531; *Horn* v. *Ludington*, 32 Wis. 73; *Edwards* v. *Estell*, 48 Cal. 196; *Wright* v. *Pucket*, 22 Gratt. 374.

To constitute part performance the act must show an agreement and the nature of the agreement.

Stoddert v. *Tuck*, 4 Md. Ch. 482; *Semmes* v. *Worthington*, 38 Md. 326.

The appellant has been guilty of laches,—his claim is stale and such as a court of equity will not countenance.

Halstead v. *Grinnan*, 152 U. S. 412 (38: 495); *Johnston* v. *Standard Min. Co.* 148 U. S. 370 (37: 485); *Galliher* v. *Cadwell*, 145 U. S. 371 (36: 739); *Hammond* v. *Hopkins*, 143 U. S. 250 (36: 145); *Underwood* v. *Dugan*, 139 U. S. 384 (35: 199); *Hanner* v. *Moulton*, 138 U. S. 492 (34: 1035); *Richards* v. *Mackall*, 124 U. S. 183 (31: 396); *Speidel* v. *Henrici*, 120 U. S. 377 (30: 718); *Lansdale* v. *Smith*, 106 U. S. 392 (27: 219); *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 (17: 836); *Knight* v. *Taylor*, 42 U. S. 1 How. 161 (11: 86); *Wagner* v. *Baird*, 48 U. S. 7 How. 234 (12: 681); *Holt* v. *Rogers*, 33 U. S. 8 Pet. 433 (8: 1000); *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431); *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 178 (22: 482); *Crosby* v. *Beale*, 84 U. S. 17 Wall. 336 (21: 602); *Brown* v. *Buena Vista County*, 95 U. S. 157 (24: 422); *Piatt* v. *Vattier*, 34 U. S. 9 Pet. 416 (9: 177); *Stearns* v. *Page*, 48 U. S. 7 How. 819 (12: 928); *Bowman* v. *Wathen*, 42 U. S. 1 How. 189 (11: 97).

In the following cases the time was four, five, six, seven, nine, twelve, and seventeen years, under a variety of circumstances.

Sullivan v. *Portland & R. R. Co.* 94 U. S. 811 (24: 326); *McQuiddy* v. *Ware*, 87 U. S. 20 Wall. 14, 20 (22: 311, 313); *Hayward* v. *Eliot Nat. Bank*, 96 U. S. 617 (24: 857); *Harwood* v. *Cincinnati & C. A. L. R. Co.* 84 U. S. 17 Wall. 79 (21: 558); *New Albany* v. *Burke*, 78 U. S. 11 Wall. 108 (20: 159); *Lupton* v. *Janney*, 38 U. S. 13 Pet. 385 (10: 212); *Pratt* v. *Carroll*, 12 U. S. 8 Cranch, 471 (3: 627); *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587 (23: 328).

In cases of this kind the death of parties who could explain the transaction has always been regarded as a controlling circumstance.

Hammond v. *Hopkins*, 143 U. S. 273 (36: 153); *Mackall* v. *Casilear*, 137 U. S. 566 (34: 776); *Godden* v. *Kimmell*, 99 U. S. 210 (25: 434); *Jenkins* v. *Pye*, 37 U. S. 12 Pet. 254 (9: 1075).

Mr. Justice **Brown** delivered the opinion of the court:

1. The ultimate object of the bill in this case is the recovery of a pecuniary demand, and, if this were its only object, it *would be [179] obnoxious to the general rule embodied in U. S. Rev. Stat. § 723, inhibiting the maintenance of a suit in equity where the remedy at law is plain, adequate, and complete.

The bill, however, in addition to the recovery of money, seeks to establish a trust in favor of the plaintiff and to obtain a sale of the property to satisfy his claim. The prayer is, not for a reimbursement to the plaintiff of the sums advanced, but for the payment to him of a sum equal to one half of the value of the house and lot in which he claims an interest, and of the rights accrued thereon. Had it not been for the fact that, subsequent to the outlays made by the plaintiff in improving the property, Mrs. Marvin had encumbered it by a trust deed in favor of Amos White, in the sum of $10,000, an ordinary bill for a specific performance would have been the proper remedy; but as the court upon such a bill could only decree him one half the property subject to such mortgage, he claims in this bill the full moiety of the value of the property, as it stood when the disbursements were made and before it was encumbered by the mortgage, and prays that such amount may be awarded him from the sale of the property; and that in respect to the residue, if any, he stand as a general creditor of her estate.

The case is not unlike that of *Wylie* v. *Coxe*, 56 U. S. 15 How. 415 [14: 753], where a bill was filed to recover a contingent fee of 5 per cent out of a certain fund arising from the prosecution of a claim against the Republic of Mexico. It was held that the death of the owner of the fund did not dissolve the con-

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tract, but that the right to compensation constituted a lien upon the money when recovered, and that this was sufficient ground for jurisdiction in equity, inasmuch as the payment of the fund to the executrix in Mexico would place it probably beyond the reach of the complainant.

Still more nearly analogous in principle is the case of *Seymour* v. *Freer*, 75 U. S. 8 Wall. 202 [19: 306]. This suit was founded upon an agreement between Seymour and one Price, by which Price undertook to devote his time and judgment to the selection and purchase of land to a certain amount, with a stipulation that the lands should be sold within five years, **180**] and one half *of the profits should be paid to Price and the other to Seymour. It was held that Seymour took the legal title in trust for the purpose specified, and to this extent Seymour was a trustee and Price the *cestui que trust;* that the trust continued after the expiration of the five years, unless Price subsequently relinquished his claim, and that the land which was to be converted into money should be regarded and treated in equity as money. "The agreement," said *Mr. Justice* Swayne, "that the property should be sold and half of the profits paid to Price, was a charge upon the property, and gave him a lien to the extent of the amount to which he should be found entitled upon the execution of the agreement, according to its terms." In reply to the contention that Price had a complete remedy at law, he further observed: "An action at law, sounding in damages, may undoubtedly be maintained in such cases for the breach of an express agreement by the trustee, but this in no wise affects the right to proceed in equity to enforce the trust and lien created by the contract. They are concurrent remedies. Either, which is preferred, may be selected. The remedy in equity is the better one. The right to resort to it under the circumstances of this case admits of no doubt, either upon principle or authority. Such, in our judgment, were the effect and consequences of the contract."

The earlier English cases held broadly that where a vendor of land had disabled himself from carrying out a contract to sell the land to the plaintiff, by a subsequent sale to another party, a court of equity would entertain a bill as for a specific performance and award damages to the plaintiff. This was the distinct ruling in *Denton* v. *Stewart*, 1 Cox, C. C. 258, where the court directed an inquiry as to what damages the plaintiff had sustained, and decreed that such damages should be paid by the defendant. A similar ruling was made in *Greenaway* v. *Adams*, 12 Ves. Jr. 395, although the master of rolls indicated a doubt with regard to the soundness of the principle announced in *Denton* v. *Stewart*. In *Gwillim* v. *Stone*, 14 Ves. Jr. 128, the bill asserted from the first that defendant could not make a good title and asked for compensation by reason of the failure of the contract, and a decree was **181**]*made for the delivering up the contract, without prejudice to an action, instead of an inquiry before the master.

In *Todd* v. *Gee*, 17 Ves. Jr. 278, the case of *Denton* v. *Stewart* was practically overruled by Lord Chancellor Eldon, who held that the plaintiff in a bill for specific performance was not entitled generally to satisfaction by way of damages for the nonperformance, to be ascertained by an issue or reference to a master, the court saying "that, except in very special cases, it is not the course of proceeding in equity to file a bill for specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue or inquiry before the master with a view to damages. The plaintiff must take that remedy, if he chooses it at law. Generally, I do not say universally, he cannot have it in equity, and this is not a case of exception." This case was followed in *Ferguson* v. *Wilson*, L. R. 2 Ch. 77, where the plaintiff prayed the specific performance of a resolution passed by the board of directors of a railway company, under which he alleged that he was entitled to have a certain number of shares allotted to him; and also prayed that if it should appear that all the shares had been allotted to other shareholders, the directors might indemnify him out of their own shares, or might be charged with damages. All the shares having been allotted before the filing of the bill, it was held that, as no remedy by way of specific performance was possible, plaintiff's claim for damages failed also.

The principle of these cases was also adopted by Chancellor Kent in *Kempshall* v. *Stone*, 5 Johns. Ch. 193, which is strongly relied upon by the appellees in this connection. In that case, the defendant entered into an agreement with the plaintiff to sell and convey him a lot of land, and, after the time of performance had elapsed, sold the land to a third person for a valuable consideration without notice of the agreement. Plaintiff filed his bill for a specific performance, which it was held could not be decreed, the lands having passed into the hands of a bona fide purchaser without notice, and the court further held that the plaintiff's remedy was at law for compensation in damages. In this case, as well as in the English*cases[**182** above cited, there was no possible lien upon the land, and no trust in favor of the plaintiff which the court could execute, and it was very properly held that his only remedy was at law.

But if the defendant has not wholly disabled himself from carrying out the contract, he may be decreed to perform specifically so much as he is still able to perform, and plaintiff may recover damages for the residue. Thus, in *Burrow* v. *Scammell*, L. R. 19 Ch. Div. 175, when the defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises she had agreed to lease to the plaintiff, the other moiety being vested in her son, a minor. She was decreed to specifically perform so much of the contract as she was able to perform, with an abatement of half the rent, and an inquiry as to damages was refused only upon the ground that there was no evidence that plaintiff had sustained any damages. The American cases are also to the effect that, where the defendant has only partially disabled himself from carrying out the contract, the plaintiff may be entitled to a specific performance so far as it can be enforced, and may receive compensation in damages for the deficiency. 3 Pom. Eq. Jur. §§ 1405, 1407; *Bostwick* v. *Beach*, 103 N. Y. 414.

In the case under consideration, Mrs. Marvin had but partially disabled herself from

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carrying out her contract with the plaintiff according to its original terms, by encumbering the property with the trust deed in favor of White. Under such circumstances, the plaintiff might have filed a bill for a specific performance *pro tanto*, and obtained a decree for a conveyance of one half of the property to himself, subject to a moiety of the trust deed; but we think he also had the option of treating the whole property as subject to a lien in his favor, and praying that it be sold to satisfy his claim for half of its original value. He would doubtless have a remedy at law to recover the value of his services as well as the moneys disbursed by him. This, however, under the averments of his bill, would not be the amount to which he would be justly entitled. It is possible that, in an action at law, he might also recover a personal judgment against the es-**183**]tate for one *half the value of the property in question; but this is not the complete and adequate remedy which a bill to enforce a trust in his favor upon the property in dispute would afford to him, and we think it is not beyond the power of a court of equity to entertain a bill for this purpose. *Sullivan* v. *O'Neal*, 66 Tex. 433.

2. Does the statute of frauds stand in the way of a decree in his favor? As there was no contract in writing, plaintiff must maintain his bill, if at all, upon the theory of a part performance. He must maintain it, too, upon the same principles and with the same cogency of proof as if it were in fact, as well as in substance, a bill for a specific performance. In this connection, the allegation is in effect that the plaintiff arranged with Mrs. Marvin to pay half the cost of the lot, and half the cost of erecting a dwelling thereon, he to purchase the materials and superintend the erection of the dwelling, and that each was to own half the property; that he performed his contract in full; that she not only never questioned that he had paid his half in full, but stated to him and to mutual friends that he had paid in full, and was jointly interested with her in the premises; that his ownership of half the premises was never disputed by her, but was openly recognized, and that, when he requested a settlement and that she convey his half to him, she replied that she had provided for that in her will, by which she gave him the entire property.

Admitting to the fullest extent the proposition that a mere payment of the consideration in money is insufficient to remove the bar of the statute, there is no doubt that such payment, accompanied by an entry into possession under the contract, is such a part performance as will support the bill. This court so expressly decided in the case of *Neale* v. *Neale*, 76 U. S. 9 Wall. 1 [19: 590]. And in *Brown* v. *Sutton*, 129 U. S. 238 [32: 664], it was held that where the defendant's intestate bought certain property for the complainant, under a promise made orally that he would make over the title to her upon consideration that she should take care of him during the remainder of his life, as she had done in the past, there had been sufficient part performance of this parol contract to take it out of the operation of **184**]the statute *of frauds, and render it capable of being enforced by a decree for specific performance. Similar cases of promises to convey property upon the consideration of support are frequent in the books. *Gupton* v. *Gupton*, 47 Mo. 37; *Sutton* v. *Hayden*, 62 Mo. 101; *Hiatt* v. *Williams*, 72 Mo. 214, 37 Am. Rep. 438; *Watson* v. *Mahan*, 20 Ind. 223; *Twiss* v. *George*, 33 Mich. 253; *Warren* v. *Warren*, 105 Ill. 568; *Patterson* v. *Patterson*, 13 Johns. 379.

The general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so change the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defense and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays or to an action upon a *quantum meruit* for the value of his services. In discussing what are and what are not acts done in part performance, which will entitle the plaintiff to a decree in his favor, the entry into possession of the land and the making of valuable improvements thereon are treated by all the cases as one of the most satisfactory evidences of part performance, and entitling plaintiff to a decree in his favor. 3 Pom. Eq. Jur. § 1409; Fry, Specific Performance, § 585; *Wills* v. *Stradling*, 3 Ves. Jr. 378; *Mundy* v. *Jolliffe*, 5 Myl. & C. 167; *Williams* v. *Evans*, L. R. 19 Eq. 547.

Although there is no distinct allegation in this bill that the plaintiff entered into possession, there is an allegation that the land in question consisted of a lot 34 feet in width by 110 feet in depth, and that the plaintiff gave his personal attention to the selection and purchase of the materials for a dwelling house and the erection of the same upon this lot, and paid $4,000 in defraying the cost of the house—facts which are inconsistent with any other theory than that he took possession of the lot for the purpose of erecting the house. *Whitsitt* v. *Pre-emption Presby. Church*, 110 Ill. 125. If he subsequently and after the completion of the house allowed Mrs. *Marvin to take[**185** possession of the lot, in view of the intimate relations between them, he lost no rights as against her which he obtained by his original entry and the erection of the house. The possession thus taken was evidently in performance of and in reliance upon the original agreement with the owner, and we think, taken in connection with the improvements made by him, it makes a case of part performance sufficient to remove the bar of the statute. His subsequent relinquishment of such possession was evidently with no intention to abandon the interest he had already acquired in the property. *Drum* v. *Stevens*, 94 Ind. 181.

3. We are also of opinion that, under the peculiar circumstances of this case, the bill is not open to the defense of laches. It is true the advances were made at sundry times from 1879 to 1884, and the bill was not filed until 1889, but the delay is sufficiently accounted for by the intimate personal relations that had always existed between the plaintiff and Mrs. Marvin and the unlimited confidence he had reposed in her. It is alleged in this connection

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that they had long lived together in the same house; that she had treated him and spoken of him as a foster child; that from the time the services were rendered until her death he had repeatedly urged her to come to a settlement with him; that, whenever the subject was referred to, she acknowledged the justice of the claim, and assured him she had provided for him in her will, saying that she intended the house to be his when she was done with it, and that it should belong to them both while she lived; that on this account he had neglected to take measures for the enforcement of his rights; and that he did not know until her death that she had failed to carry out her promise to devise the entire property to him.

Dealing with a person who stood in this relation to him, and with whom he had always been upon friendly and even intimate terms, the same diligence could not be expected of him as would have been if he had been treating with a stranger. If, as he avers, she had promised to leave him the entire property at her death, he may have considered it to his advantage to await this contingency, rather than **186**]to pursue *her for half the property during her life. As she died in February, 1889, and the bill was filed in October of the same year, there can be no claim that, with reference to this event, he did not act with sufficient promptness. The only circumstance that occurred during the period of nine years from the time the contract was made which was calculated to excite his suspicion that she did not intend to carry out her alleged agreement, was the execution of a trust deed in favor of White, of which, however, there is nothing in the bill to indicate that he had actual notice. While the record of this trust deed would operate as constructive notice to subsequent purchasers or encumbrancers of the property, it is at least doubtful whether it would have the same effect as to one who stood in plaintiff's relation to the property. *Howard Ins. Co.* v. *Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Bates* v. *Norcross*, 14 Pick. 224; *James* v. *Brown*, 11 Mich. 25; *Cooper* v. *Bigly*, 13 Mich. 463; *Iglehart* v. *Crane*, 42 Ill. 261; *Doolittle* v. *Cook*, 75 Ill. 354.

The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. In this case, we think the delay is fully explained. *Gunton* v. *Carroll*, 101 U. S. 426 [25: 985]. It is true that one of the parties to this alleged agreement has died, and that the court has lost the benefit of her testimony with regard to the alleged agreement. This, however, is a circumstance to be considered by the court in weighing the evidence, rather than an obstacle to the maintenance of the bill upon demurrer.

There are doubtless circumstances in the case which indicate at least a difficulty of proof, if not to arouse a suspicion, that perhaps the plaintiff may have overstated his case, but the pleader in a bill in equity is not bound to state either the testimony or facts which militate against his theory, but only to present his case in the light most favorable to his own interests, and asks that, upon such presentation, the court shall decide upon the sufficiency of his bill.

*4. We do not think the bill is open to [**187** the charge of multifariousness. While the 10th paragraph sets out a verbal agreement to convey an interest in land, and the prayer is for the payment of a certain amount of money, the discrepancy is explained by the fact that, in view of the trust deed to White, a decree for a half interest in the land will fail to satisfy plaintiff's claim, and that his lien is claimed to extend, not merely to the half interest, but to the whole property, to satisfy her promise to convey to him a moiety of its unencumbered value. Of course, nothing that is here said can affect the rights of White.

The decree of the court below is therefore reversed and the case remanded, with directions to overrule the demurrer and for further proceedings in conformity with this opinion.

A. W. BALLEW, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 187-203.)

Authentication of public record—testimony—withholding money from pensioner—statute—judgment on reversal in criminal case.

1. A certificate by the Commissioner of Pensions, with a certificate of the Secretary of the Interior certifying to the official character of the former, and under the seal of that Department, is sufficient authentication of a copy of a record in the office of the former to authorize it to be admitted in evidence.
2. Testimony on cross-examination as to part of a conversation does not render admissible on redirect examination the other parts of the conversation on a different subject.
3. Where pension money has been paid over to a pensioner, the obtaining thereafter of such money from him does not constitute a withholding of the same from him under the statute punishing the wrongful withholding of pension moneys from a pensioner.
4. The term "withholding" in the statute punishing the wrongful withholding of pension moneys from a pensioner, is confined to money due, and does not embrace that which had been paid to the pensioner and has passed under his control.
5. Where there is a general verdict of guilty on an indictment containing two counts, and the only errors found in the record relate to and affect the crime covered by the first count, the general judgment of the court below should be reversed and the cause remanded with instructions to enter judgment upon the second count, and for such proceedings as to the first count as may be in conformity to law.

[No. 547.]

Argued October 28, 1895. Decided December 16, 1895.

IN ERROR to the Circuit Court of the United States for the Northern District of Georgia, to review a judgment convicting A. W. Ballew for wrongfully withholding from a pen-

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sioner, one Lucy Burrell, part of a pension allowed and due her, and for receiving, as agent, a greater compensation for services in prosecuting the claim for pension than is provided by the statutes relating to pensions. *Reversed, and cause remanded with instructions.*

Statement by *Mr. Justice* **White:**

At the October term, 1893, of the circuit court of the United States for the northern district of Georgia, an indictment was found against the plaintiff in error, embracing two counts, the first charging him with wrongfully withholding from a pensioner of the United States, one Lucy Burrell, part of a pension allowed and due her, and the second accusing him of demanding and receiving, as agent, a greater compensation for services in prosecuting the claim for pension than is provided by the title of the Revised Statutes pertaining to pensions.

The offenses charged in the indictment are made punishable by the final paragraph of U. S. Rev. Stat. § 4786, as amended by the pension appropriation act of July 4, 1884 (23 Stat. at L. 101, chap. 181, § 4).

On the trial of the case there was conflict in the testimony in many particulars as to the offense charged in the first count. The evidence tended to show that the check issued for the payment of the pensioner was received by the accused, a pension agent; that he went with the pensioner to a bank; that there in the presence of an officer of the bank, the check was indorsed, and was presented to the paying teller, by whom the amount was paid over to or "put in the hat" of the pensioner, who was shown to be an illiterate negro woman; that, either by the suggestion of the bank officer or of the accused, the money was deposited in the bank for account of the pensioner, a deposit slip being issued therefor. The proof, moreover, was that immediately after this deposit the pensioner went to an office in the vicinity, where a check for $1,887.34, one half of the amount of the pension check, was drawn by her, she making her mark, this check being payable to the order of Hurley Ballew, a son of the accused, by whom it was immediately collected. There was conflict as to whether the accused participated in the fraud by which the drawing of the check was brought about, or whether the amount inured to his 189]*benefit. The pensioner testified that she supposed the check was drawn for $25 in favor of her son, while the drawee of the check, Hurley Ballew, testified that it was given him in payment for an insignificant service rendered in connection with the procuring of testimony during the prosecution of the claim for the pension. There was testimony on the second count tending to support the same, although as to this count there was also a conflict in the evidence.

During the course of the trial a page from the records of the Pension Office, showing the issue of the pension to the pensioner named in the indictment, was offered and admitted in evidence over the objection of the accused, to which action of the court exception was duly reserved.

One J. B. Chamblee was examined as a witness for the defendant, and exception was reserved to the exclusion of testimony given on his redirect examination. At the close of the evidence the following instruction was requested by counsel for the accused, which was refused and exception noted.

"When a pension check is delivered to a pensioner, and she takes the same to a bank and has it cashed, and then deposits the said fund in a bank and takes a deposit slip therefor, the fund loses its nature and character as pension money, and the ordinary relation of debtor and creditor exists between the pensioner and the bank, and if thereafter, by any device or in any way whatever, the pension attorney obtains a draft from her and draws it out of her general account, he cannot be convicted of withholding under U. S. Rev. Stat. § 5485, and it would be your duty to acquit him on that count, if these be the facts as to that branch of the case."

The giving of the following as part of the charge of the court was also excepted to by defendant:

"Now, the defense here is that the amount of the check received from Mr. Rule, the pension agent, really went into the possession of the pensioner in this case, and the contention for the government is that under the facts of the case the money really did not go into her possession in contemplation of law, and they also contend that the attorney, the *defendant[190 in this case, could not withhold the money or any part of it by getting the check, which is in evidence here, for eighteen hundred and odd dollars.

"Upon that branch of the case I instruct you thus: If you believe that the receipt of the pension check under all the circumstances connected with it, and the possession of the pension check by the defendant in this case, and the taking of the check to the bank and his accompanying the pensioner to the bank, the turning of the check into cash, and the payment of money to her, the physical possession placed in her by putting the money in her hat, the deposit of the money in the bank, and the taking of the pensioner to the office of the defendant and the drawing of the check for $1,800,—if you believe that this was all one transaction arranged and designed by the defendant in this case for the purpose of getting into his possession $1,800 of the money which the pensioner received; that it was a scheme designed by him, one continuous transaction, for that purpose, and that he was a party to it and was the beneficiary of the money received,—then that would be in law a withholding of the money under this statute, and the defendant would be guilty, and it would be your duty to convict him; but it would be necessary for you to believe that. The other rule which I gave you is true and exists in law, that is, that the money can be paid by their attorney to the pensioner, and thereafter there might be a transaction between them which, of course, would be entirely legal and honest, by which the cash could pass from the pensioner to the attorney, but that would depend on the character of the transaction. The jury will see the facts, and I state it to you again, that if all these facts or series of facts are one continuous transaction designed by the defendant and arranged by him, as contended by the government, for the purpose of

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getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiary of the receipt of it, then that would be withholding in the meaning of the statute. Now, the facts in this case are for the jury to determine. The check signed by the pensioner, which **191**]*seems to be made to Hurley Ballew and indorsed by him, is in evidence and you will have that out with you."

The court instructed the jury that if they considered the defendant guilty on one count and innocent on the other, they should so find; and if they found him guilty on both counts, that they should return a general verdict of guilty. This last was the verdict returned. After an ineffectual effort for a new trial, the case was brought here on error.

Messrs. **W. C. Glenn** and *Daniel W. Rountree*, for plaintiff in error:

The deposit of money in the bank by the pensioner, under the circumstances, became a general deposit, the pensioner parting with her title to the money, and thereby the relation of debtor and creditor existed between the bank and the pensioner, the bank agreeing to pay said debt by returning the same amount or any part thereof on demand. The money became the property of the depository and the depositor's claim was a mere chose in action. It is impressed with no trust in favor of the depositor, and there is no relation of *cestui que trust* between her and the banker.

Marine Bank v. *Fulton County Bank*, 69 U. S. 2 Wall. 256 (17: 787); *National Bank of the Republic* v. *Millard*, 77 U. S, 10 Wall. 152 (19: 897); *Marine Bank* v. *Rushmore*, 28 Ill. 463; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; Jones, Bailm. 102; Story, Bailm. § 88.

If the evidence submitted by the government is true, the defendant, if guilty of any offense, is only guilty of the crime of cheating and swindling under the laws of the state of Georgia.

Ga. Code of 1882, § 4595; *Jones* v. *State*, 93 Ga. 552; *Johnson* v. *State*, 90 Ga. 441; *Doyle* v. *State*, 77 Ga. 515; *Ratteree* v. *State*, 77 Ga. 776; *Tatum* v. *State*, 58 Ga. 408.

Where the government introduced in evidence a part of a confession or an admission of a party to a cause made in the course of a conversation with a witness, the defendant has the right to lay before the court the entire conversation. In criminal as well as in civil cases the whole of an admission made by a party is to be given in evidence.

Greenl. Ev. (15th ed.) § 218; Roscoe, Crim. Ev. (10th ed.) 54; *State* v. *Hollenscheit*, 61 Mo. 302; *State* v. *Martin*, 28 Mo. 530; *Griswold* v. *State*, 24 Wis. 144; *State* v. *Elliott*, 15 Iowa, 72; *Peterson* v. *State*, 47 Ga. 524 (3); *Long* v. *State*, 22 Ga. 40 (7); *Alfred* v. *State*, 37 Miss. 296; *Green* v. *State*, 13 Mo. 382; *Bower* v. *State*, 5 Mo. 364, 32 Am. Dec. 325; *William* v. *State*, 39 Ala. 532; *Corbett* v. *State*, 31 Ala. 329; *Chambers* v. *State*, 26 Ala. 59; *Frank* v. *State*, 27 Ala. 37; *State* v. *Mahon*, 32 Vt. 241; *Kelsey* v. *Bush*, 2 Hill, 440; *People* v. *Johnson*, 2 Wheel. Crim. Cas. 361; *Com.* v. *Keyes*, 11 Gray, 323; *State* v. *Worthington*, 64 N. C. 594; *Crawford* v. *State*, 4 Coldw. 190; *Tipton* v. *State*, Peck (Tenn.) 308; *State* v. *Isaac*, 3 La. Ann. 359; *People* v *Navis*, 3 Cal. 106; *People* v. *Murphy*, 39 Cal. 52; *People* v. *Gelabert*, 39 Cal. 663; *Respublica* v. *McCarty*, 2 U. S. 2 Dall. 86 (1: 300); *United States* v. *Prior*, 5 Cranch, C. C. 37; *United States* v. *Wilson*, 1 Baldw. 78; *Rex* v. *Jones*, 2 Car. & P. 629; *Rex* v. *Higgins*, 3 Car. & P. 603; *People* v. *Strong*, 30 Cal. 151; *Coffman* v. *Com.* 10 Bush, 495; *State* v. *McDonnell*, 32 Vt. 491.

Where the charge of the judge to the jury, is of a character to mislead the jury, the error is one of law and may be corrected in an appellate court.

Washington & G. R. Co. v. *Varnell*, 98 U. S. 485 (25: 235); *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 212 (6: 605); *Loring* v. *Frue*, 104 U. S. 223 (26: 713).

It is error for the judge to submit to the jury a fact or state of facts which there is no evidence tending to prove, or to give instructions with reference to a state of facts not in evidence.

Wakefield v. *Smithwick*, 4 Jones, L. 327; *Gilchrist* v. *Rogers*, 6 Watts & S. 488; *Herdic* v. *Bilger*, 47 Pa. 60; *Kelso* v. *Townsend*, 13 Tex. 140; *Bogle* v. *Kreitzer*, 46 Pa. 465; *Sartwell* v. *Wilcox*, 20 Pa. St. 117; *Switland* v. *Holgate*, 8 Watts, 385; *Sutton* v. *Madre*, 2 Jones, L. 320; *Bond* v. *Hall*, 8 Jones, L. 14; *Webster College* v. *Tyler*, 35 Mo. 268; *Jeffersonville R. Co.* v. *Swift*, 26 Ind. 459; *Dickerson* v. *Johnson*, 24 Ark. 251; *Cothran* v. *State*, 39 Miss. 541; *Herndon* v. *Bryant*, 39 Miss. 336; *Oliver* v. *State*, 39 Miss. 526; *Galena & C. U. R. Co.* v. *Jacobs*, 20 Ill. 487; *Swank* v. *Nichols*, 24 Ind. 199; *Starr* v. *United States*, 153 U. S. 624, 625 (38: 845), and cases cited; *Cobb* v. *Fogalman*, 1 Ired. L. 440.

If upon any one issue error was committed, either in the admission of evidence or in the charge of the court, a general verdict upon several issues cannot be upheld.

Maryland v. *Baldwin*, 112 U. S. 490 (28: 822); *Com.* v. *Boston & M. R. Co.* 133 Mass. 383, 392; *Wood* v. *State*, 59 N. Y. 117, 122.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error:

A pension is not a vested right, but a periodical bounty.

Frisbie v. *United States*, 157 U. S. 160, 166 (39: 657, 659), and cases cited.

The copy is sufficient under U. S. Rev. Stat. § 882, which requires merely that such copies be "authenticated under the seals of such departments." It was signed by the Commissioner of Pensions himself and attested under the seal of the Interior Department by the acting Secretary of the Interior.

Thompson v. *Smith*, 2 Bond, 320; *Catlett* v. *Pacific Ins. Co.* 1 Paine, 594, 612; *Stephens* v. *Westwood*, 25 Ala. 716.

It is claimed that the court should have directed a verdict of acquittal at the close of the government's evidence. It is unnecessary to discuss this claim, as the exception taken was waived by putting in testimony on behalf of the defendant.

Union P. R. Co. v. *Snyder* ("*Union P. R. Co.* v. *Daniels*") 152 U. S. 684 (38: 597); *Wilson* v. *Haley Live Stock Co.* 153 U. S. 49 (38: 627); *Runkle* v. *Burnham*, 153 U. S. 216 (38: 694).

It was claimed that the court erred in excluding from the jury a portion of the testimony of J. B. Chamblee to the effect that A.

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W. Ballew, at some subsequent time not definitely stated, claimed that the $1,800 check was paid to his son for services in prosecuting the pension claim, and that his own fee was simply what he got from the pension office as attorney.

This testimony was all admitted without objection, but subsequently excluded from the consideration of the jury by instruction of the court. Whether or not this instruction was proper, it is submitted that the defendant could not have been prejudiced, as this statement, admittedly made *post litem motam*, was reiterated most strongly by himself and his son in their own testimony on the trial. Whatever weight the jury might have given to statements in his own behalf had any been made by the defendant before any controversy or question had arisen, this statement, made under circumstances at least questionable, could not possibly have had even the slight effect on the case which is sufficient to require a retrial.

Lucas v. *Brooks*, 85 U. S. 18 Wall. 436, 454 (21: 779, 783).

There would be no safety in putting a general question to a witness upon his cross-examination if his answer might be the means of rendering the declaration of the opposite party evidence in his own favor without being called for by his antagonist.

Winchell v. *Latham*, 6 Cow. 682, 685.

When a man is sued upon two independent causes of action or indicted for two separate crimes, and on cross-examination of one of his witnesses a conversation was referred to in which he declares his innocence of one of the two charges against him, that does not entitle his own counsel to draw out upon re examination other declarations of innocence relating to the other charge as made in the same conversation.

Prince v. *Samo*, 7 Ad. & El. 627; 1 Greenl. Ev. § 467, and cases cited. See also cases cited in *note* to 1 Greenl. Ev. (15th ed.) § 201.

A witness on redirect examination can be asked as to so much only of a conversation brought out in his cross-examination as could in any way qualify or explain the statement as to which he had been cross-examined.

Queen's Case, 2 Brod. & B. 297; *Rouse* v. *Whited*, 25 N. Y. 170, 82 Am. Dec. 337; *People* v. *Beach*, 87 N. Y. 508-512.

Nor can a statement on direct, which is absolutely adverse to the party calling the witness, as a general rule, require or justify any explanation or qualification upon cross-examination, although there may be cases where it may be justifiable to supplement the statement.

Simmons v. *Havens*, 101 N. Y. 427, 433; *Cook* v. *State*, 24 N. J. L. 843.

Perhaps the rule in criminal cases may be thus briefly stated. If, on the trial of an indictment, the state offers in evidence any verbal or written declaration of the defendant, or any act done by him, admitting his guilt, either expressly or by implication, or from which a jury may legitimately draw any inference prejudicial to the defendant's claim of innocence, the defendant is entitled to offer in evidence the whole of the conversation, writing, or transaction.

Com. v. *Keyes*, 11 Gray. 323, 325; *Com.* v. *Goddard*, 14 Gray, 402, 404.

Because it is held that the issues upon one count were improperly submitted to the jury, that does not render nugatory the whole trial upon the other count and their verdict thereon.

Claasen v. *United States*, 142 U. S. 140 (35: 966); *Evans* v. *United States* (No. 1), 153 U. S. 584, 588 (38: 830, 832).

An error in the sentence does not vitate the verdict (*Re Bonner*, 151 U. S. 242, 262 (38: 149, 153)) and the case may be remanded for resentence.

Whart. Crim. Pl. & Pr. §§ 780, 928; Act of Feb. 6, 1889, chap. 113, § 6; cases cited in 21 Am. & Eng. Enc. Law, 1082, 1083.

If error be found to exist in instructions concerning one of two crimes tried together, the district attorney should be given the same right which plaintiff has in a civil action.

Washington & G. R. Co. v. *Tobriner* ("*Washington & G. R. Co.* v. *Harmon's Exr.*") 147 U. S. 571 (37: 284).

The broad authority given to this court in criminal cases is equivalent to the powers given to many state courts in such cases to render, on appeal, such judgment upon the verdict as the trial court should have rendered.

Ex parte Frederich, 149 U. S. 70 (37: 653); *Simpson* v. *State*, 56 Ark. 8, 19.

A general verdict of guilty upon a series of counts for different crimes (as distinguished from a series of counts intended to cover the same crime) is practically equivalent to a separate verdict upon each.

Com. v. *Boston & M. R. Co.* 133 Mass. 383; *Com.* v. *Andrews*, 132 Mass. 263; *Wood* v. *State*, 59 N. Y. 117; *Blitz* v. *United States*, 153 U. S. 308, 317 (38: 725, 728).

Mr. Justice **White** delivered the opinion of the court:

The assignments of error address themselves to four rulings of the court, the one admitting in evidence the pension certificate and the other excluding certain testimony, and two to the refusal to give the instruction requested as well as to the error alleged in the instruction given.

The ground of objection relied upon as to the record from the Pension Office is that the copy was improperly authenticated, because the certificate signed by the acting Secretary of the Interior, and under the seal of the Department, referred only to the official character of the Commissioner of Pensions, and the faith and credit to which his attestations were entitled, and U. S. Rev. Stat. § 882, is cited in support of the contention. That section reads as follows:

"Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."

By reference to the transcript in question in the record, we find that the certificate of the acting Secretary of the Interior was preceded by a certificate signed "Wm. Lochren, Commissioner of Pensions," certifying that "the accompanying page, *numbered 1, is truly [192 copied from the original in the office of the Commissioner of Pensions." The records of the Pension Office constitute part of the records of the Department of the Interior, of which executive department the Pension Office is

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but a constituent. We think that the certificates in question, taken together, were a substantial compliance with the statute.

The exception taken to the ruling out of certain answers made by Chamblee, one of defendant's witnesses, on his redirect examination, results from the following facts: The witness upon his examination-in-chief testified solely with reference to the circumstances connected with the giving by the pensioner of the check of $1,887.34, which formed the basis of the charge of withholding covered by the first count in the indictment. The cross-examination was confined to the same subject. At the close of the cross-examination the witness stated that he had been asked by a special examiner of pensions, who was investigating the matter, what he knew about the consideration of the check in question. The witness further said that A. W. Ballew came and asked him if he had been interviewed by the examiner, to which inquiry of Ballew the witness stated he had answered yes, and had informed Ballew that the examiner had questioned him about the $1,800 check, and that he told him that he thought the check had been given for a house and lot. The witness next stated that Mr. Ballew then told him that the pensioner had given the check to Hurley Ballew.

Upon redirect examination he testified as follows:

"Q. In that conversation with A. W. Ballew, the defendant here, what did he say was the basis of that money given to Hurley Ballew?

"A. What did A. W. Ballew say he done as a matter of inducement to her?

"Q. Yes.

"A. I don't know anything, only that he prosecuted this pension claim, and as to what he had to do with Hurley I don't know that he ever said anything. I think he told me he got his fee from the Pension Department as attorney.

193] *"Q. That is all he ever got?

"A. That is all he got, I think he told me.

"Q. That he got his fee from the Pension Department?

"A. That is all he ever got."

Objection being interposed by the district attorney to proof of Ballew's declarations, the objection was sustained and the testimony excluded from the consideration of the jury.

The ground upon which counsel for plaintiff in error rests his claim of admissibility is that when a confession is put in evidence by the prosecution, it is the right of the accused to demand that all the conversation in which the alleged confession was made should be received. We are unable to reach the conclusion that Ballew's mere statement to a witness that the pensioner had given his son the check was a confession or in the nature of a confession. It had no tendency to establish his guilt or to operate to his prejudice, and confessions are only admitted as being statements against the interest of the party by whom they are claimed to have been made. But the re-examination of the witness was not directed to the ascertainment of what other statements had been made in the conversation upon the subject about which he had testified on his cross-examination, to wit, the check to Hurley Ballew, but to the drawing out of new matter, not connected with the subject to which the cross examination related. This was clearly improper. 1 Greenl. Ev. § 467, and cases cited. See also cases cited in *note a* to Greenl. Ev. (15th ed.) § 201, and *People* v. *Beach*, 87 N. Y. 508, 512.

The statute upon which the first count is based reads as follows:

"Any agent or attorney or other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner *or claimant, or the land[194 warrant issued to any such claimant, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for every such offense be fined not exceeding $500, or imprisonment at hard labor not exceeding two years, or both, in the discretion of the court."

The refusal of the court to give the charge asked, and the charge by it given, proceeded upon the theory that although pension money was actually paid over to the pensioner and by her deposited in bank, the obtaining thereafter of such money from the pensioner constituted a withholding under the statute just quoted. The word "withholding" has a definite signification, and we think contemplates, as used in the statute under consideration, not the fraudulent obtaining of money from a pensioner, but the withholding of the money before it reaches the hands of the pensioner and passes under his dominion and absolute control. The context of the statute supports this view, for its penalty is imposed for the wrongful withholding of the whole or any part of the pension claim allowed and due such pensioner, and not for a wrongful obtaining of the same. The fact that the offense of withholding is limited to any agent or attorney or other person instrumental in prosecuting any claim for pension demonstrates that Congress intended to legislate merely against the wrongful withholding by certain individuals, who, by reason of their relation to the pensioner and his claim, might lawfully obtain possession of the same from the government, and upon whom rested the duty of paying it over to the pensioner. If withholding had been considered as applicable to the retaining of pension money obtained from the pensioner by false pretenses, the limitation as to particular persons would not have been enacted. Indeed, to construe the word "withholding" as relating to money received from a pensioner, not only reads the word "due" out of the statute, but also leads to the inevitable conclusion that Congress, whilst intending to make it an offense to obtain from a pensioner pension money by false pretenses, has yet confined the offense to particular individuals, and permitted all others to commit with impunity the crime it was intended to punish. It also follows if the statute *be construed as embracing money ob-[195

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from a pensioner by false pretense, that the act forbids withholding money thus obtained, but does not forbid or punish the act of obtaining the money by a false or fraudulent pretense. These reasons make it clear that the purpose of the statute in punishing a withholding by certain persons standing in a fiduciary relation to the pensioner is consistent only with the theory that Congress was legislating to prevent an embezzlement of pension money, not a larceny thereof from the pensioner or the obtaining of the same from him by false pretenses. This construction of the statute is further supported by reference to the act of March 3, 1873 (17 Stat. at L. 575), in § 31 of which is contained the original provision making it an offense to withhold pension money. In juxtaposition to that section, in § 32, was the following:

"Any person acting as attorney to receive and receipt for money for and in behalf of any person entitled to a pension shall, before receiving said money, take and subscribe an oath, to be filed with the pension agent, and by him to be transmitted, with the vouchers now required by law, to the proper accounting officer of the treasury, that he has no interest in said money by any pledge, mortgage, sale, assignment, or transfer, and that he does not know or believe that the same has been so disposed of to any person."

The portion of § 32 above quoted was subsequently embodied in U. S. Rev. Stat. § 4745.

The signification which we affix to the word "withholding" is also shown to be the one intended by Congress, by the previous portion of the paragraph of the act of 1884, which not only makes it an offense to directly or indirectly contract for, demand, or receive, or retain any greater compensation for services, or for instrumentality in prosecuting a pension claim than allowed by the act, but specifically inhibits the obtaining of payment thereof "at any other time or in any other manner" than as provided in the act, thus making it clear that where it was intended to punish the offense of receiving an illegal fee as well after the payment of the pension to the pensioner as before the receipt by him of the money, the intention 196]*was unequivocally conveyed. The clause "payment thereof at any other time or in any other manner than is herein provided," was not contained in the act of 1873, nor in U. S. Rev. Stat. § 5485, but was first embodied in the act of 1884, whereas the provision as to withholding of a pension has always been confined to the withholding of a pension "due" the pensioner. In the very next sentence of the act of 1873, following the designation of the offense of withholding, there is a provision affixing a penalty to the offense of embezzlement of pension money by a guardian from his ward. This latter offense is now embodied in U. S. Rev. Stat. § 4783, which reads as follows:

"Every guardian having the charge and custody of the pension of his ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding $2,000 or imprisonment at hard labor for a term not exceeding five years, or both."

It may be remarked, in passing, that it would be as reasonable to argue that one who had fully accounted as guardian and paid over to his ward the balance due, when the ward had attained his or her majority, could be prosecuted under § 4783, if, after such accounting and payment, he fraudulently obtained money from his former ward which might from the proof appear to be a portion of the balance so paid on the accounting, as to contend that when a pension, allowed and due from the government, had been paid to the pensioner, it continued to be "due," in any money transaction between the pensioner or his former agent or attorney.

The instruction given by the trial court that there was a withholding under the statute if the transaction in this case was a continuous scheme designed by the accused for the purpose of getting into his possession a portion of the pension money, made his guilt or innocence depend, not alone upon whether there was a withholding in the statutory sense of the word, but on whether there was a scheme to defraud. It was tantamount to instructing the jury that they should convict even though they were satisfied that the money had not been *withheld, if they believed that before [197 payment over a scheme to defraud had arisen which was carried out after the pensioner had received the amount of the pension, and after it had been by her deposited in bank, and had created between her and the bank the legal relation of debtor and creditor. *Scammon* v. *Kimball*, 92 U. S. 362, 369, 370 [23: 483, 485, 486]; *Florence Min. Co.* v. *Brown*, 124 U. S. 385, 391 [31: 424, 427]. Of course, if the indictment had been so framed as to bring the facts which it alleged constituted a withholding within the reach of the first clause of the statute, which forbids the taking of illegal compensation, the instruction given by the court would have been sound. In that case, the taking of the money is made criminal, whether done before payment to the pensioner, at the time of such payment, or at any other time; withholding, on the contrary, is confined to money due, which, in no sense, embraces that which has been actually paid over to a pensioner and has passed under his complete control. However much pension money, even when taken into the possession of a pensioner, may retain its identity for certain purposes, we do not think, for the reasons just stated, that this instruction given was sound in law. The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute. *United States* v. *Brewer*, 139 U. S. 278 [35: 190]. It follows, therefore, that the instruction asked was wrongfully refused and the instruction given was erroneous, and that there was error in the conviction as to the first count in the indictment.

The verdict was a general verdict. That in a case such as this a general verdict is proper and imports of necessity a conviction as to both crimes is settled. *Claasen* v. *United States*, 142 U. S. 140, 146 [35: 966, 968]. It follows, then, that though there was error as to the conviction of one of the offenses charged, there was no error in the conviction upon the other. The question therefore arises whether error as to one only of the counts

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must lead to reversal of the conviction on that count alone or to like reversal as to the count where no error exists; in other words, whether, after reversing the judgment, which was on both counts, we can annul the verdict upon **198**]the first *count alone, and leave the verdict to stand as to the second count unaffected by the reversal.

It was held in England that at common law a reviewing court upon a writ of error in a criminal case had not the power, upon a reversal, to enter a proper judgment or to remand the cause for that purpose. *Ex parte Frederich*, 149 U. S. 70, 74 [37: 653, 656], citing *Rex* v. *Bourne*, 7 Ad. & El. 58. This conclusion rested upon the theory that a court of error was confined exclusively to the determination whether error existed, and if it found that it did, its duty was to reverse and discharge the prisoner. In *Reg.* v. *Holloway*, 17 Q. B. 317, 328, it was held that since the passage of the act of 11 & 12 Vict. chap. 78, § 5, the English courts possessed ample power upon the reversal of a judgment to remand the case for a proper judgment. The act referred to provided as follows:

"That whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition in any criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition."

In order to save all doubt on the subject, so also in the several states statutes have been adopted expressly conferring upon reviewing courts authority upon reversal to remand the cause to the lower court with such directions for further proceedings as would promote substantial justice.

The statutes in reference to the power of Federal appellate tribunals have from the beginning dealt with the subject.

By the judiciary act of September 24, 1789 (1 Stat. at L. 85), it was provided in § 24 "that when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed, and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be **199**]assessed or matter to be decreed, *are uncertain, in which case they shall remand the same for final decision."

By § 25 of the same act, this court was given power on writs of error to the state courts to re-examine, reverse, or affirm their final judgments "in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, . . . may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution."

Under the power thus conferred it has never been questioned that this court possessed authority upon reversal for error of a final judgment to award a new trial. The recognition of this right involves necessarily a denial of the principle upon which the case of *Rex* v. *Bourne* proceeded. As we have seen, the postulate upon which that case rested was the absence of power to render such judgment or order as the ends of justice might require, because of the want of authority to do anything else but determine the existence of the error complained of. It is clear that by § 24 of the judiciary act of 1789, power was conferred upon the circuit courts when reviewing the judgments or decrees of district courts to render such judgment or pass such decree as the district court should have rendered or passed, and that upon this court was conferred the same power. True, at the time the judiciary act was passed, no jurisdiction to review final judgments in criminal cases was vested in circuit courts or in this court, except in cases of error to courts of last resort of a state, but as the power on writs of error to state courts embraced criminal cases, it could not have been contemplated that the general grant of authority on such writs to render the judgment required by the justice of the case was restricted to civil cases alone. The subsequent statutes add cogency to the view that this was not contemplated.

The 2d section of the act of June 1, 1872 (17 Stat. at L. *196, chap. 255), provided that [**200** the appellate court (referring to this court and circuit courts) may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had, by the inferior court as the justice of the case may require.

The subsequent embodiment of the provision just quoted in U. S. Rev. Stat. § 701, makes clear the fact that Congress in conferring the power to review an error did not intend that the power, on reversal, to make such order as was called for by the nature of the error found to exist, should be limited to civil cases. Section 701 reads as follows:

"The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had, by the inferior court as the justice of the case may require."

The re-enactment of the provisions as to writs of error to the highest court of a state, contained in U. S. Rev. Stat. § 709, manifests the purpose to continue in force the power in such cases to render the judgment required by the ends of justice. The language of the statute is that on such writs the judgment of the state court—

"May be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as

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if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

By the act of March 3, 1879 (20 Stat. at L. 354, chap. 176), jurisdiction was conferred in certain criminal cases upon circuit courts to review judgments of the district courts, and it was provided in § 3 that "in case of an affirmance of the judgment of the district court, the cir-
201 cuit court shall proceed *to pronounce final sentence and to award execution thereon; but if such judgment shall be reversed, the circuit court may proceed with the trial of said cause *de novo* or remand the same to the district court for further proceedings."

The act of February 6, 1889 (25 Stat. at L. 655, chap. 113), which gave jurisdiction to this court by writ of error in all capital cases tried before any court of the United States, provided that the final judgment of such court against the respondent, upon the application of the respondent, should be re-examined, reversed, or affirmed, upon writ of error, under such rules and regulations as this court might prescribe. And the act further declared:

"When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution."

By the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), jurisdiction was conferred upon this court "in cases of conviction of a capital or otherwise infamous crime;" and jurisdiction was conferred in other criminal cases upon the circuit courts of appeals established by that act.

With reference to the newly established courts, in § 11 of the act it was provided as follows:

"And all provisions of law now in force regulating the methods and systems of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act, in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error."

It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases, to state courts, and to the circuit courts in capital cases, was confessedly conferred
202 by express statutory *provisions, and that a like power was conferred upon the circuit courts of appeals and circuit courts in cases where they exercised jurisdiction by error in criminal cases over the district court.

From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil, but in criminal, cases, might require. To contend otherwise presupposes that Congress had conferred this power upon this court on writs of error to state courts, on writs of error to the circuit courts in capital cases, and had also conferred like power upon circuit courts and the circuit courts of appeals, and yet had denied it to this court in a class of criminal cases where jurisdiction was conferred by writ of error under the act of 1891. To so conclude would work out an absurdity, and would destroy the unity of the Federal judicial system. The contrary conclusion finds support only in the contention that because in each concession of jurisdiction, by writ of error, there was not a re-expression of the general method by which such writ should be exercised, therefore the grant of power was devested of its efficacy. But this is fully answered by the entire history of the legislation which demonstrates that the general grant of power to render a proper judgment on writs of error was evidently not reiterated in express terms when new subjects-matter of jurisdiction were vested in this court, because such authority was deemed to be already adequately provided by the general statutes on the subject. For this reason, in speaking of the act of 1891, this court said, in *Hudson* v. *Parker*, 156 U. S. 277, 282 [39: 424, 425]: "As to the methods and systems of review, through appeals and writs of error, including the citation, supersedeas, and bond or other security, in cases, either civil or criminal, brought to this court from the circuit court or the district court, Congress made no provision in this act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system."

In *Re Bonner*, 151 U. S. 242, 262 [38: 149, 153], we held that an error *in a sentence did
203 not vitiate a verdict, and that this court, sitting in habeas corpus, might remand for resentence one whose conviction was lawful but against whom a judgment, erroneous in part, had been rendered. In this case, as the only errors found in the record relate to and affect the crime covered by the first count, substantial justice requires, and it is so ordered, that *the general judgment rendered by the court below should be reversed*, and the cause be remanded to that court with instructions to enter judgment upon the second count of the indictment, and for such proceedings with reference to the first count as may be in conformity to law.

JOHN ALLISON, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 203-217.)

Self-defense—witness in criminal case—party—instruction to jury—recent threats—demonstration of violence—evidence of ill-will.

1. Where homicide is sought to be justified as committed in self-defense, by the testimony of the accused, the instruction to the jury that,

NOTE.—*As to threats by deceased in cases of homicide; when admissible in evidence,*—see note to Wiggins v. Utah, 23: 941.

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"you must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness when he is confronted with a charge of murder. All men would say that,"—is erroneous as practically depriving him of the benefit of his testimony.

2. The wise and humane provision of the law that the person accused is a competent witness should not be defeated by hostile intimations of the trial judge.

3. As a witness a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness.

4. The instruction to the jury that they are to draw the distinction between where a man arms himself from ill-will and animosity and hunts up his adversary and slays him, and where he arms himself for self-defense, is erroneous as ignoring the evidence that defendant had not armed himself at all, but had a gun with him for the purposes of sport and that his being at the place of the homicide had no connection with the deceased, and does not allude to defensive matter which throws a different light on the transaction.

5. Communicated recent threats are admissible in evidence on the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with bodily injury, and was justified in acting on a slight hostile demonstration from the other.

6. What is or is not an overt demonstration of violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger.

7. An instruction that threats by deceased to take the life of defendant may be treated as evidence of spite or ill will by the latter is misleading in itself and erroneous where it omits all reference to the conduct of the deceased at the time of the killing, which showed an intention then and there to carry out the previous threats.

[No. 693.]

Submitted November 20, 1895. Decided December 16, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment convicting John Allison of the murder of his father, William Allison, and sentencing him to be hanged. *Reversed, with directions for a new trial.*

Statement by *Mr. Chief Justice* **Fuller:**

John Allison, some twenty years old, was indicted for the murder of his father, William Allison, on the 5th day of January, 1895, at the Cherokee Nation in the Indian country, in the western district of Arkansas, found guilty by a jury, under the instructions of the court, and sentenced to be hanged, whereupon he sued out this writ of error.

The evidence tended to show that the Allisons resided up to the year 1893 in the state of Washington; that the parents had been divorced; that the father had repeatedly threatened the lives of the members of his family, and for an assault upon one of his sons and his son-in-law, by shooting at them with a pistol, had been sent to the penitentiary for a year; and that thereupon the family left the state of Washington and came to the Indian country. In about a year the father appeared, first at Hot Springs, Arkansas, where one daughter had located, and then in the neighborhood of the other members of the family in the Indian country; and at once began threatening the lives of the entire family, and particularly that of his son John. A great variety of vindictive threats by the deceased in Washington, at Hot Springs, and in the Indian country, was testified to.

Evidence was also adduced that on one occasion he came to the house where the mother and her children were living and demanded to see the children, who (except John and one whom he had seen) were not at home, and he then wished to see their mother, who objected to meeting him; that he persisted, whereupon his son John, who had a gun in his hand, told him he must leave, and the father dared John to come out and he would fight him outside, but John answered that he did not want any trouble with him—only wanted him to stay away from there, and the deceased replied: "God damn you, I will go off and get a gun and kill the last damned one of you;" that he subsequently told his son-in-law to tell John Allison* "that he would blow his God damned [205 brains out the first time he seen him; told him to tell him he would kill his mother and the entire family;" that the day after this occurrence John Allison and his mother made an affidavit to get a peace warrant for William Allison, and on that occasion John told the prosecuting attorney that the old man threatened his life, and he thought he was in danger, and asked him if he killed the old man what would be done with him, and he replied that "if the old man came to his house and raised a racket and tried to carry out his threats that he told me he had made on him, I told him he would be justified in doing it," but that he must not go "hunting the old man up and trying to kill him;" and that John said: "I will not bother him; if he will let me alone, I will let him alone;" and that this was five or six days before the killing. The evidence further tended to show that the deceased had been in the habit of carrying a pistol; that he stated that he had one; that on New Year's day he threatened one of the witnesses with that weapon, and another witness testified to catching a glimpse of it once when he put his hand around to his hip pocket; but that he had no pistol on him when he was killed. The deceased was staying at the house of one Farris, and a witness testified in rebuttal to conversing with John when he was "warming" on one occasion at the barn—presumably Farris' barn—and asking him why he did not go up to the house, and he said he did not want to go up there; that he was afraid he and his father would have some trouble; that he was afraid his father would hurt him; and that he was going to kill him just as quick as he caught him away from the house.

As to the circumstances immediately surrounding the homicide, the defendant testified that he and a man by the name of Rucker had killed a deer near Rucker's the day before, and that he had promised Rucker to come back the next day to hunt for others, and was riding by Farris' place, which was on the road to Rucker's, with his gun in his

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hand, on that errand, on the morning of January 5, when he saw a person whom he took to be his brother Jasper up at Farris' house; that **206**] *this person turned out to be Farris with his brother's coat on; but he stopped at the stable thinking that his brother would come down that way, as he had learned from his sister that his brother was to be at the place at that time for the purpose of removing some household goods; that he did not go up to the house because he did not want to meet his father; that shortly after he arrived at the barn his father came through the gate, and he stepped to one side to let him go into the barn if he wished to, but deceased did not go towards the door, came straight towards him, and when he got a few feet from him said: "You have got it, have you?" and threw his hand back as if he was going to get a pistol; "made a demonstration that way," and that this demonstration and the threats he had made led defendant to believe that he was going to draw a pistol, and he fired; that he fired three shots, but none after the deceased fell. Defendant was corroborated by Rucker and others in many particulars, but contradicted by the government's witnesses in respect of firing after his father was down, they testifying that he fell at the first shot.

Mr. **William M. Cravens** for plaintiff in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It was claimed on behalf of defendant that the homicide was excusable because committed in self-defense, in that, his life having been repeatedly threatened by deceased, when he saw him on this occasion moving his hand as if to take a pistol from his hip pocket, he believed, and, as a prudent man, might reasonably have believed, at that time and under those circumstances, that he was in imminent and deadly peril which could only be averted by the course he pursued; or that, at the most, he could only be found guilty of manslaughter for acting under an unreasonable access of fear, but without malice.

The threats were conceded; and there was evi- **207** dence that *the deceased was in the habit of carrying a pistol; that he had recently carried one in his hip pocket; that he had sent word to defendant that he should kill him on sight; that defendant had started on a hunting expedition that morning; and that his stopping at Farris' place was accidental; but the facts that he at first stepped away from his father, and that the latter advanced on him and made the threatening demonstration as if to draw a pistol, which the defendant knew he was accustomed to have upon him, apparently depended on defendant's testimony alone. The question for the jury to determine, from all the facts and circumstances adduced in evidence, was the reasonableness of the belief, or fear, of the existence of such peril of death or great bodily harm as would excuse the killing. And it was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law.

We repeat what was said by *Mr. Justice* Shiras, speaking for the court, in *Hicks* v. *United States*, 150 U. S. 442, 452 [37: 1137, 1141]: "It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and perhaps a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is, that 'the person charged shall, at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law."

*Similar views have been expressed in [**208** many cases in the state courts.

In *Com.* v. *Wright*, 107 Mass. 403, it was held that there was no presumption either way as to the truthfulness of a defendant's testimony in a criminal case, and that his testimony is to be considered and weighed by the jury, taking all the circumstances of the case and all the other evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have.

"It cannot," observed Scholfield, *J.*, in *Chambers* v. *People*, 105 Ill. 409, "be true that the evidence given by the defendant charged with crime is not to be treated the same as the evidence of other witnesses. It could not even be true as a universal proposition that, as matter of law, it is not to have the same effect as the evidence of other witnesses. Many times it certainly cannot have that effect, but there are times when it can and should,—and of this the jury are made the judges."

And see *Greer* v. *State*, 53 Ind. 420; *Veatch* v. *State*, 56 Ind. 584, 26 Am. Rep. 44; *Buckley* v. *State*, 62 Miss. 705; *State* v. *Johnson*, 16 Nev. 36.

Among the errors assigned in the present case was one to so much of the charge as is given below in italics, in respect of which a sufficient exception was preserved. The trial judge said:

"You have heard in argument here, incidentally dropped, no doubt, because these things have been repeated here so often in this court that every child knows what the law of self-defense is, that if a man thinks he has a right to slay he can slay. That is a great misapprehension of what this proposition of the law is and what it means. If that was the case how many men, when they were arraigned for the killing of a human being, would not assert that they thought they had a right to kill; they might be mistaken, but they thought

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so. They perhaps had a misunderstanding of the law, but then they thought they had the right to kill. What a perversion of this protection agency called the law of the land this would be! No, that is not the law. It must be 209]shown*by the evidence that the party who was slain was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant, and that he could not prevent it except by doing as he did do. *The question as to whether that is the state of case or not is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances, and the juries as a matter of fact would have nothing to do but to record the finding which was willed or established by the declaration of the party who did the killing.*"

In this there was error. While the trial judge may not have intended to be understood that the defendant could not prove his defense by his own testimony, and had it in his mind simply to warn the jury that they should not rely on the defendant's opinion that his conduct was justifiable, but on the facts, or what reasonably appeared to him to be such, we think these remarks had a much wider scope, and must have been so understood by the jury. The "state of case" put to the jury was whether William Allison was at the time doing something that would satisfy a reasonable man, situated as defendant was, that he was about to do what would destroy defendant's life, and which defendant could not prevent except by doing as he did; and the question as to the existence of that state of case was required by the instruction to be passed on by the jury on something more than defendant's declaration, which, it was stated, would certainly be made by any man created when confronted with a charge of murder.

Defendant had testified to the facts upon which he based his belief that he was in peril, and it was for the jury to say from the evidence whether the facts as he stated them actually or apparently existed, and whether the 210] homicide could *therefore be excused either wholly or in part. And if the jury regarded the remarks of the court as applicable generally to defendant's testimony, then defendant was practically deprived of its benefit, and the statute enabling him to testify was rendered unavailing. In our opinion the liability of the jury to thus understand these observations was so great that their utterance constitutes reversible error.

Nor was this error obviated by what, some time after,—the intervening portion of the charge occupies six closely printed pages,—was said by the trial judge, as follows: "The defendant has gone upon the stand, and he has made his statement. See if it is in harmony with the statements of witnesses you find to be reliable. If they are not, they stand before you as contradicted. If they are, they stand before you as strengthened as you may attach credit to the corroborating facts. In passing upon his evidence you are necessarily to consider his interest in the result of this trial, in the result of this case. He is related to the case more intimately than anybody else, and you are to apply the principle of the law that is laid down everywhere in all civilized countries, commanding you to look at a man's statements in the light of the interest that he has in the case. There is no odor of sanctity thrown around the statements of the defendant as a witness, as is sometimes supposed, because he is charged with crime. You are to view his statements in the light of their consistency, their reasonableness, and their probability, the same as the statements of any other witness, and you are to look at them in the light of the interest he has in the result of the case." If this could be, in any aspect, treated as a modification of the previous assertions of the court, it was too far separated from that connection to permit us to attribute that operation to it, and moreover it was, in itself, erroneous. As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness.

Exception was taken, not with much precision, but, we are disposed to hold, sufficiently to save the point, to the following *in- [211 struction, given in discussing the question of malice aforethought:

"Now, of course, you are to distinguish (and I have to be particular upon this point; I have my reasons for it, and it is not necessary to name to you what they are) between a case where a man prepares simply to defend himself and keeps himself in the right in that defense, and a state of case where he prepares himself recklessly, wantonly, and without just cause to take the life of another. If he prepares himself in the latter way, and he is on the lookout for the man he has thus prepared himself to kill, and he kills him upon sight, that is murder, and it would shock humanity or even the most technical and hair-splitting court to decide anything else. That can be nothing else but murder. If he is in the right —if he is in the right at the time of the killing —and simply prepared himself to defend his own life, that is preparation, not to take the life of another, but preparation to defend himself. That is the distinction, a distinction that is clear and comprehensive."

And also to this in reference to the exercise of the right of self-defense:

"The first proposition is as follows: 'A man who, in the lawful pursuit of his business'— I will tell you after awhile what is meant by that. I will tell you, in short, in this connection it means that the man is doing at the time just exactly what he had a right to do under the law. When so situated—'is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, may lawfully kill the assailant, provided he uses all the means in his power, otherwise, to save his own life or to prevent the intended harm—such as

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retreating as far as he can, or disabling his adversary without killing him, if it be in his power.' Now, that means by its very language that the party was in the right at the time. If he was hunting up his father for the purpose of getting an opportunity to slay him without just cause and in the absence of legal provocation, he was not in the right, and the consequence would be that he would be deprived of the law of self-defense, as you will learn presently, when such a condition as that 212 exists. Now, of *course, in this connection —and I am this particular again for certain reasons—you are to draw the distinction between a state of case where a man arms himself, where there is ill-will, or grudge, or spite, or animosity, existing, and he hunts up his adversary and slays him, and the state of case where he simply arms himself for self defense. He has a right to do the latter as long as he is in the right, but he has no right to do the former, and if he does the former and slays because of that condition he is guilty of murder."

We are of opinion that defendant's objections to these portions of the charge are well founded. The hypothesis upon which the defense rested on the trial was that John Allison had a gun with him on the morning of the tragedy in order to hunt deer, and that his stopping at Farris' place, which was on his way to Rucker's, was accidental. His testimony to this effect was corroborated and was not contradicted.

Justice and the law demanded that so far as reference was made to the evidence that which was favorable to the accused should not be excluded. His guilt or innocence turned on a narrow hinge, and great caution should have been used not to complicate and confuse the issue. But the charge above quoted ignored the evidence tending to show that defendant had not armed himself at all, but had a gun with him for purposes of sport, and that his halt at Farris' had no connection whatever with the deceased; and invited the jury to contemplate the spectacle of a son hunting up his father with the deliberately preconceived intention of murdering him, unrelieved by allusion to defensive matter, which threw a different light on the transaction.

If defendant were "in the right at the time of the killing," the inquiry as to how he came to be armed was immaterial, or, at least, embraced by that expression. If there were evidence, and as to this the record permits no doubt, tending to establish that defendant carried his gun that morning for no purpose of offense or defense, then this disquisition of the court was calculated to darken the light cast on the homicide by the attendant circumstances as defendant claimed them to be; and of this he had just cause to complain, even though there 213]*were competent evidence indicating that he harbored designs against his father's life, as frequently intimated by the court,—intimations which we fear seriously trenched on that untrammeled determination of the facts by a jury to which parties accused are entitled.

As will have been seen, the theory of the defense was that the defendant was in terror of his life by reason of the threats of deceased to take it, and was therefore led to interpret the alleged menacing action of deceased as demonstrating an intention then and there to carry those threats into execution. The bearing of the previous threats then was very important, and in relation to them the trial judge admonished the jury as follows:

"Now, then, these mitigating facts which reduce the killing so as to make it manslaughter cannot be previous acts of violence exerted at some other time, and so far in the past as that there was time for the blood to cool, or the party to think or to deliberate—it cannot be an act of that kind that can be taken into account to mitigate the crime. Nor can they exist in the shape of previous threats, made at some other time than the killing, or, if you please, if the proof had shown that they were made at the time of the killing, because threats of violence, mere threats of that character, cannot be used to justify nor to mitigate a killing, unless they are coupled with some other condition which I will give you in connection with the law given you showing the figure that threats cut in a case. . . . If threats were made previous to the time of the killing, and they were not coupled with the condition that they may be used to illustrate, as I will give it to you presently, and the party kills because of those threats, that is evidence of spite, that is evidence of grudge, that is evidence showing that he kills because of ill-will and special animosity existing upon his part against the party who is slain."

After much intervening discussion on other matters, the subject was returned to thus:

"You want to know, of course, what figure threats cut. Evidence has been offered here of threats made by the deceased. You want to know what office they perform in the *case [214 how you are to view them, whether you are to say that the law authorizes you to say that if a man has been threatened at some time previous to the killing, and that he kills because of these threats, or he kills when no overt demonstration of violence, really or apparently, is being made by the party slain at the time, whether or not those threats can be taken into consideration by you to excuse that killing or to mitigate it. . . . Now, you see, they do not cut any office at all in favor of a defendant unless at the time, in this case, his father was doing some act, making some actual attempt, to execute the threat, as shown by some act or demonstration at the time of the killing, taken in connection with the threat, that would induce a reasonable belief upon the part of the slayer that it was necessary to deprive his father of life in order to save his own or prevent some felony upon his person. That is the law, stated plainly, as to the office of communicated threats. . . . If he (the deceased) was doing some act or making some demonstration that really or apparently was of a character that indicated a design to take life, then the defendant could couple previous threats made with the act or demonstration. Now, the act or demonstration must have gone sufficiently far to show a reasonable purpose or to induce a reasonable belief, when coupled with threats, under the circumstances, that that was William Allison's purpose at the time. It must have gone to that extent. It must have gone sufficiently far, the overt act done by him, as to in-

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duce a reasonable belief, when coupled with threats, that that was his purpose. . . . Now, you see that no matter how many threats William Allison may have made against his family, and no matter to what extent this family broil had gone, this defendant, because of threats of that character, could not hunt him up and shoot him down because of those threats. If that was the state of case the threats cannot be considered in his favor, but they may be considered to show that he killed him because of malice, because of malice aforethought existing, because of a spirit of spite, or ill will, or grudge, that he was seeking to satisfy by that sort of attack."

Defendant excepted to so much of these [215] instructions as ruled *that threats to take his life might be treated as constituting evidence of spite, or ill will, or grudge on his part.

In *Wiggins* v. *Utah*, 93 U. S. 465 [23: 941], it was held that, on a trial for a homicide committed in an encounter, where the question as to which of the parties commenced the attack is in doubt, it is competent to prove threats of violence against defendant made by deceased, though not brought to defendant's knowledge, for the evidence, though not relevant to show the *quo animo* of the defendant, would be relevant, under such circumstances, to show that at the time of the meeting deceased was seeking defendant's life. Whart. Crim. Ev. § 757; *Stokes* v. *People*, 53 N. Y. 174, 13 Am. Rep. 492; *Campbell* v. *People*, 16 Ill. 17, 61 Am. Dec. 49; *People* v. *Scoggins*, 37 Cal. 676; *Roberts* v. *State*, 68 Ala. 156. It is from the dissenting opinion in *Wiggins's Case* that the trial judge indulged in quotation in connection with the undisputed proposition that a person's life is not to be taken simply because he has made threats.

Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause for apprehension of danger and reason for promptness to repel attack, but they could not have been admitted on a record such as this, if offered by the prosecution as tending to show spite, ill-will, or grudge on the part of the person threatened; nor could they, being admitted on defendant's behalf, if coupled with an actual or apparent hostile demonstration, be turned against him in the absence of evidence justifying such a construction. The logical inference was that these threats excited apprehension, and another and inconsistent inference could not be arbitrarily substituted. If defendant, to use the graphic language of the court, hunted his father up and shot him down merely because he had made the threats, speculation as to his mental processes was uncalled for. If defendant committed the homicide because of the threats, in the sense *of acting upon emotions aroused by them, [216] then some basis must be laid by the evidence other than the threats themselves before a particular emotion different from those they would ordinarily inspire under the circumstances could be imputed as a motive for the fatal shot.

What is or is not an overt demonstration of violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger; under other circumstances this would not be so. And it is for the jury, and not for the judge, passing upon the weight and effect of the evidence, to determine how this may be. In this case it was essential to the defense that the jury should be clearly and distinctly advised as to the bearing of the threats and the appearance of danger, at the moment, from defendant's standpoint, and particularly so as it did not appear that the deceased then had a pistol upon him, though there was evidence that it was his habit to carry one, and that he had had one immediately before.

We think that the language of the court in the particulars named is open to the criticism made in reference to like instructions under consideration in *Thompson* v. *United States*, 155 U. S. 271, 281 [39: 146, 151], where we remarked: "While it is no doubt true that previous threats will not, in all circumstances, justify or, perhaps, even extenuate the act of the party threatened in killing the person who uttered the threats, yet it by no means follows that such threats, signifying ill-will and hostility on the part of the deceased, can be used by the jury as indicating a similar state of feeling on the part of the defendant. Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all reference to the conduct of the deceased at the time of the killing, which went to show an intention then and there to carry out the previous threats."

Other exceptions to parts of the charge were taken, but, while not to be understood as holding that there was no error in respect thereof, we do not feel called upon to prolong this opinion by their consideration, and they may not arise upon another trial.

*Where the charge of the trial judge [217] takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided.

Judgment reversed and cause remanded, with a direction to set aside the verdict and grant a new trial.

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INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY, *Plff. in Err.*,

v.

JOHN C. GIBNEY ET AL.

(See S. C. Reporter's ed. 217-220.)

Jurisdiction of circuit court—who may object.

1. The question of jurisdiction of the circuit court is sufficiently certified to this court, where the record shows that the only matter tried and decided was a demurrer to the plea to the jurisdiction, and the petition on which the writ of error was allowed asks only for the review of the judgment that the court had no jurisdiction of the action.

2. Defendants who have appeared generally in an action in a Federal court cannot object that themselves or other defendants were not inhabitants of the district in which the action was brought, where the ground of jurisdiction is diversity of citizenship.

[No. 99.]

Argued December 6, 1895. Decided December 16, 1895.

IN ERROR to the Circuit Court of the United States for the District of Indiana to review a judgment of that court in favor of defendants, John C. Gibney *et al.*, in a suit brought by the Interior Construction & Improvement Company, on a bond for the performance of a contract. *Reversed with directions to sustain the demurrer to the plea, and for further proceedings.*

Statement by *Mr. Justice* **Gray**:

This was an action at law, brought June 9, 1890, in the circuit court of the United States for the district of Indiana, by the Interior Construction & Improvement Company against John C. Gibney and Harvey Bartley, copartners under the name of J. C. Gibney & Company, and James B. McElwaine and James B. Wheeler, upon a bond, by which "J. C. Gibney & Co., as principals, and J. B. McElwaine and J. B. Wheeler, as sureties, are holden and firmly bound," jointly and severally, to the plaintiff, in the sum of $20,000, for the performance of a contract made by "said J. C. Gibney & Co." with the plaintiff.

The complaint alleged that the plaintiff was incorporated under the laws of the state of New Jersey, and was a citizen thereof; and that all the defendants were citizens and residents of the state of Indiana.

On June 19, 1890, the defendants, Gibney, McElwaine, and Wheeler, by their attorney, entered a general appearance. But Gibney never pleaded or answered; and the defendant Bartley never appeared or made any defense.

On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the state of Pennsylvania, and not citizens or residents of the state of Indiana; and that therefore the court had no jurisdiction of the case.

The plaintiff demurred to this plea as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its demurrer to the plea, the court adjudged that the plaintiff take nothing by its action and that the defendant recover costs.

The plaintiff thereupon presented a petition for the allowance of a writ of error "for the review of the judgment heretofore rendered therein in favor of the defendants and against the plaintiff, therein holding and deciding that this court has no jurisdiction of said action;" and assigned, as errors, that the circuit court erred: 1st, in overruling the plaintiff's demurrer to the plea in abatement; 2d, in sustaining the plea in abatement, and holding that the court had no jurisdiction of the cause; 3d, in entering judgment in favor of the defendants and against the plaintiff on the plea in abatement, and dismissing and quashing the proceedings. The writ of error was thereupon allowed by the judge presiding in the circuit court.

Mr. **John C. Donnelly** for plaintiff in error.

No counsel for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

The record shows that the only matter tried and decided in the circuit court was a demurrer to the plea to the jurisdiction, and the petition upon which the writ of error was allowed asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court, as required by the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, § 5). *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322 [39:438]; *Shields* v. *Coleman*, 157 U. S. 168 [39:660].

The act of March 3, 1887, as corrected by the act of August 13, 1888, confers upon the circuit courts of the United States original jurisdiction of all civil actions, at common law or in equity, between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000; and provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. at L. 552, chap. 373; 25 Stat. at L. 433, chap. 866.

The circuit courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the pro-

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence,*—see note to Emory v. Greenough, 1: 640.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit,—see note to Roberts v. Lewis, 36: 579.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor,—see note to M'Donald v. Smalley, 7: 287.

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ceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought 220] in the wrong district is waived *by entering a general appearance, without taking the objection. *Gracie* v. *Palmer*, 21 U. S. 8 Wheat. 699 [5: 719]; *Toland* v. *Sprague*, 37 U. S. 12 Pet. 300, 330 [9: 1093, 1105]; *Ex parte Schollenberger*, 96 U. S. 369, 378 [24: 853, 855]; *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127 [35: 659]; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 206 [36: 942, 945]; *Texas & P. R. Co.* v. *Saunders*, 151 U. S. 105 [38: 90]; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129 [38: 98]; *Southern Exp. Co.* v. *Todd*, 12 U. S. App. 351.

In *Smith* v. *Lyon*, 133 U. S. 315 [33: 635], this court held that the provision of the act of 1888, as to the district in which a suit between citizens of different states should be brought, required such a suit, in which there was more than one plaintiff or more than one defendant, to be brought in the district in which all the plaintiffs or all the defendants were inhabitants.

When there are several defendants, some of whom are and some of whom are not inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the nonresident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a nonresident and does not appear, the defendants who do come in may object, at the proper stage of the proceedings, to being compelled to answer the suit.

But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all the defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and, of course, cannot object that others of the defendants were such.

Judgment reversed and case remanded, with directions to sustain the demurrer to the plea, and for further proceedings not inconsistent with this opinion.

Re KEASBEY & MATTISON COMPANY.

(See S. C. Reporter's ed. 221-231.)

Jurisdiction of circuit court—suit against corporation.

1. The United States circuit court for the southern district of New York has not jurisdiction of an action for infringement of a trade-mark brought by a corporation of Pennsylvania against a corporation of Massachusetts, which has its principal office and place of business in New York city, unless the objection to the jurisdiction is waived.

2. A corporation cannot be compelled to answer in a United States circuit court in a district in which neither the defendant nor the plaintiff is an inhabitant.

[No. 6, Original.]

Submitted October 14, 1895. Decided December 16, 1895.

PETITION for a writ of mandamus to the judges of the United States Circuit Court for the Southern District of New York to command them to take jurisdiction and proceed against the E. L. Patch Company, in a suit in equity brought by the Keasbey & Mattison Company. *Writ of mandamus denied.*

Statement by *Mr. Justice* **Gray:**

This was a petition for a writ of mandamus to the judges of the circuit court of the United States for the southern district of New York to command them to take jurisdiction and proceed against the E. L. Patch Company, upon a bill in equity filed in that court on January 26, 1895, by the petitioner, described in the bill as a corporation organized and existing under the laws of the state of Pennsylvania, against the E. L. Patch Company, alleged in the bill to be a corporation organized and existing under the laws of the state of Massachusetts, and having its principal office and place of business in the city and state of New York, and against Henry E. C. Kuehne and Edward H. Lubbers, alleged to be citizens of the United States and of the state of New York, and managing or general agents of the E. L. Patch Company in that state, for infringement of a trade-mark, owned by the petitioner, registered in the Patent Office under the laws of the United States, and used in commerce between the United States and several foreign nations named in the bill; and alleging that "this is a suit of a civil nature in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the laws of the United States, and also in which there is a controversy between citizens of different states, within the intent and meaning of the statute in such case made and provided."

*Upon the filing of the bill in equity, a 222 subpœna addressed to all the defendants was issued and was served in the city of New York upon the E. L. Patch Company, by exhibiting the original, and delivering a copy to Kuehne, one of its managing agents in the district, and was also served upon Kuehne and Lubbers individually.

Upon the return of the subpœna, the E. L. Patch Company, by its solicitor appearing specially for this purpose, moved to set aside the alleged service of the subpœna upon the company; and the circuit court, upon a hearing, ordered that the motion be granted, and

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NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence,*—see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor,—see note to M'Donald v Smalley, 7: 287.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit,—see note to Roberts v. Lewis, 36: 579.

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that service set aside as null and void, and the company relieved from appearing to plead or answer the bill.

Mr. **Edward K. Jones,** for petitioner:

The circuit court clearly has jurisdiction of the defendant corporation.

Act of March 3, 1881, relating to trade-marks (21 Stat. at L. 503, §7); act of 1887, as amended (25 Stat. at L. 433).

There can therefore be no question of jurisdiction.

The place or district where suits in the courts of the United States are to be brought is a mere privilege which the defendant may waive.

Ex parte Scholienberger, 96 U. S. 369 (24: 853); *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127 (35: 659); *Central Trust Co.* v. *McGeorge*, 151 U. S. 129 (38: 98).

The present suit being founded on the special act of Congress relating to trade-marks, the privilege of being sued only in the district of the defendant's residence provided by the act of 1887, as amended, does not apply.

As the trade-mark statute, unlike the act of 1887, does not confer upon defendants the privilege of being sued only in the districts of their residence, it leaves it to the circuit courts to assume jurisdiction whenever the ordinary conditions to its exercise exist, *i. e.*, whenever the defendant is present in such a way that courts of general jurisdiction may assert their authority over his person or property. And in the case of a foreign or nonresident corporation this condition exists whenever such foreign or nonresident corporation comes within the territorial limits of a state and Federal district, and there carries on business by agents or servants pursuant to local laws, providing, as a condition to such corporation doing business there, that it shall submit to the authority of the courts of the place where it is thus permitted to exercise its functions.

Lafayette Ins. Co. v. *French*, 59 U. S. 18 How. 404 (15: 451); *Baltimore & O. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 65 (20: 354); *Ex parte Schollenberger*, 96 U. S. 369 (24: 853); *Baltimore & O. R. Co.* v. *Koontz*, 104 U. S. 5, 10 (26: 643, 644); *St. Clair* v. *Cox*, 106 U. S. 350 (27: 222); *New England Mut. Ins. Co.* v. *Woodworth*, 111 U. S. 138 (28: 379); *Re Louisville Underwriters*, 134 U. S. 488 (33: 991).

This suit, being founded upon a special act of Congress, is not subject to the operation of the general judiciary act of 1887 as amended.

Re Hohorst, 150 U. S. 653 (37: 1211); *United States* v. *Mooney*, 116 U. S. 104 (29: 550); *Third Nat. Bank* v. *Harrison*, 3 McCrary, 162; *Ex parte Kang-Gi-Shun-Ca*, 109 U. S. 556 (27: 1030); *Thorpe* v. *Adams*, L. R. 6 C. P. 135.

A general act is not to be construed to repeal a previous particular act unless there is some express reference to the previous legislation on the subject, unless there is a necessary inconsistency in the two acts standing together.

Fitzgerald v. *Champneys*, 30 L. J. Ch. 782, 2 Johns. & H. 31–54; *Earl of Derby* v. *Bury Imp. Comrs.* L. R. 4 Exch. 226; *Kidston* v. *Empire Marine Ins. Co.* L. R. 1 C. P. 546; Broom, Legal Maxims (6th Eng. ed.) 24.

As the suit in question is brought under the trade-mark statute, which, like the patent laws, contains no limitation as to the place of suit and no limitation as to the amount involved, the restrictions of the exercise of jurisdiction contained in the subsequent act of 1887 as amended do not operate upon this case.

By doing business in the state the laws of which require a nonresident corporation to designate a person upon whom service may be made, or, in case such designation be not made, that service may be made upon its managing agent, the defendant waived its privileges of being sued only in the place of its inhabitancy; and the suit not being one where jurisdiction depends only on diverse citizenship, the court is not only competent to take cognizance of the case, but may subject the defendant to its process.

The cases of *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 (36: 768); *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 (36: 942); and *Empire Coal & Transp. Co.* v. *Empire Coal & Min. Co.* 150 U. S 159 (37: 1037), were cases where the sole ground of jurisdiction was diverse citizenship.

Conceding that the act of 1887, as amended, applies, this case rests upon the other clause which provides that "no civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;" and under this clause it is insisted that the defendant may waive its privilege of being sued in its place of residence, and that it has waived it by doing business and having agents in the state and city of New York.

Baltimore & O. R. Co. v. *Harris*, 79 U. S. 12 Wall. 65 (20: 354); *St. Clair* v. *Cox*, 106 U. S. 350 (27: 222).

If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service.

New York, L. E. & W. R. Co. v. *Estill*, 147 U. S. 591, 607 (37: 292, 300); *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404 (15: 451); *Baltimore & O. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 65 (20: 354); *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 207 (36: 942, 945); *Gibbs* v. *Queen Ins. Co.* 63 N. Y. 114, 20 Am. Rep. 513; 2 Morawetz, Priv. Corp. § 977.

The principle applicable under such circumstances is that if the corporation does business in the state, it will be presumed to have assented to the statute and will be bound accordingly.

Van Dresser v. *Oregon R. & Nav. Co.* 48 Fed. Rep. 202; *Consolidated Store Service Co.* v. *Lamson Consolidated Store-Service Co.* 41 Fed. Rep. 833; *Smith* v. *Sargent Mfg. Co.* 67 Fed. Rep. 801, the latter of which overrules *Union Switch & S. Co.* v. *Hall Signal Co.* 65 Fed. Rep. 625, cited by Judge Lacombe in dismissing the present suit.

The laws of the state of New York where the present suit was brought contain similar provisions to those considered in the foregoing cases.

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The subpœna was duly served on one of the firm of Kuehne & Lubbers, as managing agent of the defendant corporation, in his district on the 28th of January, 1895; and, as it does not appear that the corporation has designated a particular person upon whom service may be made, this is a strict compliance with N. Y. Code Civ. Proc. § 432, subd. 3.

St. Clair v. *Cox*, 106 U. S. 350, 359 (27: 222, 226); *Société Foncéire et Agricole* v. *Milliken*, 135 U. S. 304 (34: 208); *Mexican C. R. Co.* v. *Pinkney*, 149 U. S. 194 (37: 699); *Tuchband* v. *Chicago & A. R. Co.* 115 N. Y. 437; N. Y. Code Civ. Proc. § 432.

Mr. **Wm. A. Abbott,** for respondent:

The United States circuit court for the southern district of New York had no jurisdiction, the respondent not being an inhabitant of that district.

Judiciary act of March 3, 1887, § 1 (24 Stat. at L. 552), as corrected by the act of August 13, 1888 (25 Stat. at L. 433).

The jurisdictional question is *res judicata*.

Ex parte Shaw ("*Shaw* v. *Quincy Mfg. Co.*") 145 U. S. 444 (36: 768); *Southern Pac. Co.* v. *Denton*, 146 U. S. 292 (36: 942); *Empire Coal & Transp. Co.* v. *Empire Coal & Min. Co.* 150 U. S. 159 (27: 1037); *Galveston H. & S. A. R. Co* v. *Gonzales*, 151 U. S. 496 (38: 248).

The prohibition in the act of 1887 and 1888, that no civil action shall be brought in any district against any person in any other district than that whereof he is an inhabitant, has been uniformly (with but one exception) applied by circuit courts of the United States in suits for infringements of patents.

Donnelly v. *United States Cordage Co.* 66 Fed. Rep. 613, and cases there cited; *Adriance, P. & Co.* v. *McCormick Harvesting Mach. Co.* 55 Fed. Rep. 287; *Cramer* v. *Singer Mfg. Co.* 59 Fed. Rep. 74; *Union Switch & S. Co.* v. *Hall Signal Co.* 65 Fed. Rep. 625. *Contra, Smith* v. *Sargent Mfg. Co.* 67 Fed. Rep. 801.

The circuit court had no jurisdiction by reason of diversity of citizenship of the parties.

The application for mandamus should be denied.

Mr. Justice **Gray** delivered the opinion of the court:

This case presents a single question of jurisdiction of the circuit court of the United States, and involves no consideration of the merits of the cause of action asserted in the bill filed in that court.

By the act of March 3, 1881, chap. 138, "owners of trade-marks used in commerce with foreign nations or with the Indian tribes, provided such owners shall be domiciled in the United States or located in any foreign country or tribe which by treaty, convention, or law affords similar privileges to citizens of the United States, may obtain registration of such trade-marks" by causing to be recorded in the Patent Office a statement and description thereof, and complying with other requirements of the act. 21 Stat. at L. 502.

By § 7 of that act, "any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark at the suit of the owner thereof; and the party aggrieved shall also have his remedy, according to the course of equity, to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy."

By § 11, nothing in this act shall be construed "to give cognizance to any court of the United States in an action or suit between citizens of the same state, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe."

*While § 7 provides that "courts of the [227 United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy," and while the provision of § 11, that nothing in the act shall be construed to give "cognizance to any court of the United States in an action or suit between citizens of the same state," unless the trade-mark is used in commerce with a foreign country or an Indian tribe, implies that a suit for infringement of a trade mark used in such commerce may be maintained in some court of the United States; yet neither of those sections, and no other provision of the act, specifies in what court of the United States, or in what district, suits under the act may be brought; but the jurisdiction of such suits, in these respects, is left to be ascertained from the acts regulating the jurisdiction of the courts of the United States.

At the time of the passage of the trade-mark act of 1881, the only act to which reference could be had to ascertain such jurisdiction was the judiciary act of March 3, 1875, chap. 137, § 1, providing that "the circuit court of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the Constitution or laws of the United States, or treaties made or which shall be made, under their authority, . . . or in which there shall be a controversy between citizens of different states, . . . or a controversy between citizens of a state and foreign states, citizens, or subjects. . . . But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," except in certain cases not material to the present inquiry. 18 Stat. at L. 470.

The restriction of jurisdiction with respect to amount, in the act of 1875, was perhaps superseded as to trade-mark *cases by the [228 express provision of § 7 of the act of 1881; but the jurisdiction with regard to the court, as well

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as to the district, in which such suits should be brought, was controlled by the act of 1875, as the only act in force upon the subject. Under the provision of that act, which allowed a defendant to be sued in the district of which he was an inhabitant, or in that in which he was found, a corporation could doubtless have been sued either in the district in which it was incorporated or in any district in which it carried on business and had a general agent. *Ex parte Schollenberger*, 96 U. S. 369, 377 [24: 853, 854]; *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, 146 [28: 379, 381]; *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444, 452 [36: 768, 772]; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 207 [36: 942, 945].

But when this suit was brought, the 1st section of the judiciary act of 1875 had been amended by the act of March 3, 1887, chap. 373, as corrected by the act of August 13, 1888, chap. 866, in the parts above quoted, by substituting for the jurisdictional amount of $500, exclusive of costs, the amount of $2,000, exclusive of interest and costs; and by striking out, after the clause: "and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,"—the alternative, "or in which he shall be found at the time of serving such process or commencing such proceeding," and by adding "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. at L. 552; 25 Stat. at L. 433.

The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the 229]*parties are citizens of different states, the suit shall be brought in the district of which either party is an inhabitant. And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a circuit court of the United States held in another state, even if the corporation has a usual place of business in that state. *McCormick Harvesting Mach. Co.* v. *Walthers*, 134 U. S. 41, 43 [33: 838, 834]; *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768]; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942]. Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the Constitution, laws, or treaties of the United States; and the only difference is that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant.

When the parties are citizens of different states, so that the case comes within the general grant of jurisdiction in the first part of the section, the defendant, by entering a general appearance in a suit brought against him in a district of which he is not an inhabitant, waives the right to object that it is brought in the wrong district. *Interior Const. & Imp. Co.* v. *Gibney*, 160 U. S. 221 [*ante*, 401] and cases therecited. But a corporation, by doing business or appointing a general agent in a district other than that in which it is created, does not waive its right, if seasonably availed of, to insist that the suit should have been brought in the latter district. *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") and *Southern Pac. Co.* v. *Denton*, above cited.

In the case of *Re Hohorst*, 150 U. S. 653 [37: 1211], on which the petitioner in this case principally relied, the decision was that the provision of the act of 1888, forbidding suits to be *brought in any other district than that [230 of which the defendant is an inhabitant, had no application to an alien or a foreign corporation sued here, and especially in a suit for infringement of a patent right; and therefore such a firm or corporation might be so sued by a citizen of a state of the Union in any district in which valid service could be made on the defendant. That case is distinguishable from the one now before the court in two essential particulars: First, it was a suit against a foreign corporation, which, like an alien, is not a citizen or an inhabitant of any district within the United States; and was therefore not within the scope or intent of the provision requiring suit to be brought in the district of which the defendant is an inhabitant. See *Galveston, H. & S. A. R. Co.* v. *Gonzales*, 151 U. S. 496 [38: 248]. Second, it was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit courts of the United States by U. S. Rev. Stat. § 629, cl. 9, and § 11, cl. 5, re-enacting earlier acts of Congress; and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States concurrent with that of the several states.

In *United States* v. *Mooney*, 116 U. S. 104 [29: 550], it was likewise held that the 1st section of the judiciary act of 1875 did not take away the exclusive jurisdiction conferred by earlier statutes upon the district courts of the United States over suits for the recovery of penalties and forfeitures under the customs laws of the United States.

No such rule is applicable to a suit for infringement of a trade-mark under the act of 1881. That act, while conferring upon the courts of the United States, in general terms, jurisdiction over such suits, without regard to the amount in controversy, does not specify either the court or the district of the United States in which such suits shall be brought; nor does it assume to take away or impair the

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jurisdiction which the courts of the several states always had over suits for infringement of trade-marks.

This suit, then, assuming it to be maintainable under the act of 1881, is one of which the 231]courts of the United States*have jurisdiction concurrently with the courts of the several states. The only existing act of Congress which enables it to be brought in the circuit court of the United States is the act of 1888. The suit comes within the terms of that act, both as arising under a law of the United States and as being between citizens of different states. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the circuit court.

Whether the provision in § 7 of the trade-mark act of 1881, that the courts of the United States should have original jurisdiction in such cases, without regard to the amount in controversy, would control the pecuniary limit of jurisdiction in the subsequent act of 1888, as in the prior act of 1875, of which that act was an amendment, it is unnecessary to consider, because this bill distinctly alleges that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.

Writ of mandamus denied.

GEORGE E. WHITTEN, *Appt.*, *v.* CHARLES A. TOMLINSON, Sheriff of New Haven County, Connecticut.

(See S. C. Reporter's ed. 231-247.)

Habeas corpus—general allegations—discharge on committal—objections to indictment—extradition proceedings—defect in return—questions for state courts—when writ denied.

1. No allegation of fact in a petition for a writ of habeas corpus can be assumed to be admitted, unless distinct and unambiguous.
2. General allegations in the petition, that the petitioner is detained in violation of the Constitution and laws of the United States and of the state, and is held without due process of law, are averments of mere conclusions of law and not of matters of fact.
3. A hearing and discharge upon an application for committal to jail to await prosecution is no ground for discharge on habeas corpus from imprisonment under an indictment.
4. That an indictment in a state court lacks the words, "a true bill," and was found by the grand jury by mistake and misconception, are proper subjects of inquiry in the courts of the state, but are not ground for interposition by the United States courts by writ of habeas corpus.
5. A warrant of extradition by the governor of a state issued upon the requisition of a governor of another state, accompanied by a copy of the indictment, is prima facie evidence that the accused had been indicted and was a fugitive from justice, and, if the state court has jurisdiction of the offense, prevents interposition by United States courts by writ of habeas corpus until the lawfulness of his detention is determined by the state courts.
6. Any defect in the sheriff's return to the writ of habeas corpus in failing to set forth the indictment and warrant of extradition, is no reason why the United States courts should take the prisoner out of the custody of the authorities of the state.
7. The questions whether a recognizance for appearance on the first day of the term can be construed as requiring an appearance on a subsequent day in the term, and whether the word "resides" in a statute implies domicil, or only presence in the county, should be left to the decisions of the state courts.
8. A prisoner in custody under the authority of a state should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of habeas corpus, in advance of any proceedings in the courts of the state to test the validity of his arrest and detention.

[No. 619.]

Argued November 20, 1895. Decided December 16, 1895.

APPEAL from a decree of the Circuit Court of the United States for the District of Connecticut denying a writ of habeas corpus

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NOTE.—*As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of,*—see note to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus, see note to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

As to extradition from another state; right to try person extradited for a different crime from that for which he was surrendered; who are fugitives from justice; character of offense; demand for arrest and delivery of fugitives; surrender of fugitive,—see note to Cook v. Hart, 36: 934.

Extradition; interstate; trial for a different crime; character of offense; international extradition.

A fugitive from justice surrendered to the authorities of a state upon their demand, by the governor of another state, can be held or tried in the former state for another crime than that charged in the warrant, by virtue of which he was arrested and surrendered, where the act for which he was extradited and that for which he is afterwards indicted are the same. People v. Cross, 135 N. Y. 536, distinguishing United States v. Rauscher, 119 U. S. 407 (30: 425).

Whether the rule would be the same with respect to the trial of a person extradited for another and different offense—query. People v. Cross, *supra*.

Substantial defects, under the laws of the demanding state, in an indictment upon which extradition is sought, are not cause for discharge of the fugitive upon habeas corpus, where it reasonably appears that he is charged by indictment with an offense. *Ex parte* Pearce, 32 Tex. Crim. Rep. 301, 48 Alb. L. J. 525.

A person is a fugitive from justice when, having committed a crime within a state, he withdraws himself from the jurisdiction of its court without waiting to abide the consequences of his act, although some other cause than a desire to flee induces his withdrawal. *Re* White, 55 Fed. Rep. 54.

Upon an application for a warrant of removal of an alleged offender to another district, the judge is not precluded from hearing other evidence, and

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to discharge George E. Whitten from imprisonment. *Affirmed.*

See same case below, 67 Fed. Rep. 230.

Statement by *Mr. Justice* **Gray:**

This was a petition filed March 26, 1895, in the circuit court of the United States for the district of Connecticut, and addressed to the Honorable William K. Townsend, the district judge, as a judge of the circuit court, for a writ of habeas corpus to the sheriff of the county of New Haven in the state of Connecticut. The petition was signed by the petitioner and verified by his oath and was as follows:

"The petition of George E. Whitten respectfully shows to your honor that he is now a prisoner confined in the custody of Charles A. Tomlinson, sheriff of the county of New Haven, in the county jail in the city of New Haven in said county, for a supposed criminal offense, to wit, a crime of murder in the second degree.

"Your petitioner also shows that such confinement is by virtue of a warrant, a copy whereof is in the possession of said sheriff; and your petitioner avers that, to the best of his knowledge, he is not committed or detained by virtue of any process of law known to the courts of the United States *or the[233 several states, but he is now detained in violation of the Constitution of the United States, in violation of the laws of the United States, and in violation of the Constitution and laws of the state of Connecticut; and that he is not held in confinement by virtue of any final judgment or decree of any competent court or tribunal of criminal jurisdiction, or by virtue of any process issued upon such judgment or decree, but is held without due process of law.

"And your petitioner further says that at the time of his arrest, and for a long time prior thereto, he was a citizen of Massachusetts, and was extradited from Massachusetts for said alleged crime in January, 1895; and he says that he is advised by his counsel, William H. Baker, residing at Boston, and so believes, that his said imprisonment is illegal, and that said illegality consisted in this, to wit:

"That in August and September, 1893, this petitioner was tried before the local court sitting within and for the county of New Haven, state of Connecticut, upon a charge of murder

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confined to mere inspection of the indictment in all cases, but may require that he be satisfied that there is evidence on which a conviction might be had in the state to which removal is sought. United States v. Fowkes, 53 Fed. Rep. 13, 3 U. S. App. 247.

One extradited from another state may be tried for a different crime from that for which he was extradited. State v. Glover, 112 N. C. 896.

Upon the surrender of a fugitive from justice by one state to the state demanding his return in pursuance of national law, he may be tried in the state to which he is returned for any other offense than that specified in the requisition for his rendition, without first having an opportunity to return to the state from which he was extradited; and in so trying him against his objection, no right, privilege, or immunity secured to him by the Constitution and laws of the United States is thereby denied. Lascelles v. Georgia, 148 U. S. 537 (37: 549).

The right to try a criminal in a state to which he has been surrendered by another state in extradition proceedings is not limited to the offense specified in the requisition. Com. v. Wright, 158 Mass. 149, 19 L. R. A. 206.

A fugitive from justice fleeing from one state to another and surrendered on demand under the provisions of the United States Constitution may be tried for any offense committed in the state to which he is returned, although such offense was committed before the demand and surrender, and is not that on account of which he was brought back for trial. Lascelles v. State, 90 Ga. 347.

A complaint for extradition need not have the precision and particularity of an indictment, but should set forth the substantial and material features of the offense. *Re* Adutt, 55 Fed. Rep. 376.

A complaint which charges the forging of certain bills of exchange of the value of 81,000 guldon, Austrian coin, is sufficient to give jurisdiction as charging the crime of forgery, although if objected to as wanting in particularity an amendment may be required so as to fully inform the accused of the special charge for which he is sought to be extradited, and of all its particulars. *Re* Adutt, *supra.*

A requisition to another state for the extradition of a criminal may be granted in a case of misdemeanor as well as in one of felony. State v. Hudson, 2 Ohio Dec. 41, 2 Ohio N. P. 1.

No presumption can be made in extradition proceedings against the prisoner. He is to be adjudged by strict construction of the charge against him. *Re* Hampton, 2 Ohio Dec. 579, 1 Ohio N. P. 181.

A recital in the requisition and warrant in extradition proceedings, of "shooting and wounding with intent to kill" does not state a crime under a statute denouncing the offense of shooting and wounding "a person" with intent to kill. *Re* Hampton, *supra.*

A copy of an indictment certified only by the judge and clerk of the court in which it was found is not sufficiently authenticated for the purposes of extradition, where there is no certificate or statement by the governor that it is a copy of the indictment, or certificate that those certifying to it are respectively clerk and judge. *Re* Hampton, *supra.*

The sufficiency of an indictment in another state, which conforms to a statute of that state, but is attacked on the ground that the statute violates the Federal Constitution, need not be decided by a state court on a writ of habeas corpus for the release of a fugitive from justice who has been surrendered on requisition by the governor, but may be remitted to the courts of the state in which the indictment was found for a decision of that question in the first instance. Pearce v. Texas, 155 U. S. 311 (39: 164).

An information cannot be regarded as a substitute for an indictment within the meaning of U. S. Rev. Stat. § 5278, providing for the surrender of a fugitive from justice from another state. *Ex parte* Hart, 25 U. S. App. 22, 63 Fed. Rep. 249, 28 L. R. A. 801.

The departure of a purchaser of goods to his home in another state after making criminally false representations, in reliance on which the goods were subsequently delivered to a common carrier and shipped to him, is within the meaning of the law a flight from justice for which he may be surrendered on a requisition. *Re* Sultan, 115 N. C. 57, 28 L. R. A. 294.

A person not in the demanding state at the time of the commission of the alleged offense or after its commission cannot be extradited as a fugitive from justice. *Ex parte* Knowles, 16 Ky. L. Rep. 263.

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in the second degree, being the same alleged charge for which he was extradited, and was after a full hearing thereof discharged from said court.

"That thereafterwards this petitioner remained in the city of New Haven, state of Connecticut, for a long time,—during at least two sessions of the grand jury,—and then removed to Newton, in the commonwealth of Massachusetts, some time early in the year 1894.

"That he was, in January, 1895, while such citizen of Massachusetts, arrested and extradited from the state of Massachusetts upon a warrant issued by the governor of Massachusetts on demand and application of the governor of Connecticut, alleging that an indictment had been found by the grand jury against him of murder within and for the county of New Haven, being the same charge on which he was tried as above. This petitioner was taken to the said city of New Haven by virtue thereof.

"This petitioner avers that no indictment was ever found against him by any grand jury sitting at any time within the state of Connecticut, nor no indictment as and for a true 234] bill *ever was presented by any grand jury in said state of Connecticut against him, which he is ready to verify and prove, and any pretended indictment was found by mistake or misconception, and was not their true verdict or finding.

"Further, your petitioner says that he was not, at the time of this extradition as aforesaid, a fugitive from justice from said state of Connecticut.

"Wherefore your petitioner prays a writ of habeas corpus, to the end that he may be discharged from custody and be allowed to depart safely from out the state of Connecticut to the commonwealth of Massachusetts, without interference in any way by the state authorities of the state of Connecticut, without reference to said charge made against him."

On March 27, a writ of habeas corpus was issued accordingly by the district judge, returnable forthwith at a special term of the circuit court.

On March 28, the sheriff made his return to the writ, stating, as the cause of the petitioner's detention and imprisonment, that he was committed to the jail by virtue of the following mittimus:

"To the sheriff of New Haven county, his deputy, or any proper officer or indifferent person, Greeting:

"Whereas Lucius B. Hinman, of New Haven, Connecticut, did on the 17th day of January, 1895, enter into a recognizance in the

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One who by interstate rendition proceedings is brought to a state from another state or territory as a fugitive from justice is not exempt from civil prosecution while detained in the former state under such proceedings. Reid v. Ham, 54 Minn. 205, 21 L. R. A. 232.

One extradited under an indictment for assault with intent to murder connot be convicted of an assault in the second degree, where the treaty between the two countries makes no provision for extradition for such an offense. People v. Stout, 81 Hun. 336.

A fugitive seeking an asylum upon a war vessel of the United States cannot make it a condition that he shall be transferred to another vessel or placed without the jurisdiction of the United States. *Re* Ezeta, 62 Fed. Rep. 964.

Justification of a killing as in self-defense is not available on a proceeding for extradition to a foreign country. *Re* Ezeta, *supra*.

Crimes by officers of the established government of a foreign country, directly connected with a conflict existing between such governments and revolutionary forces, are political offenses not extraditable. *Re* Ezeta, *supra*.

Interstate extradition only is referred to by N. Y. Penal Code, § 51, which makes it a misdemeanor for an officer of the state to receive any compensation for service or "expense incurred in procuring from the governor . . . a demand upon the executive authority of a state or territory of the United States, or of any foreign government, for the surrender of any fugitive from justice." People v. Columbia County Supers. 134 N. Y. 1.

One who while within a state sets in motion the machinery for crime and commits an act in furtherance of the offense, but departs the state before its consummation, is a fugitive from justice within the law relating to interstate extradition. *Re* Cook, 49 Fed. Rep. 833.

As between the United States and foreign governments, the surrender of fugitives from justice depends upon treaties. Dos Santos' Case, 2 Brock. 493; United States v. Davis, 2 Sumn. 482; *Re* Metzger, 46 U. S. 5 How. 176, 12 L. ed 104; 6 Ops. Atty. Gen. 85; 2 Ops. Atty. Gen. 359; 7 Ops. Atty. Gen. 536; 1 Kent, Com. 39, *note;* Wheat. International Law, 171.

The United States government has never recognized the right, unless under treaty stipulations. *Re* Fetter, 23 N. J. L. 313, 57 Am. Dec. 384; Com. v. Deacon, 10 Serg. & R. 135; Story, Conf. L. §§ 626, 1808.

Complaint on oath for the arrest and commitment of a person for the purpose of extradition, under U. S. Rev. Stat. § 5270, must be a complaint by some one authorized to represent the executive department of the foreign treaty power. *Re* Ferrelie, 24 Blatchf. 155, 28 Fed. Rep. 878.

On the examination of a party before a United States commissioner in the state of Minnesota, in extradition proceedings under the treaty of 1842 with Great Britain he has the right to examine witnesses in his own behalf. *Re* Kelley, 25 Fed. Rep. 268.

The testimony of the accused is not admissible, although the judge be sitting in a state where such evidence is admissible. *Re* Dugau, 2 Low. Dec. 367.

Extradition proceedings do not invalidate in their nature the right of accused not to be prosecuted upon any other charge than that upon which his extradition is asked. United States v. Lawrence, 13 Blatchf. 295; 6 Ops. Atty. Gen. 691; United States v. Caldwell, 8 Blatchf. 131; Adriance v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; *Re* Miller, 23 Fed. Rep. 83.

But one extradited from a foreign country may claim exemption from trial upon any one charge other than that mentioned in the extradition proceedings, and this right cannot be waived. *Ex parte* Coy, 32 Fed. Rep. 911.

In a proceeding under a treaty with Great Britain evidence of criminality must be such as would justify the arrest and commitment of the accused according to law in the place where he is found. *Re* McPhun, 24 Blatchf. 254, 30 Fed. Rep. 57; *Ex parte* Kaine, 3 Blatchf. 1; United States v. Warr, 3 N. Y. Leg. Obs. 346; 4 Ops. Atty. Gen. 201, 330; *Re* Kelley, 2 Low. Dec. 339; *Re* Macdonnell, 11 Blatchf. 170; *Re* Farez, 2 Abb. U. S. 346.

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sum of $5,000 for the appearance of George E. Whitten, of the town of Newton, state of Massachusetts, before the superior court to be holden at New Haven within and for the county 235] *of New Haven on the first Tuesday of January, 1895, and the said Lucius B. Hinman now believes that said George E. Whitten intends to abscond, and having produced the evidence that he is surety as aforesaid for the said George E. Whitten, and hath applied to me for a mittimus, and hath made oath before me that the statements in his said application are true:

"These are therefore by authority of the state of Connecticut, to command you that you forthwith arrest the said George E. Whitten and him commit to the jail of said New Haven county; and the keeper of said jail is hereby ordered to receive the said George E. Whitten, and him safely keep within said jail until he be discharged by due order of law. Hereof fail not, but due service and return make.

"Dated at New Haven this 26th day of March, A. D. 1895.

"John S. Fowler,
"Justice of the Peace."

The petitioner moved to quash the return as insufficient to justify his detention.

The circuit court, upon a hearing, denied the motion and discharged the writ of habeas corpus without prejudice to the right of the petitioner to renew the motion; and filed an opinion by the district judge (67 Fed. Rep. 230) in which the grounds of decision were stated as follows:

"The writ was issued; and the sheriff brought the petitioner into this court, and made return, as to the cause of his detention and imprisonment, that he was committed to jail by virtue of a mittimus, in the form provided for by statute, duly issued by a justice of the peace on the application of the bondsman, upon oath, that the petitioner intended to abscond. A hearing was had upon a motion to quash the return."

"The petitioner was arrested in Massachusetts, and brought into this state under a warrant issued by the governor of Massachusetts, upon the requisition of the governor of Connecticut, accompanied by a certified copy of the indictment charging the crime and an affidavit that the petitioner was a fugitive from justice.

"It is claimed, in support of the petition, that the indictment was procured by mistake, and that the prisoner was not in fact a fugitive from justice. These claims are denied by the attorney for the state. In view of the conclusions reached, it is not necessary to pass upon these questions of fact. It may be assumed, in the disposition of this motion, that all the allegations in the petition are true.

"Counsel for the petitioner claims that he can prove, in the first place, that the indictment is invalid or void, by reason of some mistake on the part of the grand jury. But the effect of 236] *an inquiry into this question, assuming such evidence to be admissible and true, would be to call upon the Federal court to examine into the proceedings under which said indictment was obtained, and to determine collaterally its sufficiency under the laws of this state."

"It is further claimed that the petitioner was not a fugitive from justice, and that, inasmuch as extradition proceedings are based upon the statutes of the United States, the question whether he was in fact such fugitive is a Federal question which it is the duty of this court to decide. But it is not denied that the demand made upon the executive authority of the asylum state, and his action thereon, were proper in form; and it will not be assumed in advance that he has surrendered the petitioner upon insufficient evidence."

"I do not mean to be understood as denying the right to this prisoner, at an appropriate time, to introduce evidence that he was not a fugitive from justice, or that the evidence before the governor of Massachusetts was insufficient to authorize his action; nor do I intend at this time to pass upon the merits of this or any other questions presented, nor to intimate what disposition might be made of these claims, in case they were brought before this court after final action in the state court. All that is now decided is that it must be assumed in advance that the petitioner may obtain all the protection to which he may be entitled in the courts of this state."

"In view of the principle of right and law underlying the forbearance which the Federal and state courts exercise towards each other in order to avoid conflict, I should not be justified in passing upon such questions in advance of the proceedings in the state courts."

On April 25 the petitioner filed in the circuit court an appeal, reciting the petition, the return, and the motion to quash the return, and concluding as follows:

"The said circuit court of the United States for the district of Connecticut, on the 28th day of March, 1895, made final ruling, and decreed that upon the face of the petition, without hearing any evidence to sustain the petition [and *denying the petitioner the right to [237 introduce any evidence to sustain said petition or tending to sustain it, which the plaintiff duly offered], the writ should be discharged, and that the motion to quash said return be denied, and it was afterwards so decreed and ordered.

"Wherefore this petitioner appeals from the whole of said decree of said circuit court, and the petition, return, motion to quash, decree, writ, and all other papers forming a record of said cause may be sent to the Supreme Court of the United States without delay, together with this appeal, and moves that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court be reversed, and for such further order and decree to be made as will to the Supreme Court of the United States seem just and right. The petition for the writ of habeas corpus, the writ of habeas corpus, the return of the sheriff, the motion to quash, and the decree of the court are hereby made a part of this appeal."

On the same day that appeal was allowed by the district judge.

On May 8 the petitioner filed a paper purporting to amend his appeal by inserting the words above printed in brackets, and with this paper filed the following letter addressed to his counsel by the district judge:

"United States Courts, Judges' Chambers, New Haven, May 4, 1895. William H. Baker, Esq., 39 Court Street, Boston, Mass. Dear

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Sir: Continuous court engagements night and day for two days have prevented an earlier reply to your letter of April 29th. I had supposed that the record contained a statement of the fact that the court declined to hear the evidence; and, if not, I am willing that the statement of said fact should be inserted in the record, provided it can be properly done at this time.

"Yours truly, William K. Townsend."

The record transmitted to this court set forth **238**] the matters *above stated; but showed no further order amending the record, or allowing the amendment of the appeal.

Mr. **William H. Baker,** for appellant:

There is no presumption in favor of the jurisdiction of a justice of the peace, but it must be affirmatively shown by the record.

State v. *Hartwell*, 35 Me. 129; *Re Hersom*, 39 Me. 476; *Lane* v. *Crosby*, 42 Me. 327; *Waterville Iron Mfg. Co.* v. *Goodwin*, 43 Me. 431; *Rossiter* v. *Peck*, 3 Gray, 538; *Gurney* v. *Tufts*, 37 Me. 130, 58 Am. Dec. 777; *Vinton* v. *Weaver*, 41 Me. 430.

If the original recognizance is void the magistrate or justice would have no authority to issue the mittimus or cause the arrest.

This is an undertaking on the 17th day of January, 1895, to perform something on the 1st Tuesday of January of the same year, which is an impossible contract and absolutely void, because there is no possible day certain fixed for performance.

State v. *Sullivant*, 3 Yerg. 281; *Com.* v. *Bolton*, 1 Serg. & R. 330; *Butler* v. *State*, 12 Smedes & M. 470; *Thurston* v. *Com.* 3 Dana, 225; *Wegner* v. *State*, 28 Tex. App. 419; *State* v. *Casey*, 27 Tex. 111; *Brite* v. *State*, 24 Tex. 219; *State* v. *Allen*, 33 Ala. 422; *Henry* v. *Com.* 4 Bush, 427; *State Treasurer* v. *Merrill*, 14 Vt. 64.

One deprived of his liberty on such or like process is deprived of it without due process of law, and the Federal courts in such a case will grant relief.

Re Monroe, 46 Fed. Rep. 52.

A return to a writ of habeas corpus is bad if it does not show for what cause the prisoner is detained in custody.

Church, Habeas Corpus, 123; *Ex parte Trader*, 24 Tex. App. 393; *Barkham's Case*, 3 Cro. Cas. 507.

The return is bad because it does not state the crime, the place of commission, the time, and person upon whom committed. It should so state the facts as to apprise the opposite party of what was intended to be proved.

State v. *Reuff*, 29 W. Va. 751; *Souden's Case*, 4 Barn. & Ald. 294; *Re Doo Woon*, 18 Fed. Rep. 898; Hurd, Habeas Corpus, 255–257.

And the mittimus should state with certainty for what offense the commitment is made in order for the court to determine if it be lawful.

2 Hale, P. C. 122; 2 Hawk. P. C. chap. 16, § 16; *Ex parte Burford*, 7 U. S. 3 Cranch, 448 (2: 495); *Rex* v. *Croker*, 2 Chitty, 138, 18 Eng. C. L. 279; 4 Coke, Inst. 290; *Vintners Co.* v. *Clerke*, 5 Mod. 159; *Bracy's Case*, 1 Salk. 349; *State* v. *Everett*, 1 Dud. L. 295.

A return showing an award to prison "and to remain there until further order" is uncertain.

Re Seeles, 3 Cro. Car. 557; *Re Douglas*, 3 Q. B. 825.

A return may be disputed in the petition by anticipation as well as by special traverse.

Seavey v. *Seymour*, 3 Cliff. 439–455.

The Federal courts, recognizing this wholesome principle of law, have often discharged persons at once on habeas corpus when the return on its face was defective, without further considering the case.

Ex parte Smith, 3 McLean, 121; *Re Doo Woon*, 18 Fed. Rep. 898; *Ex parte Jenkins*, 2 Wall. Jr. 521; *Ex parte Burford*, 7 U. S. 3 Cranch, 448 (2: 495); *Ex parte Friday*, 43 Fed. Rep. 916; *Re Cuddy*, 131 U. S. 283 (33: 155).

After the writ of habeas corpus has once issued and the prisoner been brought before the court, it is the duty of the court to proceed in a summary way to determine the facts by hearing the testimony and arguments, and then dispose of the party as law and justice require.

Cunningham v. *Neagle*, 135 U. S. 1 (34: 55); U. S. Rev. Stat. § 761.

If this is not done by the circuit court, all the proceedings can be revised on appeal.

Ex parte McCardle, 73 U. S. 6 Wall. 325 (18: 817).

There being no indictment, the state court had no jurisdiction over the person or subject-matter.

Ex parte Bain, 121 U. S. 1 (30: 849); *Ex parte Farley*, 40 Fed. Rep. 66; *Re Buell*, 3 Dill. 116.

A Federal court has no legal discretion, but must discharge the prisoner unless it appears he is held on some state process valid on its face.

Re Monroe, 46 Fed. Rep. 52; *Re Nielsen*, 131 U. S. 182 (33: 120); *Re McDonald*, 9 Am. L. Reg. 661.

A habeas corpus proceeding is a civil action between the petitioner and the person detaining him, for the purpose of inquiring into the cause of his commitment and detention.

Ex parte Milligan, 71 U. S. 4 Wall. 2 (18: 281); *Ex parte Frederich*, 149 U. S. 75 (37: 656); *Ex parte Tom Tong*, 108 U. S. 556 (27: 826).

Messrs. **Edward H. Rogers** and *Tilton E. Doolittle*, for appellee:

The only questions reviewable by this court upon this appeal are such as are raised by the pleadings, the petition, the return, and the motion to quash.

England v. *Gebhardt*, 112 U. S. 502 (28: 811); *Leeper* v. *Texas*, 139 U. S. 462 (35: 225).

It appears from the record that there is an indictment against the petitioner in the state of Connecticut. The circuit court had no jurisdiction of the petition, in the absence of an averment that the petitioner had been denied protection in the state courts of Connecticut.

Pearce v. *Texas*, 155 U. S. 311 (39: 164); *Ex parte Royall*, 117 U. S. 241, 252 (29: 868, 871); *New York* v. *Eno*, 155 U. S. 89, 94 (39: 80, 82); *Cook* v. *Hart*, 146 U. S. 183 (36: 934).

Neither the alleged insufficiency or defectiveness of the indictment, nor the alleged prior trial and "discharge" of Whitten for the same offense by a "local court" in Connecticut, gave the circuit court jurisdiction.

Duncan v. *McCall*, 139 U. S. 449 (35: 219);

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Wood v. *Brush* ("*Re Wood*") 140 U. S. 278 (35: 505); *Ex parte Fonda*, 117 U. S. 516 (29: 994); *Ex parte Frederich*, 149 U. S. 70, 75 (37: 653, 656).

It must be presumed that the governor of the state of Massachusetts surrendered the petitioner upon sufficient evidence that he was a fugitive from justice.

Ex parte Reggel, 114 U. S. 642 (29: 250); *Mahon* v. *Justice*, 127 U. S. 700 (32: 283); *Ker* v. *Illinois*, 119 U. S. 436 (30: 421).

Mr. Justice **Gray** delivered the opinion of the court:

By the judicial system of the United States, established by Congress under the power conferred upon it by the Constitution, the jurisdiction of the courts of the several states has not been controlled or interfered with, except so far as necessary to secure the supremacy of the Constitution, laws, and treaties of the United States.

With this end, three different methods have been provided by statute for bringing before the courts of the United States proceedings begun in the courts of the states.

First. From the earliest organization of the courts of the United States, final judgments, whether in civil or criminal cases, rendered by the highest court of a state in which a decision in the case could be had, against a right specially set up or claimed under the Constitution, laws, or treaties of the United States, may be re examined and reversed or affirmed by this court on writ of error. Acts of September 24, 1789, chap. 20, § 25 (1 Stat. at L. 85); February 5, 1867, chap. 28, § 2 (14 Stat. at L. 386); U. S. Rev. Stat. § 709; *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 304 [4: 97]; *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264 [5: 257]. Such appellate jurisdiction is expressly limited to cases in which the decision of the state court is against the right claimed under the Constitution, laws, or treaties of the United States, because, when the decision of that court is in favor of such a right, no revision by this court is necessary to protect the national government in the exercise of its rightful powers. *Gordon* v. *Caldcleugh*, 7 U. S. 3 Cranch, 268 [2: 436]; *Montgomery* v. *Hernandez*, 25 U. S. 12 Wheat 129 [6: 575]; *Commonwealth Bank of Kentucky* v. *Griffith*, 39 U. S. 14 Pet. 56, 58 [10: 352, 353]; *Missouri* v. *Andriano*, 138 U. S. 496, 500, 501 [34: 1012, 1014].

[239] *Second. By the judiciary act of 1789 the only other way of transferring a case from a state court to a court of the United States was under section 12, by removal into the circuit court of the United States, before trial, of civil actions against aliens or between citizens of different states. 1 Stat. at L. 79. Such right of removal for trial has been regulated and extended to cases arising under the Constitution, laws, or treaties of the United States, by successive acts of Congress, which need not be particularly referred to, inasmuch as the present case is not one of such a removal.

Third. By section 14 of the old judiciary act, the courts of the United States were authorized, in general terms, to issue writs of habeas corpus and other writs necessary for the exercise of their respective jurisdictions: "provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. at L. 81. Under that act, no writ of habeas corpus, except *ad testificandum*, could be issued in the case of a prisoner in jail under commitment by a court or magistrate of a state. *Ex parte Dorr*, 44 U. S. 3 How. 103 [11: 514]; *Ex parte Burrus*, 136 U. S. 586, 593 [34: 500, 503].

By subsequent acts of Congress, however, the power of the courts of the United States to issue writs of habeas corpus of prisoners in jail has been extended to the case of any person in custody for an act done or omitted in pursuance of a law of the United States, or of an order or process of a court or judge thereof; or in custody in violation of the Constitution or of a law or treaty of the United States, or who, being a subject or citizen of and domiciled in a foreign state, is in custody for an act done or omitted under any right or exemption claimed under a foreign state, and depending upon the law of nations. Acts of March 2, 1833 (4 Stat. at L. 634, chap. 57, § 7); August 29, 1842 (5 Stat. at L. 539, chap. 257); February 5, 1867 (14 Stat. at L. 385, chap. 28, § 1); U. S. Rev. Stat. § 753.

By the existing statutes, this court and the circuit and district courts and any justice or judge thereof, have power *to grant writs [240] of habeas corpus for the purpose of inquiring into the cause of restraint or liberty of any prisoner in jail, who "is in custody in violation of the Constitution or of a law or treaty of the United States;" and "the court or justice or judge to whom the application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto:" and "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice may require." U. S. Rev. Stat. §§ 751–755, 761.

The power thus granted to the courts and judges of the United States clearly extends to prisoners held in custody, under the authority of a state, in violation of the Constitution, laws, or treaties of the United States. But in the exercise of this power the courts of the United States are not bound to discharge by writ of habeas corpus every such prisoner.

The principles which should govern their action in this matter were stated, upon great consideration, in the leading case of *Ex parte Royall*, 117 U. S. 241 [29: 868], and were repeated in one of the most recent cases upon the subject, as follows:

"We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in the state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode

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in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. . . . Where a person is in custody, under process from a state court of or-
241] iginal *jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States." *Ex parte Royall*, 117 U. S. 241, 251-253 [29: 868, 871, 872]; *New York* v. *Eno*, 155 U. S. 89, 93-95 [39: 80, 82].

In *Ex parte Royall* and in *New York* v. *Eno* it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a state, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government or its relations to foreign nations, the courts of the United States should interpose by writ of habeas corpus.

Such an exceptional case was *Cunningham* v. *Neagle* ("*Re Neagle*") 135 U. S. 1 [34: 55], in which a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on habeas corpus from custody under commitment by a magistrate of a state on a charge of homicide committed in the performance of that duty.

Such, also, was *Thomas* v. *Loney* ("*Re Loney*") 134 U. S. 372 [33: 949], in which a person arrested by order of a magistrate of a state, for perjury in testimony given in the case of a contested congressional election, was discharged on habeas corpus because a charge of such perjury was within the exclusive cognizance
242] of the courts of the *United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal.

Such, again, was *Mali* v. *Hudson County Jail Keeper* ("*Wildenhus' Case*") 120 U. S. 1 [30: 565], in which the question was decided on habeas corpus whether an arrest, under authority of a state, of one of the crew of a foreign merchant vessel charged with the commission of a crime on board of her while in a port within the state, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court. *Ex parte Royall*, 117 U. S. 241 [29: 868]; *Ex parte Fonda*, 117 U. S. 516 [29: 994]; *Duncan* v. *McCall* ("*Re Duncan*") 139 U S. 449 [35: 219]; *Wood* v. *Brush* ("*Re Wood*") 140 U. S. 278 [35: 505]; *Jugiro* v. *Brush* ("*Re Jugiro*") 140 U. S. 291 [35: 510]; *Cook* v. *Hart*, 146 U. S. 183 [36: 934]; *Ex parte Frederich*, 149 U. S. 70 [37: 653]; *New York* v. *Eno*, 155 U. S. 89 [39: 80]; *Pepke* v. *Cronan*, 155 U. S. 100 [39: 84]; *Bergemann* v. *Backer*, 157 U. S. 655 [39: 845].

In a petition for a writ of habeas corpus, verified by the oath of the petitioner, as required by U. S. Rev. Stat. § 754, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.

The facts upon which the lawfulness of the imprisonment of this petitioner depends are obscurely and imperfectly presented in his petition and in the record transmitted to this court.

The general allegations in the petition, that the petitioner is detained in violation of the Constitution and laws of the United States, and of the Constitution and laws of the state of Connecticut, and is held without due process of law, are averments of mere conclusions of law and not of matters of fact. *Re Cuddy*, 131 U. S. 280, 286 [33: 154, 157].

*The petition begins by alleging that [243 the petitioner is a prisoner confined by the sheriff of the county of New Haven in the county jail for a supposed criminal offense, to wit, the crime of murder in the second degree, and that his imprisonment is by virtue of a warrant, a copy whereof is in the possession of the sheriff. It also alleges that the petitioner was a citizen of Massachusetts, and was extradited from that state for said alleged crime in January, 1895. So far, certainly, no unlawful imprisonment is shown.

The allegation that in August and September, 1893, he was tried before a local court in New Haven upon the same charge, and, upon a full hearing, was discharged by the court, would seem to point to a hearing and discharge upon an application for his committal to jail to await prosecution, rather than to a formal trial and acquittal; and, whatever effect it might have if pleaded to a subsequent indictment, affords no ground for his discharge on habeas corpus. *Ex parte Bigelow*, 113 U. S. 328 [28: 1005]; *Re Belt*, 159 U. S. 95 [*ante*, 88].

It is then alleged that he remained in New Haven during at least two sessions of the grand jury, and then, early in 1894, removed to Massachusetts; and that in January, 1895, he was arrested in Massachusetts, and brought to New Haven upon a warrant of extradition issued by the governor of Massachusetts upon the de-

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mand of the governor of Connecticut, alleging that an indictment for murder had been found against him by the grand jury of the county of New Haven. These allegations are immaterial, except as introductory to the remaining allegations of the petition.

One of these allegations is "that no indictment was ever found against him by any grand jury sitting at any time within the state of Connecticut, nor no indictment as and for a true bill ever was presented by any grand jury in said state of Connecticut against him, which he is ready to verify and prove, and any pretended indictment was found by mistake or misconception, and was not their true verdict or finding."

It is not alleged that it appears by the records of the court that no indictment was presented by the grand jury; and it is by no means clear that **244**] it was intended to allege anything *more than that an indictment, actually presented by the grand jury to the court, lacked the words "a true bill," and was found by the grand jury by mistake and misconception. Such matters are proper subjects of inquiry in the courts of the state, but afford no ground for interposition by the courts of the United States by writ of habeas corpus. *Wood* v. *Brush* ("*Re Wood*") 140 U. S. 278 [35: 505]; *Re Wilson*, 140 U. S. 575 [35: 513].

The only other allegation in the petition is that the petitioner was not, at the time of his extradition from Massachusetts, a fugitive from the justice of Connecticut.

The record, indepedently of the opinion of the circuit court, does not show what, if any, evidence was introduced at the hearing upon which the writ of habeas corpus was discharged and the prisoner left in custody. The case was heard by the circuit court, and not by the district judge at chambers or out of court. Had it been so heard by him, there could have been no appeal to this court from his decision. U. S. Rev. Stat. §§ 751, 752, 764; Act of March 3, 1885 (23 Stat. at L. 437, chap. 353): *Carper* v. *Fitzgerald*, 121 U. S. 87 [30: 882]; *Lambert* v. *Barrett*, 157 U. S. 697 [39: 865]; The subsequent correspondence betwen the district judge and the petitioner's counsel had no proper place in the record of the court, and it does not appear that the judge intended or expected his letter to be filed or recorded. In that letter he did no more than express his willingness that the record should be amended, provided it could properly be done. It does not appear that the judge afterwards allowed, or was requested to allow, any amendment of the record or of the appeal; and the petitioner or his counsel could not amend either the record or the appeal by his own act, without leave of the judge.

If, in order to ascertain what was proved or offered to be proved at the hearing, we turn to the opinion filed in the court below and sent up with the record, it thereby appears that the petitioner offered to prove that the indictment against him was procured by some mistake of the grand jury, and that he was not in fact a fugitive from justice; and that the judge assumed, for the purpose of the disposition of the writ of habeas corpus, that all the allegations of the petition were true.

245] *But if the opinion can be referred to as showing part of what took place at the hearing, it may likewise be referred to as showing other matters then before the court, and especially the proceedings for extradition.

As to those proceedings, the opinion (consistently with the allegations of the petition, so far as anything upon the subject is distinctly and unequivocally alleged therein) not only states, as uncontroverted facts, that the petitioner was arrested in Massachusetts, and brought into Connecticut under a warrant of extradition issued by the governor of Massachusetts upon a requisition of the governor of Connecticut, accompanied by a certified copy of the indictment and by an affidavit that the petitioner was a fugitive from justice; but expressly says that it was not denied that the demand upon the executive authority of Massachusetts, and his action thereon, were proper in form.

A warrant of extradition of the governor of a state, issued upon the requisition of the governor of another state, accompanied by a copy of an indictment, is prima facie evidence, at least, that the accused had been indicted and was a fugitive from justice, and, when the court in which the indictment was found has jurisdiction of the offense (which there is nothing in this case to impugn), is sufficient to make it the duty of the courts of the United States to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the detention of the prisoner in the state in which he was indicted to be inquired into and determined, in the first instance, by the courts of the state which are empowered and obliged, equally with the courts of the United States, to recognize and uphold the supremacy of the Constitution and laws of the United States. *Robb* v. *Connolly*, 111 U. S. 624 [28: 542]; *Ex parte Reggel*, 114 U. S. 642 [29: 250]; *Roberts* v. *Reilly*, 116 U. S. 80 [29: 544]; *Cook* v. *Hart*, 146 U. S. 183 [36: 934]; *Pearce* v. *Texas*, 155 U. S. 311 [39: 164].

The return of the sheriff to the writ of habeas corpus does not (as it might well have done) set forth the indictment and the warrant of extradition as grounds for the detention of the prisoner. But any defect in the return in this respect affords no *reason why the courts [**246** of the United States should take the prisoner out of the custody of the authorities of the state.

The return does show that the petitioner is held in custody by the sheriff by virtue of a mittimus issued to him by a justice of the peace, in accordance with Conn. Gen. Stat. 1887, §§ 962, 1613,* which authorize the surety

* § 962. Any bail or surety who has entered into a recognizance for the personal appearance of another, and shall afterwards believe that his principal intends to abscond, may apply to a justice of the peace in the county in which such principal resides, produce his bail bond or evidence of his being bail or surety, and verify the reason of his application by oath or otherwise; and thereupon such justice shall forthwith grant a mittimus, directed to a proper officer or indifferent person of such county commanding him forthwith to arrest such principal, and commit him to the jail of such county; and the keeper of such jail shall receive such principal, and retain him in jail until discharged by due order of law; and such surrender of the principal shall be a full discharge of the surety upon his bond or recognizance.

§ 1613. Any surety in a recognizance in criminal proceedings who believes that his principal intends to abscond may have the same remedy, and proceed and be discharged in the same manner, as sureties upon bail bonds in civil actions.

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on a recognizance, either in civil or in criminal proceedings, upon making affidavit that his principal intends to abscond, to obtain from a justice of the peace a mittimus to commit him to jail.

The only objections taken by the petitioner to the sufficiency of this mittimus are, 1st, that it shows that the recognizance was entered into on the 17th of January, 1895, for his appearance "before the superior court to be holden at New Haven within and for the county of New Haven on the first Tuesday of January. 1895," which was a day already passed; and 2d, that it describes him as "of the town of Newton, state of Massachusetts," while the statute only authorizes the issue of a mittimus by "a justice of the peace of the county in which such principal resides." But the first Tuesday of January was the day appointed by law for the beginning of the term of the superior court. Conn. Gen. Stat. § 1615. And the question whether the recognizance might be construed as requiring an appearance at a subse-
247] quent day in the course of the term, *as well as the question whether the word "resides," as used in the statute, implies domicil, or only presence in the county, is a question which should be left to the decision of the courts of the state.

There could be no better illustration than this case affords of the wisdom, if not necessity, of the rule established by the decisions of this court above cited, that a prisoner in custody under the authority of a state should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of habeas corpus, in advance of any proceedings in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this court of its appropriate duties.

Order affirmed.

Re SANFORD FORK & TOOL COMPANY ET AL.

(See S. C. Reporter's ed. 247-259.)

Amending pleadings—decision of this court

1. Upon reversal by this court of the decree of the circuit court sustaining plaintiff's exceptions to the answer and granting the relief prayed for, this court remanding the case for further proceedings, the plaintiff has the right to file a replication and the circuit court can, in its discretion, allow amendments to the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties.
2. No questions once considered and decided by this court can be re-examined at any subsequent stage of the same case.

[No. 8, Original.]

Submitted December 2, 1895. Decided December 23, 1895.

PETITION for a writ of mandamus to the judge of the Circuit Court to command him to enter a final decree in accordance with a mandate of this court. *Denied.*

See same case, 157 U. S. 312 [39: 713].

Statement by *Mr. Justice* **Gray:**

*This was a petition for a writ of man- [248
damus to the Honorable William A. Woods as judge of the circuit court of the United States for the district of Indiana, to command him to enter, in a suit of equity pending before him, a final decree in favor of the present petitioners, defendants in that suit, in accordance with a mandate of this court upon reversing a decree of that court, on an appeal reported as *Sanford Fork & T. Co.* v. *Howe, B. & Co.* 157 U. S. 312 [39: 713].

By the former opinion and mandate of this court, the petition for a mandamus and the return to the rule to show cause, the case appeared to be as follows:

A bill in equity was filed in the circuit court of the United States for the district of Indiana, by creditors of the Sanford Fork & Tool Company against that company and certain of its directors and stockholders, to set aside a mortgage made by the company to the other defendants to secure them for their indorsements of promissory notes of the company.

To that bill the defendants filed an answer under oath, insisting that the mortgage was valid; and the plaintiffs filed exceptions to the answer upon the ground that the matters therein averred were insufficient to constitute a defense to the bill or to any part thereof, as well as upon the ground that the defendants had not duly answered specific allegations of the bill. The circuit court, held by Judge Woods, after hearing arguments upon those exceptions, sustained them; and the defendants declining to plead further and electing to stand by their answer, the court, "having considered the pleadings, and being fully advised in the premises," entered a final decree, adjudging the mortgage to be void as against the plaintiffs, and granting them the relief prayed for.

The defendants appealed to this court, which, after hearing the appeal, delivered an opinion beginning thus: "In the absence of any testimony, and in the manner in which this case was submitted for decision, it must be assumed that the matters alleged in the bill and not denied in the answer and the new matters set forth in the answer are true. And the question which arises is whether, upon these admitted facts, the decree in favor of the plaintiffs can be sustained." 157 *U. S. [249
316 [39: 716]. This court, for reasons stated in that opinion, held that the mortgage was valid, and therefore that the circuit court erred; and in the opinion, as well as by its mandate set down to the circuit court, ordered the decree of that court to be "reversed, and the cause remanded to that court for further proceedings not inconsistent with the opinion of this court." The mandate concluded, in usual form, as follows: "You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

The defendants presented the mandate and a certified copy of the opinion of this court to the circuit court held by Judge Woods; and

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moved for a final decree that the former decree of the circuit court be reversed; that the cause be held to have been submitted by the plaintiffs upon bill and answer; and that, upon the facts alleged in the bill and answer, the law is with the defendants, and the plaintiffs take nothing by their bill, and the defendants have judgment for their costs.

The circuit court overruled the motion of the defendants, and, on motion of the plaintiffs, granted leave to amend the bill, but stayed proceedings to enable the defendants to apply to this court for a writ of mandamus.

The petition to this court for a writ of mandamus alleged that the order of the circuit court, overruling the motion of the defendants for a final decree in their favor, and granting the motion of the plaintiffs for leave to amend their bill, was inconsistent with and in violation of the opinion, decree, and mandate of this court; and prayed for a writ of mandamus to Judge Woods to grant the motion of the defendants and to overrule the motion of the plaintiffs.

This court granted a rule to show cause, in the return to which Judge Woods stated that his action, complained of by the petitioners, arose upon his construction of the opinion and mandate of this court, on reversing his former decree; and set forth his view of the matter as follows:

250] *"Exceptions had been improperly sustained to the answer of defendants (petitioners). For this error, as respondent construes the opinion and mandate, the decree was reversed, and the cause remanded to the circuit court, with the usual directions for further proceedings there. Upon the return of the cause there, and after the erroneous decree had been set aside, but before other step was taken, petitioners moved for decree in their favor, on the ground that this court had treated the cause as having been submitted below on bill and answer, and that, this court having held the answer sufficient, it followed they were entitled to such decree. Respondent could not adopt that view, since it plainly was not what had occurred. There was no such submission of the cause below on bill and answer. Nor, in rendering the decree in favor of complainants, had respondents 'considered' the answer; but had, since sweeping exceptions had been sustained to it, treated it as out of the record, for any purpose of the decree—a fact plainly manifest in the record before this court on appeal. He could not, therefore, suppose that this court meant, in what is said upon this point, to hold more or other than that the answer was sufficient, and that he had erred in holding it insufficient.

"Respondent, therefore, having in view the rules of practice prescribed by this court for the government of the circuit court, held that since, if he had overruled the exceptions to the answer, complainants would have been entitled to file replication, as provided by rule 66 in equity, and, if they desired it, to have leave to amend their bill, under rule 45, he did not, nor does, believe this court, in reversing the decree, meant to deprive complainants of these rights; but inferred rather, as the more reasonable and logical deduction, that, when the circuit court had retraced its steps to the point where the first error occurred, the parties would stand, in respect of the case and of each other, as if, in the progress of the cause, it had but then arrived at that juncture. To hold, instead of this view, that complainants had, by their mistake in filing exceptions, or by the court's mistake in sustaining them, or by both things together, forfeited their right to have the cause proceed when the errors had been corrected in the *orderly manner indicated [251 above seemed and seems entirely illogical, and as therefore foreign to the purpose of this court. Respondent accordingly ruled that, when he retraced the steps held erroneous by this court, the cause should progress as if they had not been taken at all, and as if we were but now arrived at that point. To that end, he granted, when it was craved, leave to complainants to amend their bill, and would have entered the usual order against them to file replication on or before the next rule day, had not petitioners thereupon interposed their motion for stay of proceedings until this application could be heard here."

Judge Woods, in his return, declared himself ready, if his construction of the opinion and mandate should not accord with that of this court, to make and enter such order and decree, under its direction, as would carry out its opinion and mandate.

Messrs. **Alpheus H. Snow** and **George A. Knight**, for petitioners:

If this court, by its opinion, decree, and mandate, had authorized any further proceedings after reversal except an entry of a decree by the court below in favor of the defendants on the bill and answer, it must necessarily have held that the circuit court had jurisdiction to receive and rule upon the so-called "exceptions to answer" which were, in fact, demurrers to the answer, and that it erred in its ruling on the so-called exceptions. The effect of the opinion, decree, and mandate, had such further proceedings been authorized, would have been to put this court in the position of having conferred jurisdiction upon the circuit courts of the United States to receive and rule upon a demurrer to a sworn answer in equity, and thus of having indirectly promulgated a new rule in equity setting aside the settled principle of equity practice which forbids that the sufficiency of an answer to constitute a defense to the bill should ever be tested.

This court, however, carefully guarded against such a result of its decision in this case by holding in its opinion that the case had been decided and should be thereafter treated as if submitted on the bill and answer, and that the circuit court erred in its finding and decree on the facts stated in the bill and answer; and by issuing a mandate commanding the court below to proceed in conformity with the opinion and decree, plainly meaning to command the court below to set aside its decree in favor of the complainants on the bill and answer and to proceed to render a decree in favor of the defendants on the bill and answer.

The writ of mandamus prayed for should issue to effectuate the plain language and purpose of the opinion, decree, and mandate.

Circuit courts of the United States have no authority or jurisdiction to receive on their

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files and rule upon a demurrer to an answer in equity, and if a demurrer is filed, the case will be treated as if set down for hearing on bill and answer.

Banks v. *Manchester*, 128 U. S. 244, 250 (32:425, 428).

Exceptions cannot be entertained for the purpose of testing the sufficiency of an answer in equity to constitute a defense to the bill.

Adams v. *Bridgewater Iron Co.* 6 Fed. Rep. 179; *United States* v. *McLaughlin*, 24 Fed. Rep. 823; *Travers* v. *Ross*, 14 N. J. Eq. 257, 258; *Crouch* v. *Kerr*, 38 Fed. Rep. 549.

Assuming, but by no means admitting, that the opinion, decree, and mandate of this court are open to a construction which would authorize the ruling of the respondent, as sole judge of the circuit court, counsel for petitioners cannot believe, as was claimed by counsel for the complainants in the circuit court, that this court intended that such construction should be placed upon them in order to relieve the complainants from the consequences of their mistake in filing their so-called "exceptions to answer" and in order to punish the defendants because they did not point out the mistake by filing a motion to strike the so-called "exceptions to answer" from the files. Had this court intended that any such construction should be placed upon the opinion, decree, and mandate, the effect of its decision would have been to hold that the parties, by their agreement or acquiescence, may set aside the settled rules of equity practice and confer jurisdiction on the circuit courts of the United States.

The rulings of the respondent, as judge, adverse to the petitioners, are not justified by the words of the mandate directing that "such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice and the laws of the United States, ought to be had." These words are not inconsistent with an entry by the circuit court of a final decree for the appellants. This court has held that a mandate framed in similar language may necessitate the entry of a final decree in favor of the appellants.

Stewart v. *Salamon*, 94 U. S. 434 (24:275), 97 U. S. 361 (24:1045); *Gaines* v. *Cadwell* ("*Gaines* v. *Rugg*") 148 U. S. 228 (37:432).

The method adopted by the petitioners to obtain a construction by this court of its mandate, of making an application for leave to file a petition for a writ of mandamus, after notice, and of presenting therewith a verified petition to be filed, is authorized by the statutes of the United States and numerous decisions of this court. Such petition, upon leave being granted to file it, seems necessarily to be an advanced cause. If, however, a motion to advance the cause for hearing is necessary, the petitioners have complied with the requirement by incorporating such motion in their application for leave to file.

U. S. Rev. Stat. §§ 688, 716; *Dubuque & P. R. Co.* v. *Litchfield*, 68 U. S. 1 Wall. 69 (17: 514); *Ex parte Washington & G. R. Co.* 140 U. S. 91 (35:339); *Gaines* v. *Cadwell* ("*Gaines* v. *Rugg*") *supra; Re Humes*, 149 U. S. 192 (37: 699); *Re City Nat. Bank*, 153 U. S. 246 (38:705).

Messrs. **S. B. Davis** and **C. F. McNutt** for respondents.

Mr. Justice **Gray** delivered the opinion of the court:

When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald* v. *United States*, 37 U. S. 12 Pet. 488, 492, [9: 1167, 1169]; *Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237 [37: 717]. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins* v. *Fourniquet*, [256 55 U. S. 14 How. 313, 330 [14: 435, 442]; *Re Washington & G. R. Co.* 140 U. S. 91 [35:339]; *City Nat. Bank* v. *Hunter*, 152 U. S. 512 [38: 534, 153 U. S. 246 [38: 705]. But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley* v. *Morton*, 103 U. S. 764 [26: 458]; *Mason* v. *Pewabic Min. Co.* 153 U. S. 361 [38: 745]; *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 5 U. S. App. 97, 51 Fed. Rep. 929. The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. *Sibbald* v. *United States*, 37 U. S. 12 Pet. 488, 493 [9: 1167, 1169]; *West* v. *Brashear*, 39 U. S. 14 Pet. 51 [10: 350]; *Wayne County Suprs.* v. *Kennicott*, 94 U. S. 498 [24: 260]; *Gaines* v. *Caldwell* ("*Gaines* v. *Rugg*") 148 U. S. 228, 238, 244 [37: 432, 434, 437].

In the case now before us, it is important, in determining what was heard and decided by the circuit court in the first instance, and by this court upon the appeal, to bear in mind the settled practice of the courts of chancery, recognized and regulated by the rules established by this court for the circuit courts sitting in equity. U. S. Rev. Stat. §§ 916-918.

Upon the coming in of defendant's answer, several courses are open to the plaintiff:

First. The plaintiff may, upon motion, without notice to the defendant, have leave to amend his bill, with or without the payment of costs, as the court may direct. Equity rules 29, 45.

Second. The plaintiff may file exceptions to the answer for insufficiency. Equity rule 61. If the defendant does not submit to the exceptions, and file an amended answer, the plaintiff may set down the exceptions for hearing. Equity rule 63. If the exceptions are thereupon allowed by the court, the de-

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fendant must put in a full and complete answer; otherwise, the plaintiff may take the bill, so far as the matter of exceptions is concerned, as confessed. Equity rule 64.

Third. If the answer is not excepted to, or if it is adjudged or deemed sufficient, the plaintiff may file a general replication; whereupon the cause is to be deemed, to all intents **257**] and *purposes, at issue, without further pleading on either side. Equity rule 66.

Fourth. A demurrer to the answer is unknown in equity practice. But the plaintiff may set down the case for hearing upon bill and answer; whereupon all the facts alleged in the bill and not denied in the answer, as well as all new facts alleged in the answer, are deemed admitted, as upon a demurrer to an answer in an action at law. Equity rule 41, as amended at December term, 1871, 80 U. S. 13 Wall. XI [20: 914]; Equity rule 60; *Leeds* v. *Marine Ins. Co.* 15 U. S. 2 Wheat. 380 [4: 266]; *Reynolds* v. *First Nat. Bank*, 112 U. S. 405, 409 [28: 733,735]; *Banks* v. *Manchester*, 128 U. S. 244, 250, 251 [32: 425, 428].

For the purpose of the hearing upon exceptions to an answer, the facts alleged in the bill and in the answer must indeed be considered as admitted, and only matter of law is presented for decision, as in a case set down for hearing upon bill and answer. But the difference between the two cases is this: When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party. But when the matter set down for hearing is the plaintiff's exceptions to the answer, the case is not ripe for a final decree; the only question to be decided is the sufficiency of the answer; and no final decree can be entered against either party, unless it declines or omits to plead further.

In the present case, the plaintiffs, upon the coming in of the answer, neither moved for leave to amend the bill, nor filed a replication, nor set down the case for hearing upon bill and answer.

But they filed exceptions to the answer; and those exceptions only were set down for hearing, and were heard and passed upon by the court. While some of the exceptions were directed, as is usual, to the want of due answer to specific allegations of the bill, others of the exceptions related to the sufficiency of the whole answer to constitute any defense. Its sufficiency in the latter respect might properly have been questioned by setting down the case for hearing upon bill and answer. But neither for this nor for any other reason was **258**] *any objection made to the exceptions as irregular or improper in form.

The circuit court, upon sustaining the exceptions, could not (unless the defendants chose to stand by their answer) enter a final decree against the defendants; or do anything more than order them to put in a full and complete answer, on pain of being held to have confessed the bill. If the circuit court, instead of sustaining the exceptions to the answer, had overruled those exceptions, the plaintiffs would have had the right to file a replication, and the bill could not be dismissed unless and until they neglected to file one.

When the decree of the circuit court, sustaining the plaintiffs' exceptions to the answer, and (because the defendants declined to plead further) granting to the plaintiffs the relief prayed for in the bill, was reversed by this court, the only matter which was or could be decided by this court, upon the record before it, was that the answer was sufficient. This court, in so deciding, could go no further than the circuit court could have done, had it made the like decision. Neither the circuit court, nor this court, upon adjudging that the answer was sufficient, could, without any consent or neglect on the part of the plaintiffs, deprive them of their right, under the general rules in equity, to file a replication.

Nor did this court undertake, either by its opinion or by its mandate, to preclude the plaintiffs from filing a replication. On the contrary, at the outset of the opinion, after observing that, in the manner in which the case was submitted for decision, the facts alleged in the bill and not denied in the answer, and the new facts alleged in the answer, must be assumed to be true, the question arising upon those admitted facts was stated to be "whether the decree in favor of the plaintiffs can be sustained;" and, while the opinion declared that, assuming those facts, the mortgage was valid, yet both the opinion and the mandate ordered no final judgment for the defendant, but only ordered the judgment for the plaintiff to be reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with the opinion of this court.

*The case being thus left open, by the [**259** opinion and mandate of this court and by the general rules of practice in equity, for further proceedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the circuit court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties. *Marine Ins. Co.* v. *Hodgson*, 10 U. S. 6 Cranch, 206, 218 [3: 200, 203]; *Neale* v. *Neale*, 76 U. S. 9 Wall. 1 [19: 590]; *Hardin* v. *Boyd*, 113 U. S. 756 [28: 1141].

The case is quite different, in this respect, from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal, as in the cases principally relied on by the petitioner. *Stewart* v. *Salamon*, 94 U. S. 434 [24: 275], and 97 U. S. 361 [24: 1044]; *Gaines* v. *Caldwell* ("*Gaines* v. *Rugg*") 148 U. S. 228 [37: 432]; *Dubuque & P. R. Co.* v. *Litchfield*, 68 U. S. 1 Wall. 69 [17: 514]; *Re Washington & G. R. Co.* 140 U. S. 91 [35: 339].

It must be remembered, however, that no question once considered and decided by this court can be re-examined at any subsequent stage of the same case. *Clark* v. *Keith*, 106 U. S. 464 [27: 302]; *Sibbald* v. *United States*, 37 U. S. 12 Pet. 488 [9: 1167]; and *Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237 [37: 717], cited at the beginning of this opinion.

Writ of mandamus denied.

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CENTRAL RAILROAD COMPANY of New Jersey, *Plff. in Err.*,
v.
BERNARD KEEGAN.

(See S. C. Reporter's ed. 259-268.)

Who are fellow servants.

The conductor of a drill crew in a railroad yard who is a component part of the crew and an active coworker in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches, is a fellow-servant of a member of his crew, and the railroad company is not liable to the latter for the negligence of such conductor in failing to place himself or some one else at the brake of backwardly moving cars to control their movement.

[No. 373.]

Submitted December 3, 1894. Decided December 23, 1895.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying certain questions to this court for decision in a suit brought by Bernard Keegan against the Central Railroad Company for damages for personal injuries sustained while acting as brakeman in the employ of the company. *The first question answered in the affirmative; the second in the negative.*

Statement by *Mr. Justice* **White**:

The action below was brought by Keegan to recover damages for personal injuries sustained while acting as brakeman in the employ of the railroad company. Judgment having been rendered upon the verdict of a jury, in favor of Keegan, the company sued out a writ of error from the circuit court of appeals for the second circuit. Two circuit judges, sitting as the court, differed in opinion upon questions of law arising, and thereupon certified two questions to this court. The certificate sets forth the following statement of facts:

"Five men—O'Brien, Keegan, Lally, Gooley, and Ward—were, on the night of the accident (October 7, 1889), in the service of the Central Railroad of New Jersey and employed in its yard at Jersey City. They comprised what was called the 'night float drill crew,' the duty of such crews being to take cars from the tracks on which they had been left by incoming trains and place them on the floats, by which they were transported across the North river to the city of New York. The drill crews, like others employed in the same yard, received their general instructions from Dent, the yardmaster. The men composing such crews were hired by Dent and discharged by him, and he had the general charge of the yard and yardmen, and assigned them to their duties.

"The course of business was as follows: Dent, the yardmaster, gave to O'Brien drill slips—that is, slips of paper containing the

NOTE.—*As to fellow-servants and their negligence; who are fellow-servants; vice principal; superior servant; liability of master.*—see note to Baltimore & O. R. Co. v. Baugh, 37: 772.

The following are the more recent decisions as to who are fellow-servants, within the rule exempting from liability the master for injuries committed by the negligence of a servant upon a fellow-servant.

Employees are not fellow-servants unless they are under the control and direction of a common master. Kruider v. Woolverton, 11 Misc. 537.

Where a railroad company furnished proper appliances and ropes to its freight handlers, and supplied proper materials for their repair, not of a permanent character and requiring skilled mechanics, —*Held*, that the duty of keeping them in repair fell upon the freight handlers, and the neglect of one to the injury of another was that of a coservant, in the absence of notice to the employer of any defect. Conway v. New York C. & H. R. R. Co. 13 Misc. 53, Reversing 11 Misc. 641.

Evidence in an action for the death of a fireman occasioned by the collapse of the crown sheet of a locomotive due to its scorching, considered, and *held*, in view of expert testimony, that such scorching occurred at the time of the accident and was the fault of the engineer, the coservant of deceased, and that a judgment in favor of plaintiff should be reversed. Hudson v. Rome, W. & O. R. Co. 145 N. Y. 408.

Death of an assistant steward on a vessel by falling overboard through a gangway at night in an unexplained manner,—*Held*, not to sustain action, the failure to close the gangway doors, if negligent, being the duty of the mate of the vessel. Geoghegan v. Atlas S. S. Co. 146 N. Y. 369.

Where there was posted on the bulletin boards of a railroad company a rule to the effect that if the conductor of a freight train about to pass over a summit and descend a steep grade, had a train which in his judgment was too heavy to pass with safety, he should apply for additional brakemen, or set off some of the cars,—*Held*, that this exercise of discretion committed to him did not change his character of fellow-servant to his brakemen, and that his omission to avail himself of the rule did not charge the railroad company with liability for an injury suffered by a brakeman in consequence. Wooden v. Western N. Y. & P. R. Co. 147 N. Y. 508.

Though a brakeman employed on a railroad has a right to assume that a car just returned from the repair shop is in order, if he discovers a defect and in attempting to remedy it is injured by the negligence of a fellow-workman, he assumes the risk, and cannot recover damages from his employer. Howey v. Lake Shore & M. S. R. Co. 13 Misc. 641.

Car inspectors employed in the yard of a railroad are not fellow-servants of a yard brakeman so as to relieve the railroad company from liability for injuries resulting from improper inspection. Jennings v. New York, N. H. & H. R. Co. 12 Misc. 408.

Where plaintiff, employed by a contractor in repairing defendant's elevator, was injured by the negligence of the person operating the elevator, who was endeavoring to assist in the work, the operator remaining in defendant's employ and under its control,—*Held*, that the negligence was not that of a fellow-servant so as to exonerate defendant from liability. Higgins v. Western U. Teleg. Co. 11 Misc. 32.

In employing competent foremen and proper appliances to excavate a trench the employer discharges his duty toward the laborers employed, and in such case, in the absence of personal participation on the part of the employer, negligence in the conduct of the work on the part of a foreman is negligence of a fellow-servant of the laborer. Collins v. Crimmins, 11 Misc. 24.

The unauthorized use of a switchboard as a passageway, by reason of which plaintiff was injured through the carelessness of a fellow-servant,—*Held*, to call for a reversal of a judgment on a verdict for plaintiff against his employer. Teetsel v. Simmons, 88 Hun, 621.

Where a railroad company has promulgated

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numbers of the cars and the particular tracks leading to the floats on which these cars were to be placed. These float tracks were five in number and were connected by switches with the other tracks in the yard. The execution of this order required frequent switching of cars 261] from one *set of cars to another in order to sort out from arriving trains the particular car or cars to be placed on a particular float track. It also required the making up of trains of cars sometimes longer, sometimes shorter; their movement by the engine attached to them, forward or backward and at varying rates of speed; the braking, coupling, and uncoupling of the cars composing them. Ward was engineer. Lally had his post on some car near the engine in order to transmit to the engineer any signals received. He also helped the engineer with coal and water and acted as brakeman. Keegan did the coupling, Gooley the uncoupling and acted as brakeman, while the turning of the switches was attended to by O'Brien. The direction of all these operations was with O'Brien, who was called in the evidence sometimes 'foreman driller,' sometimes 'conductor of the drill crew.' He was the one to direct what cars should be taken on by the engine, and when and where they should be moved to, when the movement should start, and where it should stop, and it was in obedience to his orders that one or other of the men employed in his crew went to one place or another, and coupled or uncoupled particular cars. The general management of the operation was with him, and he had control over the persons employed therein.

"On the night of the accident Keegan, who had been relighting his lantern at the engine, which was then standing still, attached to several cars, walked to the rear end of the train. O'Brien and Gooley were standing there looking over the drill slip. There were some other cars standing on the same track, about 40 feet beyond the end of the cars to which the engine was attached. O'Brien told Gooley what cars were to be uncoupled. He then told Keegan to couple the train onto the cars beyond. Keegan took the coupling link of the rear car in his right hand, and, having signalled for the train to back slowly, walked towards the detached cars, with the rear end of the last car at his back. Before he reached them he caught his right foot in the guard rail of a switch, and at once called out to hold up the train. His call was heard and the engine stopped immediately. Gooley, however, *had [262 already, on O'Brien's order, drawn the pin and thus uncoupled the cars indicated, so that when the engine pulled up it did not stop their backward movement. Neither Gooley nor O'Brien were on the cars thus moving backwards, so there was no one to check their motion by applying the brakes, and as a con-

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rules, known to its employees, which, if observed, would have rendered the accident improbable, if not impossible, and their nonobservance by a co-employee causes the death of a fireman in a collision of trains,—the railroad company is not liable in damages. Smith v. New York C. & H. R. R. Co. 88 Hun, 468.

A switchman in the employ of a railroad company which had granted the right to use its tracks to a company employing plaintiff as a locomotive engineer, the persons operating that part of the road being, under the terms of the agreement, joint employees, to be paid by each company in proportion to its business, and each to be responsible to the employers when engaged in its business,—*Held*, not to be a fellow-servant of plaintiff, whose employer had no interest in or care of the tracks, and the switchman being paid by, and responsible to, the division superintendent of the lessor company only. Strader v. New York, L. E. & W. R. Co. 86 Hun, 613.

Where a fireman on a locomotive was killed by a collision of railroad trains due to the neglect of the conductor of the train he was on to send back a messenger to warn a train which the conductor knew was due at the time he was attempting to get his train which had been delayed, upon a siding,—*Held*, that the negligence was that of a fellow-servant and that a recovery for causing his death could not be had against the railroad company which employed them. Herrington v. Lake Shore & M. S. R. Co. 83 Hun, 365.

It being the duty of the master to furnish suitable appliances for doing the work, their reparation and adjustment, though entrusted by him to a fellow-servant of the person operating them, is within the master's responsibility, and he is liable for the negligence of the one making the repairs. Scherer v. Holly Mfg. Co. 86 Hun, 37.

A gang boss in a railroad repair shop in suggesting that a workman go down to a track used for the shifting of cars needing repairs and take a required article from one of the cars to be found there for use in the job upon which such workman is engaged, does not represent the common employer, and the act being dangerous and injuries resulting therefrom, an action will not lie against the employer for the injuries sustained. Keenan v. New York, L. E. & W. R. Co. 145 N. Y. 190.

Where the foreman of a gang of masons had practical charge of the work, the employers exercising no further authority over the work than occasionally consulting with him,—*Held*, that as to the employees the foreman stood in the place of the employers and his negligence resulting in injury to an employee was imputable to them. Kimmer v. Weber, 81 Hun, 509.

Employees under the control and direction of different masters are not fellow-servants. Kruider v. Woolverton, 11 Misc. 587.

Servants working in the same department are not fellow-servants, unless they directly co-operate with each other in the same line of employment, or by their usual duties are brought into habitual association so that they may exercise a mutual influence upon each other. Chicago & A. R. Co. v. O'Brien, 155 Ill. 628.

One hired as a substitute is a fellow-servant with a fellow-servant of the hirer. Anderson v. Guinean, 9 Wash. 304.

One assisting the servants of another to facilitate his own business or that of another is not their fellow-servant. O'Donnell v. Maine C. R. Co. 86 Me. 552, 25 L. R. A. 658.

A riveter and carpenters under the same superintendent engaged in shipbuilding are fellow-servants, so as to preclude recovery by the riveter for injuries caused by negligence of the carpenters in constructing a scaffold on which he works. Beesley v. F. W. Wheeler & Co. 103 Mich. 196, 27 L. R. A. 266.

An employee of an iron company engaged in unloading cars is not a fellow-servant with the employees of the railroad company engaged in shifting the cars, although both are under the direction of the foreman of the iron company. Noll v. Philadelphia & R. R. Co. 163 Pa. 504.

A coal passer at the boilers of a manufacturing

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sequence the rear wheel passed over Keegan's leg, producing the injuries complained of.

"There was evidence tending to show that under circumstances such as these O'Brien or some one else should have been on the rear car of those moving backward, and the negligence complained of was his ordering defendant in error to couple cars which he had just ordered to be uncoupled from a backwardly moving train to stationary cars beyond them without himself being on the moving cars or seeing that either Gooley or Lally was there to exercise control over their movement.

"The jury, by their verdict, found that O'Brien was negligent."

The questions of law arising from these facts, upon which the court desired instruction for the proper decision of the writ of error were certified as follows: 1, whether the defendant in error and O'Brien were or were not fellow-servants; and, 2, whether from negligence of O'Brien in failing to place himself or some one else at the brake of the backwardly moving cars, the plaintiff in error is responsible.

Messrs. **Robert W. Deforest** and *George Holmes*, for plaintiff in error:

If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master, but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.

Baltimore & O. R. Co. v. *Baugh*, 149 U. S. 387 (37: 781).

The liability does not depend in any manner on the grade of service of a coemployee, but upon the character of the act itself and a breach of the positive obligation of the master.

Northern P. R. Co. v. *Hambly*, 154 U. S. 360 (38: 1013); *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Northern P. R. Co.* v. *Hubert*, 116 U. S. 642 (29: 755); *Quebec S. S. Co.* v. *Merchant*, 133 U. S. 375 (33: 656); *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 (28: 787).

The liability of the master for negligence of a fellow-servant depends, not upon the grade of service, but upon the character of the act, and upon a breach of positive obligation of the master to the servant.

McKinney, Fellow Servants (1890) p. 53, § 25, and numerous cases there cited; *Potter* v. *New York C. & H. R. R. Co* 136 N. Y. 77.

Mr. **A. G. Vanderpoel**, for defendant in error:

Chicago, M. & St. P. R. Co. v. *Ross*, 112 U. S. 377 (28: 787), stands as the law to-day in fact and in law. In that case there was a conductor of a freight train present.

Baltimore & O. R. Co. v. *Baugh*, 149 U. S. 368 (37: 772), was a case where in fact and in law there was no conductor present.

The case of *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 (38: 1009), may be taken as the judicial construction of the relation of the *Baugh Case* to the *Ross Case*.

The test of liability of the master for the act of a servant is given in *Chicago, M. & St. P. R. Co.* v. *Ross*, in the following words: "The conductor has entire control and management of

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establishment is not a fellow-servant with the chief engineer in charge of the factory. Mattise v. Consumers' Ice Mfg. Co. 46 La. Ann. 1535.

Railroad employees may be fellow-servants although employed in different departments of labor and wholly separate and disconnected in the performance of their duties, where in performing their separate and distinct functions they are so habitually thrown together or consociated as to exercise an influence upon each other promotive of proper caution. Cleveland, C. C. & St. L. R. Co. v. McLaughlin, 56 Ill. App. 53.

The porter of a palace car, employed by a palace car company, although bound by his contract to obey all rules for employees of carriers on whose lines his car may run, is not a fellow-servant of those operating the engine and train which his car accompanies. Jones v. St. Louis S. W. R. Co. 125 Mo. 666, 26 L. R. A. 718.

A trainmaster in ordering cars to be taken out of a train without notice to a brakeman engaged in making a coupling acts as a fellow-servant of such brakeman. Martin v. Chicago & A. R. Co. 65 Fed. Rep. 384.

A station agent in discharging his duty of placing cars upon side tracks is not a fellow-servant of a section hand upon a work train passing such station. St. Louis, A. & T. H. R. Co. v. Biggs, 53 Ill. App. 550.

Two engine crews engaged in switching cars in the yards of a company, each of which has a foreman who gives orders to his own crew, while both crews are under the command of a common yardmaster and are associated together in the business of switching cars in the company's yards, are fellow-servants. O'Leary v. Wabash R. Co. 52 Ill. App. 641.

A railroad company is not liable to a brakeman, under the North Dakota statute providing that an employer is not liable for injuries to an employee by the negligence of a fellow employee in the same general business for injuries received, because of the negligence of the conductor of the train. Northern P. R. Co. v. Hogan, 53 Fed. Rep. 102.

A conductor on one train is the fellow-servant of a fireman on another train who is injured by the negligence of the former in leaving the switch open. Northern P. R. Co. v. Mase, 63 Fed. Rep. 114.

An engineer in charge of an engine on the main track is not as a matter of law a fellow-servant of a brakeman at the rear of a train on a side track, who signals the engineer to go ahead. Chicago & W. I. R. Co. v. Flynn, 154 Ill. 448.

A gripman on a cable car and the crew of a wrecking train are not fellow-servants. West Chicago Street R. Co. v. Dwyer, 57 Ill. App. 440.

A railroad hostler and his helper are fellow-servants, although the former is superior to the latter and has supervision and direction of the work or service, where they are both engaged in cleaning an engine, and the former gives no direction to the latter which increases the usual hazard of their undertaking. Clay v. Chicago, B. & Q. R. Co. 56 Ill. App. 235.

The men engaged upon a railroad work train, and section hands engaged upon a hand car, in keeping the roadbed in order, are fellow-servants although under separate foremen. Thom v. Pittard, 62 Fed. Rep. 232.

A brakeman on a railroad train running on the tracks of another company is not a fellow-servant with a switchman in the latter company's employ, although the superintendent of such company has power in certain cases to discharge the employees of the former company for misconduct while running trains on its tracks. Tierney v. Syracuse, B. & N. Y. R. Co. 85 Hun, 146.

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the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what station it shall stop and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders." 112 U. S. foot of p. 391 (28: 792). In *Baltimore & O. R. Co.* v. *Baugh*, *Judge* Brewer cites with approval the same words, as above quoted. 149 U. S. 381 (37: 779).

In *Northern P. R. Co.* v. *Hambly*, *Judge* Brown characterizes the *Ross Case*, and quotes from it as follows: "The case was decided not to be one of fellow-service upon the ground that the conductor was [he here adopts the words of the *Ross Case*] 'in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants.' The court drew a distinction 'between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence.' In that particular case the court found that the conductor had entire control and management of the train to which he was assigned, directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. [The word 'orders' referred to the orders of the conductor.] Under such circumstances, he was held not to be a fellow-servant with the fireman, brakeman, and engineer, citing certain cases from Kentucky and Ohio." 154 U. S. 359 (38: 1013).

O'Brien was a conductor, and the proximate cause of plaintiff's injury was his, O'Brien's, negligent order to Gooley to pull the pin; the giving that order was a negligent masterial act in law.

Mr. Justice **White** delivered the opinion of the court:

We held in *Baltimore & O. R. Co.* v. *Baugh*, 149 **264**] *U. S. 368 [37: 772], that an engineer and fireman of a locomotive engine running alone on a railroad, without any train attached, when engaged on such duty, were fellow-servants of the railroad company, hence that the fireman was precluded from recovering damages from the company for injuries caused, during the running, by the negligence of the engineer. In that case it was declared that "prima facie, all who enter the employment of a single master are engaged in a common service, and are fellow-servants. . . . All enter in the service of the same master to further his interests in the one enterprise." And whilst we in that case recognized that the heads of separate and distinct departments of a diversified business may, under certain circumstances, be considered, with respect to employees under them, vice principals or representatives of the master, as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent, we declined to affirm that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice principal or representative of the master. It was further declared that "the danger from the negligence of one specially in charge of the particular work was as obvious and as great as from that of those who were simply coworkers with him in it; each is equally with the other an ordinary risk of the employment" which the employee assumes when entering upon the employment, whether the risk be obvious or not. It was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair and reasonable precautions to surround his employee with fit and careful coworkers, and the furnishing to such employee of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employee turn rather on the character of the alleged negligent act than on the relations of the employees to each other, so that if the act is one done in the discharge of some positive duty of *the master to the servant, then [265 negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor.

There is nothing in the latter decision of this court in *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 [38: 1009], militating against the views expressed in the *Baugh Case*. On the contrary, that case is approvingly referred to (p. 359 [1013]), although said there to involve a different question from that which was in the *Hambly Case*.

The principles thus applied in the case referred to are in perfect harmony with the rules enforced by the supreme court of the state of New Jersey, within whose territory the accident happened which gave rise to the present controversy.

In *O'Brien* v. *American Dredging Co.* 53 N. J. L. 291, O'Brien sought to hold the company liable for an injury sustained by him while employed as a deck hand on one of their dredges, at the time used in dredging the James river, near Richmond, under a contract with the United States government. The ground of liability alleged was that the injury had been caused by the negligence of another employee, one Cannon, who was called the "captain" of the dredge. Cannon was authorized to employ men to work on the dredge, subject to the approval of the general superintendent (who had his headquarters at the home office of the company) who had power to disapprove or discharge them; the duty of the captain was to operate the dredge in said dredging; plaintiff was employed by Cannon as a deck hand on the dredge and his duty was to aid in the operation of the dredge; and Cannon had charge of the men so employed and they were under him. The court held that while Cannon was intrusted with some authority to employ the workmen, yet, with respect to the operation of the dredge in the prosecution of defendant's business, he was not a general superintendent, but a mere foreman

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of the gang of workmen, engaged with them in the execution of the master's work. He 266] was a superior and they *were inferior workmen, but all were employed in a common operation, though in different grades of service. In the course of the opinion, on the question of the risks which must be contemplated and assumed by one entering the service of another, the court said:

"Whether the master retains the superintendence and management of his business, or withdraws himself from it and devolves it on a vice principal or representative, it is quite apparent that, although the master or representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of the work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen, and where necessary to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow-servants."

Applying the principles announced by this court and the supreme court of New Jersey to the facts of the case at bar, it is clear that O'Brien and Keegan were fellow-servants. O'Brien's duties were not even those of simple direction and superintendence over the operations of the drill crew; he was a component part of the crew, an active coworker in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches. He was subordinate to the yardmaster who had jurisdiction over this and other drill screws, and it was the yardmaster who employed and discharged all the workmen in the yard, giving them their general instructions, and assigning them to their duties. O'Brien's control over the other members of the 267] drill crew *was similar to the control which a section foreman exercises over the men in his section; and, following its construction of the decisions of this court in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368 [37: 772], and *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 [38: 1009], the circuit court of appeals for the eighth circuit has held that a section foreman is a fellow-servant of a member of his crew, and that one of the crew, injured by the negligence of the foreman, cannot recover. *Kansas & A. V. R. Co.* v. *Waters*, 70 Fed. Rep. 28.

In *Potter* v. *New York C. & H. R. R. Co.* 136 N. Y. 77, employees of a railroad company, while switching cars in the company's yard under the direction of a yardmaster, shunted a number of cars onto a track so that they collided with a car being inspected, and caused the death of the inspector. It was claimed that the proper and reasonable care required that there should have been a brakeman on the front of the cars to control in an emergency their motion when detached from the engine. In the absence of allegation of proof to the contrary, the court presumed that competent and sufficient servants were employed, and proper regulations for the management of the business had been established, and observed (p. 82):

"It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are intrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employees is to provide competent coservants, and prescribe such regulations as experience shows may be best calculated to secure their safety."

We adopt this statement as proper to be applied to the case at bar. A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard; neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was negligent in failing to place himself or some one else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor.

*These conclusions determine both 268] questions certified for our decision, and accordingly the *first question is answered in the affirmative, and the second in the negative.*

Mr. Chief Justice **Fuller**, and *Mr. Justice* **Field**, and *Mr. Justice* **Harlan** dissent.

GEORGE S. MOORE, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 268-276.)

Indictment for embezzlement — description of property.

1. An indictment which charges, under the act of 1875, that defendant, being an assistant, clerk, or employee in a postoffice, did embezzle a certain sum of money, the property of the United States, is insufficient on demurrer in not alleging that such sum came into his possession in that capacity, as it should do if the allegation of employment be material; but if that allegation be rejected as *descriptio personæ*, then the property should be identified particularly.
2. The general rule in the absence of a statute is that an averment of the embezzlement of a certain amount in dollars and cents is insufficient.

[No. 719.]

Submitted November 20, 1895. Decided December 23, 1895.

IN ERROR to the District Court of the United States for the Southern District of

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Alabama to review a judgment of that court convicting George S. Moore of embezzling certain moneys of the United States. *Reversed and case remanded with directions to quash the indictment.*

Statement by *Mr. Justice* **Brown:**

Plaintiff in error, late assistant postmaster of the city of Mobile, was indicted and convicted of embezzling certain moneys of the United States to the amount of $1,652.59.

There were four counts in the indictment, to one of which a demurrer was sustained, and upon two others defendant was acquitted. The fourth count, upon which he was convicted, charged that "the said George S. Moore, being then and there an assistant, clerk, or employee in or connected with the business or operations of the United States postoffice in the city of Mobile, in the state of Alabama, did embezzle the sum of $1,652.59, money of the United States, of the value of $1,652.59, the said money being the personal property of the United States."

Moore, having been sentenced to imprisonment at hard labor, sued out this writ of error.

Messrs. **M. D. Wickersham** and **W. H. McIntosh,** for plaintiff in error:

The court erred in overruling the demurrers of defendant to the fourth count of the indictment. The count in question under which the defendant was convicted charged no offense against the laws of the United States.

There must be some averment of the fiduciary relations sustained by the defendant and made by the statute an element of the offense.

2 Bishop, Crim. Proc. § 323; 2d ed. § 519.

A distinct fact necessary to be proved at the trial must be averred in the indictment.

United States v. *Atkinson*, 34 Fed. Rep. 317; *United States* v. *Carll*, 105 U. S. 611 (26: 1135).

It must be averred that the defendant stood in some fiduciary relation, and that by virtue of said relation he did embezzle.

2 Archb. Crim. Pl. & Pr. § 1337; 1 Whart. Prec. of Indictments, p. 465; Loveland, Fed. Proc. No. 483, p. 453; *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385 (18: 830); *United States* v. *Bornemann*, 36 Fed. Rep. 258; *United States* v. *Harper*, 33 Fed. Rep. 474; *Huffman* v. *State*, 89 Ala. 33; *Lowenthal* v. *State*, 32 Ala. 589.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation.

United States v. *Cruikshank*, 92 U. S. 542 (23: 588); *United States* v. *Mills*, 32 U. S. 7 Pet. 142 (8: 637); *United States* v. *Cook*, 84 U. S. 17 Wall. 168 (21: 538).

An indictment for embezzlement must set forth the actual fiduciary relations and their breaches. Everything must be averred which is necessary to bring the case within the statute.

6 Am. & Eng. Enc. Law, 495; *United States* v. *Mann*, 95 U. S. 585 (24: 533); *United States* v. *Hess*, 124 U. S. 483 (31: 516).

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error:

If the defects in the indictment are defects of form only, they are cured by the verdict, and cannot be considered by this court, even though raised before the trial by demurrer.

Connors v. *United States*, 158 U. S. 408, 411, (39: 1033, 1034).

The meaning of the term "embezzle" is simple and familiar. The crime established by our legislative bodies has become known as "embezzlement." Hence it is not necessary in an indictment to describe the wrongful act with more particularity than by the simple word "embezzle," whose meaning is both clear and familiar.

2 Bishop, Crim. Proc. § 322.

This principle has been more than once recognized by the supreme court.

United States v. *Britton*, 107 U. S. 655 (27: 520); *United States* v. *Northway*, 120 U. S. 327, 331 (30: 664, 665); *Batchelor* v. *United States*, 156 U. S. 426, 429 (39: 478, 480); *United States* v. *Jackson*, 2 Fed. Rep. 502, 504; 2 Bishop, Crim. Proc. § 315.

Mere mistakes, however serious, in expressing the substance of a crime, if the meaning can be understood, are formal.

Babcock v. *United States*, 34 Fed. Rep. 873, 876; *United States* v. *Patterson*, 6 McLean, 466; *United States* v. *Hess*, 124 U. S. 483 (31: 516); *United States* v. *Cruikshank*, 92 U. S. 542, 557 (23: 588, 593).

The word "embezzle" implies an allegation that the moneys were in the hands of defendant to hold for the owner, and also an allegation that he converted them to his own use, *animo furandi.*

The moneys are described with sufficient certainty.

United States v. *Bornemann*, 36 Fed. Rep. 257.

It is not necessary in an indictment to negative defenses or exceptions, as claimed in the motion in arrest of judgment.

Whart. Crim. Pl. & Pr. § 238; 1 Bishop, Crim. Proc. § 638; *Evans* v. *United States* (No. 1) 153 U. S. 584, 593 (38: 831, 834); *Stokes* v. *United States*, 157 U. S. 187, 191 (39: 667, 669).

It is assigned for error that the court denied a motion "to exclude the testimony of the witness Hancock." This motion was made after the testimony was all in. It was therefore discretionary.

Defendant's remedy, if he desired to preserve the point for use upon a writ of error, was to move for the proper instruction to the jury.

1 Thomp. Trials, §§ 715, 716; *Pontius* v. *People*, 82 N. Y. 339, 347; *Gilmore* v. *Pittsburg, B. & C. R. Co.* 104 Pa. 275, 281, 282; *McFarland* v. *Bellows*, 49 Mo. 311; *People* v. *Long*, 43 Cal. 444; *Brockett* v. *New Jersey S. B. Co.* 18 Fed. Rep. 156; *Wilcox* v. *Stephenson*, 30 Fla. 377; *Gurley* v. *Park*, 135 Ind. 440; *Missouri P. R. Co.* v. *Lamothe*, 76 Tex. 219, 223; *Little Klamath Water-Ditch Co.* v. *Ream*, 39 Pac. 998.

Mr. Justice **Brown** delivered the opinion of the court:

Defendant was indicted under the 1st section of the act of March 3, 1875, "to punish certain larcenies and the receivers of stolen goods" (18 Stat. at L. 479), which enacts "that any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods,

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chattels, records, or property of the United States shall be deemed guilty of felony," etc.

The principal assignment of error is to the action of the court in overruling a demurrer to the fourth count of the indictment, which charges, in the words of the statute, that "the said George S. Moore, being then and there an assistant, clerk, or employee in or connected with the business or operations of the United States postoffice in the city of Mobile, in the state of Alabama, did embezzle the sum of . . . money of the United States, of the value of . . . , the said money being the personal property of the United States."

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the prop-[270] erty was lawful *or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

It is objected to the indictment in this case that there is no direct allegation that defendant was an assistant, clerk, or employee in or connected with the business or operations of the postoffice at Mobile; that the money of the United States is not identified or described, and that there is no allegation that it came into the possession of the defendant by virtue of his employment.

The act in question has never been interpreted by this court, nor has our attention been called to any case where it has received a construction in this particular, except that of *McCann* v. *United States*, 2 Wyo. 274, decided in the territorial supreme court of Wyoming, in which the allegation was that McCann, . . . at and within the district aforesaid, twenty thousand pounds of sugar . . . of the goods, chattels, and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal, and purloin," etc. This allegation was held to be defective in charging a mere legal conclusion, "leaving it impossible to determine whether the offense was committed, and the conclusion correct." It was said that the indictment for this offense must set forth the actual fiduciary relation and its breach; that the indictment did not identify the offense on the record; and did not secure the accused in his right to plead a former acquittal or conviction to a second prosecution for the offense. It was held that the words "to embezzle" were equivalent to the words "to commit embezzlement," and that a count in the words of the statute was not sufficient; that "all the ingredients of fact that are elemental to the definition must be alleged, so as to bring the defendant precisely and clearly within the statute; if that can be done by simply following the words of the statute, that will do; if not, other allegations must be used." The general principle here alluded to has been applied by this court in several cases. *United States* v. *Carll*, 105 U. S. 611 [26: 1135]; *United States* v. *Cook*, 84 U. S. 17 Wall. 168 [21: 538]; *United States* v. *Cruikshank*, 92 U. S. 542 [23: 588].

In the case of *United States* v. *Northway*, 120 [271] U. S. 327 [30: 664], *the word "embezzle" was recognized as having a settled technical meaning of its own, like the words "steal, take, and carry away," as used to define the offense of larceny. In this case the allegation was that the defendant "as such president and agent" (of a national bank) "then and there had and received in and into his possession certain moneys and funds of said banking association . . . and then and there being in possession of the said" defendant "as such president and agent aforesaid, he, the said" defendant, "then and there . . . wrongly, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his . . . own use." In respect to this it was said to be quite clear that the allegation was sufficient, as it distinctly alleged that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. "This necessarily means," said the court, "that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and exactly describes the offense of embezzlement under the act by an officer and agent of the association."

In the case of *Claasen* v. *United States*, 142 U. S. 140 [35: 966], an allegation similar in substance and effect was also held to be sufficient. The indictment, said the court, "avers that the defendant was president of a national banking association; that by virtue of his office he received and took into his possession certain bonds (fully described), the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged."

The cases reported from the English courts and from the courts of the several states have usually arisen under statutes limiting the offense to certain officers, clerks, agents, or servants of individuals or corporations, and the rulings that the *agency or fiduciary relation [272] must be averred, as well as the fact that the money embezzled had come into the possession of the prisoner in that capacity, are not wholly applicable to a statute which extends to every person, regardless of his employment, or of the fact that the money had come into his possession by virtue of any office or fiduciary relation he happened to occupy. These cases undoubtedly hold, with great uniformity, that the relationship must be averred in the exact terms of the statute; that the property embezzled must be identified with great particularity; and that it must also be averred to have come into the possession of the prisoner by virtue of his fiduciary relation to the owner of the property.

Thus, in *Com.* v. *Smart*, 6 Gray, 15, it was held that an indictment which averred that the defendant "was intrusted" by the owner "with certain property, the same being the subject of larceny" (describing it) "and to deliver the same to" the owner "on demand," and afterwards "refused to deliver said property to said" owner, "and feloniously did embezzle and fraudulently convert to his own use, the same

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then and there being demanded of him by said" owner, was fatally defective, by reason of omitting to state the purpose for which the defendant was intrusted with the property, or what property he fraudulently converted to his own use. So in *People* v. *Allen*, 5 Denio, 76, under a statute limiting the offense to *clerks* and *servants*, it was held that a count charging the defendant with having collected and received certain money as the *agent* of an individual was defective.

On the other hand, in *Lowenthal* v. *State*, 32 Ala. 589, an indictment charging, in the form prescribed by the Code, that the defendant, being agent or clerk of another, "embezzled, or fraudulently converted to his own use, money to about the amount of $1,800 . . . which came into his possession by virtue of his employment," was sufficient. See also *People* v. *Tomlinson*, 66 Cal. 344; *Com.* v. *Hussey*, 111 Mass. 432. It was held, however, in *State* v. *Stimson*, 24 N. J. L. 9, that it was not sufficient to describe the offense in the words of the statute, and that there should be 273]some description either *of the number or denomination of the coins and of the notes, and also an averment of the value of the notes.

Indeed, the rulings in this class of cases became in some instances so strict that statutes were passed in several of the states defining what should be necessary and sufficient in indictments for embezzlement. Thus, in the Criminal Code of Illinois, it is declared to be sufficient to allege, generally, in the indictment, an embezzlement, fraudulent conversion or taking with intent to embezzle and convert funds of any person, bank, corporation, company, or copartnership, to a certain value or amount, without specifying any particulars of such embezzlement. Under this statute, it was held proper for the court to permit all the evidence of what the defendant did by reason of his confidential relations with the banking firm whose clerk he was to go to the jury, and if the jury found, from the whole evidence, any funds or credits for money had been embezzled or fraudulently converted to his own use by defendant, it was sufficient to maintain the charge of embezzlement. "The view taken by the defense," said the court, "of this statute is too narrow and technical to be adopted. It has a broader meaning, and when correctly read will embrace all wrongful conduct by confidential clerks, agents, or servants, and leave no opportunity for escape from just punishment on mere technical objections not affecting the guilt or innocence of the party accused." *Ker* v. *People*, 110 Ill. 627, 647, 51 Am. Rep. 706.

The ordinary form of an indictment for larceny is that J. S., late of, etc., at, etc., in the county aforesaid (specifying the property), of the goods and chattels of one J. N., "feloniously did steal, take, and carry away." In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took, and carried certain specified goods belonging to the person named. The indictment under consideration is founded upon a statute to punish larcenies of government property. It applies to "any person," and uses the words "embezzle, steal, or purloin" in the same connection, and as applicable to the same persons and to the same property. There can be no doubt that a count charging the prisoner *with 274 stealing or purloining certain described goods the property of the United States would be sufficient, without further specification of the offense; but whether an indictment charging in such general terms that the prisoner "embezzled" the property of the government (identifying it), would be sufficient, we do not undertake to determine; although we think the rules of good pleading would suggest, even if they did not absolutely require, that the indictment should set forth the manner or capacity in which the defendant became possessed of the property.

For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employee of the postoffice be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for property received in a wholly different capacity—such, for instance, as a simple bailee of the government. In the absence of a statutory regulation the authorities upon this subject are practically uniform. Whart. Crim. L. § 1942; *Rex* v. *Snowley*, 4 Car. & P. 390; *Com.* v. *Simpson*, 9 Met. 138; *People* v. *Sherman*, 10 Wend. 298, 25 Am. Dec. 563; *Rex* v. *Prince*, 2 Car. & P. 517; *Rex* v. *Thorley*, 1 Mood. C. C. 343; *Rex* v. *Bakewell*, Russ. & R. 35.

On the other hand, if these words be rejected as surplusage and mere *descriptio personæ*, then the property embezzled should be identified with particularity, the general rule in the absence of a statute being that an averment of the embezzlement of a certain amount in dollars and cents is insufficient. *Rex* v. *Furneaux*, Russ. & R. 336; *Rex* v. *Fowler*, 5 Car. & P. 736; *Com.* v. *Sawtelle*, 11 Cush. 142; *People* v. *Bogart*, 36 Cal. 245; *People* v. *Cox*, 40 Cal. 275; *Barton* v. *State*, 29 Ark. 68; *State* v. *Thompson*, 42 Ark. 517; *State* v. *Ward*, 48 Ark. 36.

There are undoubtedly cases which hold that, where the crime consists, not in the embezzlement of a single definite quantity of coin or bills, but in a failure to account for a number *of small sums received,—a series 275 of petty and continuous peculations,—where it would be manifestly impossible, probably for the defendant himself, but much more for the prosecution, to tell of what the money embezzled consisted, an allegation of a particular amount is sufficient. These cases, however, are confined to public officers, or to the officers of corporations, and where the embezzlement consists of a single amount of property, the general rule above stated still holds good. The leading case upon this point is that of *People* v. *McKinney*, 10 Mich. 54, 89. In this case the treasurer of the state of Michigan was charged with the embezzlement of $4,000 belonging to the state. It was held that, as the treasurer had by law the entire custody and management of the public money, with authority to receive such descriptions of funds as he chose, the public could exercise no control or con-

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stant supervision over him, and that it would be wholly impracticable to trace or identify the particular pieces of money or bills received by him, and hence that the allegation of a certain amount was sufficient. This case has been followed by several others and may be said to apply to all instances where it would be impracticable to set forth or identify the particular character of the property embezzled. *State* v. *Munch*, 22 Minn. 67; *State* v. *Ring*, 29 Minn. 78; *State* v. *Smith*, 13 Kan. 274, 294; *State* v. *Carrick*, 16 Nev. 120; *United States* v. *Bornemann*, 36 Fed. Rep. 257. In some jurisdictions, however, notably in England, California, Louisiana, and Massachusetts, the difficulty has been entirely remedied by statute. Greaves' Crim. L. 156; *Rex* v. *Grove*, 1 Mood. C. C. 447; *Com.* v. *Butterick*, 100 Mass. 1, 97 Am. Dec. 65; *Com.* v. *Bennett*, 118 Mass. 443; *People* v. *Treadwell*, 69 Cal. 226; *State* v. *Thompson*, 32 La. Ann. 796.

If, then, the indictment in this case had charged that the defendant, being then and there assistant, clerk, or employee in or connected with the business or operations of the United States postoffice in the city of Mobile, embezzled the sum stated, and had further alleged that such sum came into his possession in that capacity, we should have held the in-[276]dictment *sufficient, notwithstanding the general description of the property embezzled as consisting of so many dollars and cents. But if the words charging him with being in the employ of the government be stricken out, then there would be nothing left to show why the property embezzled could not be identified with particularity and the general rule above cited would apply. The indictment would then reduce itself to a simple allegation that the said George S. Moore, at a certain time and place, did embezzle the sum of $1,652.59, money of the United States, of the value, etc., said money being the personal property of the United States, which generality of description would be clearly bad. As there was a demurrer to this count, which was overruled, we do not think the objection is covered by U. S. Rev. Stat. § 1025, or cured by the verdict.

As we hold the indictment in this case to be bad, we find it unnecessary to consider the other errors assigned.

The judgment of the court below is therefore reversed and the case remanded, with directions to quash the indictment.

JOHN KEANE, *Plff. in Err.*,
v.
ANNA SOPHIA BRYGGER, Executrix, and Ole Schillestead, Executor, of the Estate of JOHAN BRYGGER, Deceased.

(See S. C. Reporter's ed. 276-288.)

Relinquishment of homestead entry.

A voluntary formal relinquishment of a homestead entry restores the land to the public domain and makes it subject to selection by others, and their rights are not affected by the fact that the relinquishment was not returned to and noted on the records of the land office until afterwards.

[No. 94.]

Argued December 4, 5, 1895. Decided December 23, 1895.

IN ERROR to the Supreme Court of Washington to review a judgment of that court affirming the judgment of the Superior Court of King County in that State in favor of the plaintiffs, Anna Sophia Brygger *et al.*, executors, against John Keane, defendant, for the recovery of the possession of certain land in that county. *Affirmed.*

Statement by *Mr. Justice* **Field:**

*This is an action for the possession of [277] certain parcels of land in Washington territory, brought in its third judicial district. The land constitutes the southwest quarter of the northwest quarter of section 11 in township 25 north, of range 3 east, in King county, in that territory.

The complaint alleges that one Johan Brygger was, in his lifetime, the owner in fee and entitled to the possession of the land described; that he died in that county and territory on the 20th of November, 1888, the owner in fee and entitled to the possession of the premises; that he left a last will and testament, which was admitted to probate in the probate court of King county, in that territory, on the 20th of December, 1888; that the plaintiff Anna Sophia Brygger was appointed executrix, and the plaintiff Ole Schillestead was appointed executor, of the estate of decedent on the 20th day of December, 1888, and that both qualified and entered upon the discharge of their duties. The plaintiffs also allege that the real property described is assets in their hands for the payment of debts and legacies and expenses of administration, and that they have been in possession of the same since their appointment, and that the decedent, at the time of his death, was in its possession, and had been in actual possession thereof for over ten years before his death; that a part of the dwelling house of the decedent, in which his family resides, is on the property, and that there is on the land a large and costly barn and outhouses, an orchard and garden, and the same is surrounded with a fence, and is mostly improved. And the plaintiffs allege that the defendant, on the 12th of February, A. D. 1889, opened the fences surrounding the land, and with servants and teams and lumber entered upon the same with the declared intention of building a house thereon, and to claim the same, and announced his intention to hold the possession of all the described lands. They also allege that Anna Sophia Brygger is not only executrix of the estate of said Johan Brygger, deceased, but the residuary devisee of all of his estate remaining after the payment of the legacies and bequests mentioned in the will of the decedent; that the plaintiffs' title to the land and the *claim [278] to the possession thereof is as executors of the estate of Johan Brygger, deceased, and that the estate is unsettled, and that legacies, bequests, and expenses of administration are to be paid. That the defendant has threatened to continue the opening and breaking of the fences on the

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

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land, and to continue the hauling of lumber and other materials thereon, and to continue to enter the same by himself and servants, and to erect a house and other buildings thereon.

And the plaintiffs also aver that the orchard and garden and dwelling house, outhouses, and barn are all thereby exposed to destruction or great damage by stock, and the estate of Johan Brygger, deceased, to be greatly impaired; that the defendant is unable to answer in damages for the injury already done and that which is threatened by him, and that there is great danger that he will put the same into execution; and they ask for judgment for the recovery of the land and for an order restraining the defendant, his servants or agents, from interfering with its possession of the land or the improvements thereon, and restraining him or his servants from opening or breaking the fences, or doing other damage thereto during the pendency of this litigation, and for his costs and disbursements to be taxed.

The complaint was filed on the 15th of February, 1889, and on the same day an order was issued by the court directing the defendant to show cause on a day named why a temporary restraining order should not be granted, and in the meantime enjoining him from opening or breaking down the fences enclosing the land, and from entering upon the same with wagons, teams, or otherwise, and from erecting a house or other structure thereon, and from interfering with the buildings or any of them upon the same.

On the 21st of February, 1889, the defendant filed an answer and counterclaim, protesting that the court had not jurisdiction over the subject-matter of the action, and, saving all his rights by reason of the want of such jurisdiction, yet for answer and defense denies each and every allegation of the 1st and 2d paragraphs of the complaint except the allegation as to the place and date of the death of Johan [279] *Brygger; alleging that, as to the 3d paragraph, he has not sufficient knowledge or information upon which to form a belief respecting the allegations therein, and therefore denies each of them; and, answering the 4th paragraph, he denies that the real property therein referred to is assets in the hands of the plaintiffs or any of them for the payment of debts, legacies, and expenses of administration, or of any or either of said matters, or for any purpose whatever, or in any respect or manner whatever. He further denies that the plaintiffs have or that any or either of them has been in the possession of the real property since their or either of their appointment as executrix and executor respectively, as in the complaint set forth, if such appointment has been made, or at any time, or at all, and alleges that if they have or any or either of them has been in such possession the same was at all times wrongful and unlawful and without any color of right. He further denies that Johan Brygger at the time of his death, or at any time, or at all, was in possession of said real property, and alleges that if said Brygger ever was in such possession the same was at all times wrongful and unlawful and without any color of right. And also denies that Johan Brygger was in possession of said real property for over ten years before his death, or for ten years, or for any time, or at all, and alleges that if he ever was in such possession the same was wrongful and unlawful and without any color of right.

The defendant, further answering, alleges that if a part of the dwelling house of Johan Brygger is on the said property the same was wrongfully and unlawfully placed there, and that if the barn, outhouses, orchard, and garden mentioned are upon the property, the same were and each of them was put there wrongfully and unlawfully and without any color of right. And he denies that there is any fence surrounding the land, or that he opened fences surrounding the same, and alleges that the rails temporarily removed by him for the purpose of reaching the land had been wrongfully and unlawfully placed where they were, notwithstanding which he has restored the same to the position in which he had first found them.

And the defendant, answering the 5th paragraph, alleges *that he has not had suffi- [280] cient knowledge or information upon which to form a belief respecting the allegations of any of them therein contained; wherefore he denies the same. And also denies that Johan Brygger ever had any title, legal, equitable, or otherwise, to the land or any part thereof, and denies that the estate of Johan Brygger has or ever had any right, title, interest, or claim in or to the land or any part thereof.

Answering the 7th paragraph of the complaint, the defendant denies that the orchard and garden and dwelling house, outhouses, and barn therein mentioned are, or that any or either of them is, in the least exposed to destruction or damage by stock or otherwise, or to any injury or loss whatsoever by reason of anything done or intended or attempted by the defendant, and denies that the estate of Johan Brygger is thereby exposed in any manner to the least impairment or damage. And he further alleges that he has done and intends to do no damage whatsoever to any fence or fences on the land, if any there are, notwithstanding that the same, if any, have been wrongfully and unlawfully placed thereon without color of right.

Answering the 8th paragraph of the complaint, the defendant denies each and every allegation therein contained, and in particular that any injury has been done or threatened by him to any interest, property, or claim of the plaintiff, and denies that he had any intention to do such injury, and alleges that he is fully able to answer in damages for any injury which can or may arise from his occupation of the land.

And further answering the complaint, and as and for new matter constituting a first and separate defense thereto, the defendant alleges that on and before the 20th day of October, 1888, the land described in the complaint, and 40 acres, according to the United States survey, was unappropriated public land of the United States; that on the date mentioned the defendant was the head of a family, over the age of twenty-one years, and was a citizen of the United States, and had never theretofore taken up or entered any public land of the United States under the homestead laws; *that [281] on the date mentioned, being duly qualified,

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he tendered at the United States land office in Seattle his application to enter and appropriate the land described under the provisions of the homestead laws; that he made application for his exclusive use and benefit, and for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person, and paid to the United States the legal fees in such cases prescribed, and was thereupon duly permitted to enter the land, and did on the day mentioned enter the same; that his entry of the land was thereupon duly made of record, and has ever since continued to be and now is a valid subsisting entry, and that six months have not elapsed since the appropriation of the land by him; and that neither Johan Brygger nor the plaintiffs, nor either of them, ever had or now have any right, title, or interest in the land or any part thereof.

To the 4th paragraph of the defendant's answer, the plaintiffs reply and deny that the possession of Johan Brygger, their testator, or their possession after his death, was wrongful or unlawful or without color of right, and deny that the dwelling house on the property described was wrongfully and unlawfully placed there, or that the barn, outhouses, orchard, and garden on the land were wrongfully or unlawfully placed there; also deny that the rails removed by the defendant had been wrongfully or unlawfully placed where they were; deny also that the defendant was not doing damage; and deny that he did not intend to do any damage to the fence or fences on the land.

In reply to the second defense and counterclaim, they deny that the land described in the 1st paragraph of the defense or counterclaim, being the same as that described in the complaint, was, on and before the 20th day of October, 1888, unappropriated and public land of the United States, and deny that the same has been unappropriated and public land since the 10th day of March, A. D. 1864.

In reply to the 3d paragraph of the defense, the plaintiffs deny that the defendant, on the 20th day of October, A. D. 1888, or at any other time, duly tendered to the United States 282] *land office in Seattle or elsewhere his application to enter or take up or appropriate the land under the provisions of the homestead law.

In reply to paragraph 4 they deny that the defendant was duly permitted to enter the land under the provisions of the homestead law; and deny that his application or entry was duly made of record in the land office mentioned; and that the same has been since or continues to be and now is a valid or subsisting entry and appropriation of the land. And, in reply to the 7th paragraph of the defense, they deny each and every allegation of the same.

On the 9th of August, 1890, the defendant requested the court to find the following facts:

1st. That on the 14th day of February, 1864, and on the 10th day of March, 1864, and at all times in February and March, 1864, the land in controversy was included in homestead entry No. 204, of Lemuel J. Holgate, and was included in and covered by his homestead entry until the 20th day of December, 1871. 2d. That on the 14th day of February, 1864, and on the 10th day of March, 1864, and on the 14th day of March, 1864, and at all times in February and March, 1864, Holgate was living upon the land as a homestead settler and entryman, and improving the same for the purpose of making it his permanent home, and did not leave the same until about December, 1864. 3d. That on the 4th day of April, 1889, the receiver of the United States land office at Seattle, Washington, transmitted to the defendant by unregistered mail, in care of his attorney, a letter to the effect that the Commissioner of the General Land Office held defendant's entry for cancelation, which letter was the first and only notice of the holding or decision given to defendant. 4th. That No. 77 of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior in force at the time, the defendant had thirty days, together with ten days for transmission through the mail to him and from him, from the 4th day of April, 1889, for filing, either in the Seattle land office, or in the office of the Commissioner of the General Land Office, a motion *for[283 rehearing or review of the holding or decision of the Commissioner of the General Land Office; that within the period so allowed by that rule the defendant did file both in the Seattle land office and in the office of the Commissioner of the General Land Office a motion for rehearing and review of the holding and decision. 5th. That before the period had elapsed, and on the 22d day of April, 1889, the Secretary of the Interior certified the land to the University of the Territory of Washington, which certification was subsequently entered of record under the seal of the Commissioner of the General Land Office on the 9th day of May, 1889, and before the period had elapsed within which defendant could legally file his motion for rehearing and review. 6th. That by reason of the certification in the land department the United States lost jurisdiction over the land. 7th. That by the loss of jurisdiction the defendant had no further remedy in the land department. 8th. That the complaint in this action was filed in this court on the 15th day of February, 1889, prior to the time of certification and before the time had elapsed for the defendant to move for such rehearing and review, and before the land department had lost jurisdiction over the land, and while the title to the land was still in the United States. 9th. That on the 11th day of January, 1861, the legislative assembly of the territory of Washington passed an act appointing Daniel Bagley, John Webster, and Edmund Carr a board of commissioners to select, locate, and dispose of lands reserved for university purposes in the territory of Washington by the act of Congress of July 17, 1854.

And the defendant requested the court to find the following conclusions of law: 1st. That by reason of the homestead entry No. 204 of Lemuel J. Holgate remaining uncanceled on the records of the land department until December 20, 1871, the land did not become vacant public land of the United States and subject to selection for the University of the Territory of Washington until the last-named date. 2d. That upon that date it became vacant public lands of the United States,

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and open to pre-emption or homestead settlement, and was so vacant when the defendant filed [284] his homestead entry *thereon. 3d. That by defendant's homestead entry the land was appropriated to him. 4th. That defendant's homestead entry was unlawfully canceled. 5th. That the land was unlawfully certified by the land department to the territory of Washington, and no right passed to the plaintiffs or to their testators, his grantors, by such certification. 6th. That the legal title to the land conveyed by that certification enures to the benefit of the defendant, and the plaintiffs hold the same in trust for him. 7th. That the defendant is entitled to a decree for the conveyance of the legal title to him, and for the dismissal of this action, and for the dissolution of the temporary restraining order heretofore issued in this cause.

The issues involved in this cause came on to a hearing on the 18th and 19th days of June, 1890, in the superior court of King county, state of Washington, upon the pleadings and evidence taken, and the court found that said tract of land was selected by the territory of Washington, through its university commissioners, on the 10th day of March, 1864, as university lands, and that the university commissioners did upon that date execute and deliver to one John Ross a deed to the land in controversy for the consideration of $240, paid by him to them; that on the 4th day of April, A. D. 1876, Ross sold and conveyed the lands by deed to Johan Brygger, the testator herein, and that both of the deeds were duly recorded; that prior to the year 1864 one Lemuel Holgate had made a homestead filing on the land in controversy, but that he had relinquished his right, title, and interest in and to the same in the month of February, 1864; that the university commissioners filed a list of such selections in the local land office in the territory, which list was known and recognized in the land department of the government as list number 2, and that the same was filed in the proper local land office in March, 1867, and that in that list the land was located and selected for university purposes; that on the 22d day of April, A. D. 1889, the Secretary of the Interior issued his certificate under the act of Congress approved March 14, 1869, after due proof, including the land in controversy, and approving the same as a grant [285] in fee simple *to the territory and to its vendees, under and by virtue of said act; that on or about October 20, A. D. 1888, the plaintiff in error entered his homestead filing in the land office at Seattle, on the land in controversy, and that in February, 1889, he took up his residence on a portion of the land and erected a building on the same; that prior to the erection of that building defendants in error notified him of their rights, claims, and titles to the land.

The contest between the parties to the premises in controversy arises from a claim made by each of them to a segregation of a portion of such lands for a homestead under the act of Congress of July 17, 1854.

Messrs. **James K. Redington, S. F. Phillips,** and *Frederic D. McKenney* for plaintiff in error.

Messrs. **Charles K. Jenner** and *Louis Henry Legg* for defendants in error.

Mr. Justice **Field,** after stating the facts as above and referring to the act of Congress mentioned, reserving to the states, respectively, certain lands for university purposes and authorizing each of the states named to appoint commissioners for the selection and location of such lands, delivered the opinion of the court as follows:

By the 4th section of the act of July 17, 1854, referred to (10 Stat. at L. 305), it is provided "that, in lieu of the two townships of land granted to the territory of Oregon by the 10th section of the act of 1850 for universities, there shall be reserved to each of the territories of Washington and Oregon two townships of land of 36 sections each, to be selected in legal subdivisions, for university purposes, under direction of the legislatures of said territories, respectively."

On the 11th day of January, 1861, the legislative assembly of the territory of Washington passed an act appointing a board of commissioners to select, locate, and dispose of lands *reserved for university purposes in the [286] territory of Washington by the act of Congress quoted.

It appears, from an examination of the proceedings read in connection with the legislation of Congress and the action of the commissioners of the state, that a doubt was created as to the legality of the conveyance by the commissioners of the land in controversy, to John Ross, from the fact that, previous to that conveyance, one Lemuel J. Holgate had filed upon and entered as a homestead the land described, which was not canceled until December 20, 1871. It appears that Holgate executed a relinquishment of his homestead entry upon the land previous to the execution by the commissioners of their conveyance of the same to John Ross. That relinquishment was executed and delivered in February, 1864, and the selection of lands by the university commissioners was on the 10th day of March, 1864. But it is contended by the plaintiff that the relinquishment was in effect a quitclaim from Holgate to Ross, as there was no provision for a voluntary relinquishment prior to May 14, 1890, and that the only way by which lands once filed on under the homestead acts could be restored to the public domain was either by lapse of time or by contest.

But this position is not sustained by the judgment of the Secretary of the Interior, nor was it in harmony with the rulings of the land department. In its legal effect the relinquishment by Holgate was to the United States.

Section 1 of the act of May 14, 1880, provides "that when a pre-emption, homestead, or timber culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office;" and, as held by the Commissioner, the effect of the law was to give authority to local land offices to cancel the entry at once without awaiting the action of the Commissioner of the General Land Office as had been, preceding that time, its custom.

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As stated by the Commissioner, it had pre-
287] viously been the *uniform practice of the land department to cancel entries on the voluntary relinquishment of the entryman, and it would be a strange doctrine to announce that a party did not have the right to relinquish any right that he had to or in any property, and that it was the intention of the government to compel its citizens to go to the expense and delay of a contest to extinguish an interest of another citizen who was willing to make a disclaimer of that interest.

He very justly remarks that the object of the homestead law was to furnish homes to the citizens of the government and to encourage the settlement of its public domain, and to make the accession of these homes as easy and cheap as possible, and not to wantonly and senselessly place obstructions in the way of such acquisition. He observed that it is the policy of the government to protect the rights of the homestead claimant while he is endeavoring to comply with the requirements of the law; but when the government becomes satisfied that there has been an abandonment of such right by the applicant, the entry will be canceled, and the land will be subject to the re-entry of some one who will comply with the law, and that the question whether or not there has been an abandonment must be determined, like every other question of the kind, by evidence, and there certainly could be no higher or more convincing testimony than the testimony of the applicant himself, by a formal relinquishment of his rights to the land indorsed on his original receipt and filed in the land office. Secretary Teller well said that the fact that Holgate's relinquishment was not returned to and noted on the records of the land office until 1861 showed irregularity on the part of the local officers, but could not affect the rights of the university.

It appearing, therefore, that the action of the board of university commissioners, in conveying to John Ross the land involved in this case, who subsequently conveyed it to Johan Brygger, under whose will the appellees claim title to the same, was in conformity with the act of Congress of July 17, 1854 (10 Stat. at L. 305, § 4), and the amendatory act of March 14, 1864 (13 Stat. at L. 28), this court finds no error
288] in the decision *of the supreme court of the state of Washington, and *its judgment is hereby affirmed.*

JERSEY CITY & BERGEN RAILROAD COMPANY, *Plff in Err.*,
v.
JAMES E. MORGAN.

(See S. C. Reporter's ed. 288-293.)

Worn silver coin—Federal question.

1. So long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value.
2. A claim in a state court by defendant that a coin was not legal tender under the laws of the United States because it was worn smooth by circulation, without setting up any right under any statute of the United States as to the effect of the reduction in weight, will not give this court jurisdiction to review the state judgment.

[No. 97.]

Submitted December 2, 1895. Decided December 23, 1895.

IN ERROR to the Supreme Court of the State of New Jersey to review a judgment of that court affirming the judgment of the Circuit Court of Hudson County, New Jersey, in favor of plaintiff, James E. Morgan, against the defendant, the Jersey City & Bergen Railroad Company, for damages for his ejection from a street car of said company. *Dismissed.*

See same case below, 52 N. J. L. 60, 558.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action of trespass brought by James E. Morgan against the Jersey City & Bergen Railroad Company in the circuit court of Hudson county, New Jersey, to recover damages for his ejection from a street car of the company by the conductor thereof. The defendant pleaded the general issue and a special plea of *molliter manus imposuit* in defense of possession, to which plaintiff filed a replication *de injuria.* Issues were joined accordingly. There was verdict and judgment for plaintiff, which was affirmed on error by the supreme court (52 N. J. L. 60); that judgment was affirmed by the court of errors and appeals for the reasons given by the court below (52 N. J. L. 558); the record remitted to the supreme court; and this writ of error allowed.

The facts were that the company was running a horse-car railroad in certain streets of Jersey City; that plaintiff and his *wife entered
289] one of the cars, and, after riding a short distance, plaintiff handed to the conductor a ten cent piece, which was the requisite amount for two fares, but the conductor refused to receive the coin because it was worn smooth. Plaintiff protested, paid his wife's fare of five cents, and, on refusal to pay for himself with any other money than the dime he had offered, was ejected from the car. Thereupon this action was brought. The foregoing facts were proved, and, as stated by the supreme court, the coin was shown to the jury, and it did not appear in the evidence to have been so worn that it was light in weight or not distinguishable as a genuine dime: nor was it defaced, cut, or mutilated, but only made smooth by constant and long-continued handling while being circulated as part of the national currency. At the close of the evidence, defendant's counsel asked the court "to direct the jury to bring in a verdict for defendant on the ground that the coin was not a current coin, one that was not mutilated, a perfect coin, one that is

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NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

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worth its face value." The trial judge remarked: "It is not mutilated in the ordinary sense. Mutilation implies the taking away of some part. It is not mutilated in the ordinary sense of the term; a portion of it is gone only by use, by currency, and that happens to any coin after it has passed through numerous hands. How soon after use, such use as the government intends,—how soon does the coin cease to be coin? I have looked into the statutes and am unable to find any limitation upon the legal-tender character of silver coin; there is an express limitation on the gold coin, and that is when its circulation has resulted in the loss of one half of one per cent of its standard weight for twenty years of circulation. But that limitation does not extend to silver coin, and the provision of the statutes is that silver coin shall be lawful tender so long as it remains lawful money of the country;" and overruled the motion to direct the verdict for the defendant, who excepted. The judge charged the jury, among other things, as follows: "The first question to decide is whether the plaintiff tendered his lawful fare. He tendered this ten cent piece, a genuine and recognizable **290**]coin of the *United States, and that was his lawful fare, provided you believe that the coin is in the condition in which it was when issued from the mint, except as it has been changed by proper use. If there has been no other abrasion, no other wearing away, no other defacement of that coin, except such as it has received in passing from hand to hand, then it is still, under the laws of the country, a good ten cent piece and was the fare of the plaintiff. If you think it has been otherwise changed, wilfully changed, by being rubbed, or in any other way, why then it has ceased to be a lawful coin of the country; it has ceased to be lawful tender. This distinction rests upon the idea that the government issues this coin for circulation, and if the government does not choose to put any limit upon the circulation it shall receive it continues to be legal tender just as long as it is circulating and receiving only such injury as circulation gives. Every piece of money that passes through our hands is to some extent abraded thereby, and the government knows and expects that its coin will be abraded, will be worn, and will be in that way defaced, and the government does not withdraw coin that is only defaced in that way; it is still a legal tender. But if anybody chooses to resort to any other means of defacement, then the government does not any longer sanction that coin. But so long as it is only defaced by lawful use, this coin remains good current coin and lawful tender for all debts. Now if you believe that is the character of this ten cent piece, then this plaintiff lawfully tendered his fare. If you do not believe that it is of that sort, then plaintiff did not lawfully tender his fare."

To this portion of the charge defendant excepted.

The following are sections of the Revised Statutes:

"§ 3505. Any gold coins of the United States, if reduced in weight by natural abrasion not more than one half of one per centum below the standard weight prescribed by law, after a circulation of twenty years, as shown by the date of coinage, and at a ratable proportion for any period less than twenty years, shall be received at their nominal value by the United States Treasury and its offices, under such regulations as the Secretary of the Treasury may prescribe for the *protection [**291** of the government against fraudulent abrasion or other practices."

"§ 3511. The gold coins of the United States shall be a one dollar piece, which, at the standard weight of twenty-five and eight tenths grains, shall be the unit of value; a quarter eagle, or two and a half dollar piece; a three dollar piece; a half eagle or five dollar piece; an eagle or ten dollar piece; and a double eagle or twenty dollar piece. And the standard weight of the gold dollar shall be twenty-five and eight tenths grains; of the quarter eagle or two and a half dollar piece, sixty-four and a half grains; of the three dollar piece, seventy-seven and four tenths grains; of the half eagle or five dollar piece, one hundred and twenty-nine grains; of the eagle or ten dollar piece, two hundred and fifty-eight grains; of the double eagle or twenty dollar piece, five hundred and sixteen grains."

[Section 3513 enumerates the dime or ten cent piece among the silver coins of the United States.]

"§ 3585. The gold coins of the United States shall be a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced in weight below such standard and tolerance, shall be a legal tender at valuation in proportion to their actual weight."

"§ 3586. The silver coins of the United States shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment."

The 1st and 3d sections of the act of June 9, 1879 (21 Stat. at L. 7, chap. 12), are as follows:

"That the holder of any of the silver coins of the United States of smaller denominations than one dollar may, on presentation of the same in sums of twenty dollars, or any multiple thereof, at the office of the Treasurer or any assistant treasurer of the United States, receive therefor lawful money of the United States."

"§ 3. That the present silver coins of the United States of smaller denominations than one dollar shall hereafter be a legal tender in all sums not exceeding ten dollars in full payment of all dues, public and private."

Mr. A. Q. Garretson* for plaintiff[292** in error.

Mr. **Thomas J. Kennedy** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The supreme court of New Jersey, after referring to the legislation of Congress above quoted, said: "This particularity in the limitation and allowance as to gold coin is not found in the case of natural abrasion in silver coin. This difference is very noticeable and important in a question of statutory construction and legislative intention. It seems by these statutes, that so long as a genuine silver coin is

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worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value. *United States* v. *Lissner*, 12 Fed. Rep. 840." The instructions of the trial court were therefore sustained and the judgment affirmed.

By U. S. Rev. Stat. § 709, a final judgment or decree in any suit in the highest court of a state in which a decision could be had may be re-examined and reversed or affirmed in this court upon a writ of error, where, among other things, "any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute thereof, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority." Neither in defendant's pleadings, nor in the motion to direct the jury to find for defendant, nor in the objection and exception to the instructions, was any such right specially set up or claimed. The claim which defendant now states it relied on is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the state 293]courts so adjudged, "the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it. *Missouri* v. *Andriano*, 138 U. S. 496 [34: 1012], and cases cited. And, although denying plaintiff's claim, defendant did not pretend to set up any right it had under any statute of the United States in reference to the effect of reduction in weight of silver coin by natural abrasion.

No other ground of jurisdiction under § 709 is suggested, and this is insufficient to maintain it.

Writ of error dismissed.

HENRY KOHL, *Appt.*,
v.
HERMAN LEHLBACK, Sheriff of Essex County, New Jersey.

(See S. C. Reporter's ed. 293-303.)

Sufficiency of indictment—appeal—refusal of writ of error—denial of right of review—alien juror—habeas corpus.

1. Where the state court has jurisdiction of the offense charged and of the accused, it is for that court to determine whether the indictment sufficiently charges the crime of murder in the first degree and this court will not review its decision by habeas corpus proceedings.
2. An appeal to a higher court from a judgment of conviction is not a matter of absolute right independently of constitutional or statutory provisions allowing it, and a state may accord it to a person convicted of crime upon such terms as it thinks proper.
3. The refusal of a state court to grant a writ of error to a person convicted of murder will not itself warrant a court of the United States in interfering in his behalf by writ of habeas corpus.
4. The denial by a state court of the right of review in an appellate court in a criminal case constitutes no violation of the Constitution of the United States.
5. That one of the jurors in a criminal case was an alien, although cause of challenge, is not a denial of due process of law or of the equal protection of the laws to the person convicted.

[No. 650.]

Argued December 13, 1895. Decided December 23, 1895.

APPEAL from an order of the Circuit Court of the United States for the District of New Jersey denying a writ of habeas corpus on the petition of Henry Kohl therefor. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This is an appeal from an order of the circuit court of the United States for the district of New Jersey, entered May 16, 1895, denying a writ of habeas corpus on the petition of Henry Kohl therefor. Petitioner represented that he was indicted in the court of oyer and terminer and general jail delivery of Essex county, New Jersey, for the crime of murder, in December, 1894; that he moved to quash the indictment, which motion was denied, and an exception duly taken; that his trial commenced January 14 and ended January 25, 1895, in the rendition of a verdict of murder in the first degree; that on February 12 application was made for a new trial, and rule to show cause was granted and discharged February 14, 1895; that he was sentenced February 21, to be hanged on March 21, 1895; and that he was unlawfully held in imprisonment by Herman Lehlback, sheriff of Essex county, by virtue of said sentence.

It was also averred that "Samuel Ader, a juror on the jury that convicted your petitioner, is not and never was a citizen of the United States of America;" and that petitioner was restrained of his liberty in violation of the Constitution and laws of the United States and of the state of New Jersey in that petitioner was indicted for an offense having no existence under the laws of New Jersey, which recognized no such crime as murder, the common-law crime of murder having been divided by statute into two degrees, and the indictment not having distinctly set out the statutory crime.

Petitioner further showed that on the 27th day of February application for a writ of error was made to the chancellor of New Jersey, which was denied, and "that an appeal had been duly taken from the order of the said chancellor to the court of errors and appeals, where such appeals are reviewable, and said appeal

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NOTE.—*When habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of,*—see note to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus, see note to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

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is now pending in said court of errors and appeals in the state of New Jersey." It was further represented that petitioner was entitled, 295]and *desired, to have the verdict and all the proceedings on his trial, various objections and exceptions thereto having been made and taken adjudicated by the highest courts of New Jersey; "that on the sixth day of April last past your petitioner's counsel, in open court, in the said Essex oyer and terminer, in the presence of the prosecutor, presented a writ of error, signed by the clerk of the supreme court of New Jersey, sealed with the seal of said court, from the said supreme court to the said oyer and terminer; that the said court would not allow the writ, but permitted it to be filed with the clerk of said court. That said writ was presented under and by virtue of the act of 1881 of New Jersey. That the said act is valid and effectual; that the act of 1878 of New Jersey made writs of error writs of right in all cases;" and further, "that the presiding judge of the said oyer and terminer court has instructed the clerk of Essex county, who is the clerk of said oyer and terminer, not to furnish your petitioner's counsel with a copy of the record and proceedings in this case; that the supreme court of New Jersey has refused your petitioner a stay of execution, and your petitioner has exhausted all remedies in the state court."

The petition then assigned in repetition the several grounds on which it was contended that the conviction was unlawful, to the effect that the indictment was insufficient; that petitioner had been denied by the state of New Jersey the equal protection of the laws; and that petitioner's conviction not only was in violation of the laws of New Jersey but of the 14th Amendment of the Constitution of the United States, because not by due process of law. And it was further alleged that, under and by virtue of the sentence, the sheriff of Essex county threatened to execute the sentence of death on the petitioner, May 16, to which time he had been reprieved.

Messrs. **Arthur English** and *Thomas S. Henry* for appellant.

Mr. **Elvin W. Crane** for appellee.

296] **Mr. Chief Justice* **Fuller** delivered the opinion of the court:

In *Whitten* v. *Tomlinson*, 160 U. S. 231 [*ante*, 406], the power vested in the courts and judges oft he United States to grant writs of habeas corpus for the purpose of inquiring into the cause of the restraint of liberty of persons held in custody under state authority, in alleged violation of the Constitution, laws, or treaties of the United States, is considered, and the principles which should govern their action in the exercise of this power stated; and attention is there called to the necessary and settled rule that, "in a petition for a writ of habeas corpus, verified by the oath of the petitioner, as required by U. S. Rev. Stat. § 754, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence, but no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous;" and that "the general allegations in the petition, that the petitioner is detained in violation of the Constitution and laws of the United States, and of the Constitution and laws of the particular state, and is held without due process of law, are averments of mere conclusions of law and not of matters of fact. *Re Cuddy*, 131 U. S. 280, 286 [33: 154,157].

1. Having jurisdiction of the offense charged and of the accused, it was for the state courts to determine whether the indictment in this case sufficiently charged the crime of murder in the first degree. *Caldwell* v. *Texas*, 137 U. S. 692, 698 [34: 816,818]; *Bergemann* v. *Backer*, 157 U. S. 655 [39: 845].

In the latter case it was decided, in reference to a similar objection to the indictment to that made here, and upon an examination of the statutes and judicial decisions of the highest courts of New Jersey, that it could not be held that the accused was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the 14th Amendment to the Constitution. *Graves* v. *State*, 45 N. J. L. 203, 358; *Titus* v. *State*, 49 N. J. L. 36. We do not deem it necessary to reconsider in this case the conclusion there reached.

*2. In *McKane* v. *Durston*, 153 U. S. 684 [297 [38: 867], we held that an appeal to a higher court from a judgment of conviction is not a matter of absolute right independently of constitutional or statutory provisions allowing it, and that a state may accord it to a person convicted of crime upon such terms as it thinks proper; and in *Bergemann* v. *Backer*, *supra*, that the refusal of the courts of New Jersey to grant a writ of error to a person convicted of murder, or to stay the execution of a sentence, will not itself warrant a court of the United States in interfering in his behalf by writ of habeas corpus.

Appellant insists that he has been denied the equal protection of the laws because he has been deprived of a writ of error for the review of the record and proceedings in his case in violation of the laws of New Jersey.

Section 83 of the criminal procedure act of New Jersey, brought forward from § 13 of an act of March 6, 1795 (Paterson's N. J. Laws, 162), provided that "writs of error in all criminal cases not punishable with death shall be considered as writs of right, and issue of course; and in criminal cases punishable with death writs of error shall be considered as writs of grace, and shall not issue but by order of the chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the attorney general or the prosecutor for the state." N. J. Rev. 283. By an act approved March 12, 1878, this section was amended so as to read: "Writs of error in all criminal cases shall be considered as writs of right, and issue of course; but in criminal cases punishable with death, writs of error shall be issued out of and returnable to the court of errors and appeals alone, and shall be heard and determined at the term of said court next after the judgment of the court below, unless, for good reasons, the court of errors and appeals shall continue the cause to any subsequent term." N. J. Rev. Supp. 209, 210.

In *Entries* v. *State*, 47 N. J. L. 140, a writ

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of error under this act was dismissed by the court of errors and appeals, the court holding that such a writ would not go directly from that court to the oyer and terminer, and that "the legislature cannot sanction such a proceed- [298] ing, as it is one of the prerogatives *of the supreme court to exercise, in the first instance, jurisdiction in such cases."

By an act of March 9, 1881, it was provided in the 1st section that "in case a writ of error shall be brought to remove any judgment rendered in any criminal action or proceeding, in any court of this state, and such writ of error shall be presented to such court, the said writ of error shall have the effect of staying all proceedings upon the said judgment, and upon the sentence which the court or any judge thereof may have pronounced against the person or persons obtaining and prosecuting the said writ of error, pending and during the prosecution of such writ of error;" and by the 2d section, that pending the prosecution of such writ of error, the court may require the party prosecuting the writ to give bail, "*provided*, that this section of this act shall not apply to capital cases." N. J. Rev. Supp. 210. And by an act passed May 9, 1894, it was provided that the entire record of the proceedings on the trial of any criminal cause might be returned by the plaintiff in error with the writ of error and form part thereof, and if it appeared from said record that the plaintiff in error had suffered manifest wrong or injury in the matters therein referred to, the appellate court might order a new trial. N. J. Laws 1894, 246.

Clearly whether a writ of error in criminal cases punishable with death can or cannot be prosecuted under these various acts, unless allowed by the chancellor of the state under § 88 of the criminal procedure act, and, if so, under what circumstances and on what conditions, are matters for the state courts to determine. Petitioner alleged that an appeal from the chancellor's order refusing a writ of error was pending in the court of errors and appeals, and also that a writ of error signed by the clerk of the supreme court of New Jersey, and sealed with the seal of that court, from the supreme court to the oyer and terminer, had been presented to the latter court under the act of 1881, but that the court of oyer and terminer would not allow the writ, and instructed its clerk not to furnish a copy of the record and proceedings. It is, however, averred that the [299] supreme court had refused a stay *of execution, so that it would appear that if that court really issued a writ of error, it had either arrived at the conclusion that this was improvidently done or that for other reasons it could not be maintained.

And the petition set up no action by the supreme court to compel its writ to be respected and no effort on petitioner's part to procure such action, nor any effort to supply a copy of the record and proceedings. *Ableman* v. *Booth*, 62 U. S. 21 How. 506, 512 [16: 169,172].

The averments in reference to this matter are so vague and indefinite that interference might well be declined for that reason. At all events, inasmuch as the right of review in an appellate court is purely a matter of state concern, we can neither anticipate nor overrule the action of the state courts in that regard, since a denial of the right altogether would constitute no violation of the Constitution of the United States. What petitioner asks us to do is to construe the laws of New Jersey for ourselves, hold that they give a writ of error to the supreme court, and discharge petitioner on the ground, either that the courts of New Jersey have arrived at a different conclusion and denied the writ, or have granted it and refused to make it effectual. In either aspect, we are unable thus to revise the proceedings in those courts.

3. It is further contended that the petitioner was denied due process of law and the equal protection of the laws in that one of the jurors by whom he was tried was an alien. The allegation of the petition is "that Samuel Ader, a juror on the jury that convicted your petitioner, is not and never was a citizen of the United States of America."

Nothing is said as to when this matter came to petitioner's knowledge, and, for ought that appears, it may have been inquired into by the courts of New Jersey, and the fact determined to be otherwise than alleged, or the objection may have been raised after verdict and overruled because coming too late. The statute of New Jersey provides that every petit juror returned for the trial of any action of a criminal nature shall be a citizen of the state, and resident within the county from which he shall be taken, and above the age of *twenty- [300] one and under the age of sixty-five years; and if any person who is not so qualified shall be summoned as a juror on a trial of any such action in any of the courts of the state, it shall be good cause of challenge to any such juror, "*Provided*, That no exception to any such juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he has been sworn or affirmed." N. J. Rev. 532. This proviso is brought forward from an act of November 10, 1797 (N. J. Acts, 22d Gen. Assem. 1797, 250). The Constitution of New Jersey of 1776 provided that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever." And the Constitution of 1844 declares that "the right of trial by jury shall remain inviolate." It is urged that the above-mentioned proviso, which has been part of the laws of New Jersey for nearly one hundred years, should now be held by this court contrary to the Constitution of that state, although the courts of the state may have held it in this case in harmony therewith, and have certainly not pronounced it invalid.

The line of argument seems to be that by the common law as obtaining in New Jersey an alien was disqualified from serving on a jury; that the disqualification was absolute; that the common law could not be changed in that particular under the state Constitution; that the proviso was therefore void; and that, if an alien sat upon a jury, the common-law right of trial by jury would have been invaded. So far as the petition shows, this contention may have been disposed of adversely to petitioner by the state courts; and moreover, we are of opinion that in itself it cannot be sustained as involving an infraction of the Constitution of the United States.

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In *Hollingsworth* v. *Duane*, reported in Wall. C. C. 147, and also, but imperfectly, in 4 Dall. 353 [1: 864], it was held by the circuit court of the United States for the eastern district of Pennsylvania, at October term, 1801, that alienage of a juror is cause of challenge, but is not *per se* sufficient to set aside a verdict, and this whether the party complaining knew of the fact or not; and that this was the rule at common law as shown by authorities cited from the Year Books and otherwise.

301]*In *Wassum* v. *Feeney*, 121 Mass. 93, 23 Am. Rep. 258, the supreme judicial court of Massachusetts held that "a verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and impaneled, though the losing party did not know of the infancy until after the verdict." And Mr. Justice Gray, then chief justice of Massachusetts, delivering the opinion, said: "When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relation (*Jeffries* v. *Randall*, 14 Mass. 205; *Woodward* v. *Dean*, 113 Mass. 297), but, even in a capital case, to a juror who was not of the country or vicinage, as required by the Constitution. Declaration of Rights, art. 13; *Anonymous*, cited by Jackson, J., in 1 Pick. 41, 42. The same rule has been applied by other courts to disqualification by reason of alienage, although not in fact known until after verdict. *Hollingsworth* v. *Duane*, 4 U. S. 4 Dall. 353 [1: 864], Wall. C. C. 147; *State* v. *Quarrel*, 2 Bay, 150, 1 Am. Dec. 637; *Presbury* v. *Com.* 9 Dana, 203; *Rex* v. *Sutton*, 8 Barn. & C. 417, same case, *nom. Rex* v. *Despard*, 2 Man. & R. 406. In *Re Chelsea Waterworks Co.* 10 Exch. 731, Baron Parke said: 'In the case of a trial by jury *de medietate linguæ*, which by the 47th section of the jury act is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet if he was found guilty, and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them.' See also *Case of a Juryman*, 12 East, 231, *note; Hill* v. *Yates*, 12 East, 229."

The great weight of authority is to that effect, 302]† though *there are a few cases to the contrary. Thus in *Guykowski* v. *People*, 2 Ill. 476, it was held that a new trial should be granted because one of the jurors was an alien when sworn, of which fact the defendant was ignorant at the time; but in *Greenup* v. *Stoker*, 8 Ill. 202, the supreme court of Illinois, through Purple, J., reluctantly concluded that it was not indispensable to hold that that case was not the law, but limited its application to capital cases; and in *Chase* v. *People*, 40 Ill. 352, it was finally overruled. Mr. Justice Breese spoke for the court, and it was held that alienage in a juror was not a positive disqualification, but ground of exemption or of challenge and nothing more.

It has been held that, under the Constitution of New York, the defendant in a capital case cannot consent to be tried by less than a full jury of twelve men (*Cancemi* v. *People*, 18 N. Y. 128), and that, under the Constitution of California, a law authorizing a change of the place of trial of a criminal action to another county than that where the crime was committed, on application of the prosecution without defendant's consent, was invalid (*People* v. *Powell*, 87 Cal. 348, 11 L. R. A. 75); but in neither of these cases was it intimated that objection to individual jurors could not be waived by the accused, or that trial by jury would be violated if persons who were open to challenge happened to be impaneled. The disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if, voluntarily or through negligence or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it. *United States* v. *Gale*, 109 U. S. 65, 72 [27: 857, 859]. Whether, where the defendant is without fault and may have been prejudiced, a new trial may not be granted on such ground, is another question. That is not the inquiry here, but whether the law of New Jersey is invalid under the Constitution of that state, and this judgment void because one of the jurors who tried petitioner may have been an alien. If, prior to the filing of the petition, the objection had been *brought before the state 303] courts and overruled, we perceive no reason for declining to be bound by their view of the effect of the state Constitution; and, if the matter had not been called to their attention, it does not appear why that should not have been or should not now be done.

In any view, we cannot hold, on this petition, that petitioner has been denied due process of law or that protection of the laws accorded to all others similarly situated.

The circuit court was right in declining by writ of habeas corpus to obstruct the ordinary administration of the criminal laws of New Jersey through the tribunals of that state in *Wood* v. *Brush* ("*Re Wood*") 140 U. S. 278, 289 [35: 505, 509], and *its order is affirmed.*

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†Wharton's Case, Yelv. 24; 1 Co. Inst. 158a; 21 Vin. Abr. 274, *Trial*; 2 Hale, P. C. chap. 38, 271; 2 Hawk P. C. 568, 572; Queen v. Hepburn, 11 U. S. 7 Cranch, 290 [3: 348]; Brewer v. Jacobs, 22 Fed. Rep. 217; Gillespie v. State, 8 Yerg. 507, 29 Am. Dec. 137; Costly v. State, 19 Ga. 614, 628; Siller v. Cooper, 4 Bibb, 90; State v. Bunger, 14 La. Ann. 465; State v. Beeder, 44 La. Ann. 1007; Forman v. Hunter, 59 Iowa, 550; State v. Patrick, 3 Jones, L. 443; Brown v. State, 52 Ala. 345; Brown v. People, 20 Colo. 168; State v. Jackson, 27 Kan. 581, 41 Am. Rep. 424, and cases there collected.

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WILLIAM HAWS ET AL., *Appts.*,
v.
VICTORIA COPPER MINING COMPANY.

(See S. C. Reporter's ed. 303-319.)

Jurisdiction of this court—order on new trial—description of property—objection—suit for mining claim—notice of location—marking boundaries—testimony.

1. Under the act of April 7, 1874 (18 Stat. at L. 27), the jurisdiction of this court on appeal from the judgment of a territorial supreme court is limited to determining whether the facts found are sufficient to sustain the judgment, and to reviewing the rulings of the court on the admission or rejection of testimony, when exceptions have been duly taken.
2. The objection that the trial court did not consider, on the motion for new trial, affidavits of newly discovered evidence, is answered by the order which recites that it was heard upon such affidavits.
3. Findings sufficiently describe property where the judgment and complaint together furnish means to identify the property.
4. A party cannot avail himself on appeal of the objection that a finding is not supported by the evidence, where he omits to object in the trial court to such finding and thereby causes the omission from the record of the testimony in supporting it.
5. An employee who makes a relocation of a mining claim on which he is employed to work, and takes forcible possession thereof, cannot set up any flaw in the title of his employer, in an action by the latter to recover possession.
6. A notice of mining location is not required to be recorded when there is no mining district recorder, and the rules and regulations of the district are no longer in force and effect.
7. Mining locations distinctly marked on the ground so that their boundaries can be readily traced are sufficient under U. S. Rev. Stat. § 2324, as against subsequent locators, irrespective of the posting of notices.
8. Testimony of the amount expended in working a mine, by plaintiff in an action to recover it, is admissible in view of U. S. Rev. Stat. § 2324, requiring a certain amount of labor in improvements on it each year.

[No. 66.]

Argued November 15, 18, 1895. Decided December 23, 1895.

APPEAL from a judgment of the Supreme Court of the Territory of Utah, affirming a judgment of a lower court of that territory in favor of the plaintiff, the Victoria Copper Mining Company, against William Haws *et al.*, defendants, for the recovery of two mining claims. *Affirmed.*

See same case below, 7 Utah, 515.

304] *The facts are stated in the opinion.

Messrs. **Frederic D. McKenney**, *S. F. Phillips*, *Charles H. Toll*, and *D. V. Burns* for appellants.

Messrs. **C. H. Armes**, **A. A. Birney**, and *C. C. Dey* for appellee.

NOTE.—*As to ownership of mines; United States statutes as to right of support of surface,*—see note to United States v. Castillero, 17: 448.

As to title to water by appropriation; common-law rule; rule of mining states,—see note to Atchison v. Peterson, 22: 414.

Mr. Justice **White** delivered the opinion of the court:

The Victoria Copper Mining Company, a corporation created under the laws of the state of Illinois, brought its action to recover possession of two mining claims known as the "Antietam lode" and the "Copper the Ace lode." The mines thus designated were fully and specifically described in the complaint, which averred that the defendant had by force and violence ousted the complainants from the property. In addition to the averments essential to justify a judgment for possession, the complaint contained allegations deemed to be sufficient to authorize the granting of an injunction, which was prayed for, restraining the defendant from taking or shipping or selling ore extracted or to be extracted from the mines in controversy. The prayer of the complaint was for possession and $25,000 damages, the value of ore averred to have been previously unlawfully taken by the defendants. The defendants jointly answered, specifically denying each allegation of the complaint, and by cross-complaint, Edward W. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael Smith alleged that they were the owners in fee of the mines, subject to the paramount title of the United States, and they prayed that their title be quieted. The averments of the cross-bill were traversed by specific denials. Upon these issues, a jury having first been waived, the case was tried by the court, which found the following facts, which findings were tantamount to concluding that the averments of the bill of complaint had been proved:

"*Findings of Fact.*

"First. That Lewis R. Dyer, the locator of the two mining claims described in the complaint herein, called respectively "Antie-[305 tam lode' and 'Copper the Ace lode,' and situated in Uintah county, territory of Utah, at and prior to the time of locating the same, discovered and appropriated a mineral vein or lode of rock in place.

"Second. That at the time of discovery of said vein or lode and the location of said mining claims, the land included within the boundaries of said mining claims was public mineral land, wholly unoccupied and unclaimed.

"Third. That after the discovery of said vein or lode or mineral-bearing rock in place, to wit, on the 17th day of September, 1887, said Lewis R. Dyer, being a citizen of the United States, located the two mining claims described in the complaint herein by writing on a tree standing at, or in close proximity to, the place or places of discovery of said vein or lode the two notices of location, one for each of said claims.

"Fourth. That said notices each described the respective claims by reference to said tree; also respectively described the boundaries of each claim by courses and distances from said tree; that each of said notices contained the name of the locator and date of location; that said tree was a sufficient natural object by which said claims and each of them could be identified.

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"Fifth. That soon after the writing of said notices of location and during the month of September, 1887, said Dyer marked sufficiently on the ground the boundaries of said mining claims and each of them by setting suitable stakes or posts at the corners of each of said claims; also at the center of the respective side lines of each of said claims; also by writing on the stakes to identify them with reference to the respective claims, and securing said stakes by stones piled around them.

"Sixth. That thereafter, on the 18th day of February, 1888, said Dyer caused a copy of said location notices and each of them to be recorded in the office of the county recorder of said county of Uintah; that there was not at that time, or at the time of locating said claims, any mining district recorder; that said mining claims were situated in what had 306] *been known as the 'Carbonate mining district;' that the rules and regulations of said mining district had long prior to the 17th day of September, 1887, fallen into disuse, and were not then, or for a long time prior thereto had not been, in force and effect.

"Seventh. That the plaintiff is a corporation duly organized and existing under the laws of the state of Illinois, and was so organized on the 15th day of May, 1888.

"Eighth. That on the 4th day of May, 1888, said Lewis R. Dyer duly transferred an equal undivided one half of said mining claims, and each of them, to Edward A. Ferguson and August Bohn, Jr., and that thereafter, to wit, on the 28th day of May, 1888, said Lewis R. Dyer, Edward A. Ferguson, and August Bohn, Jr., duly transferred and conveyed said mining claims and each of them to the plaintiff company.

Ninth. That since said 17th day of September, 1887, until the 10th day of June, 1889, said Dyer and his grantee, the plaintiff herein, continuously worked upon and improved said mining claims and each of them, and actually possessed the same, and have expended in said work and improvements upward of the sum of $7,000; that said mining claims are contiguous to each other, and were worked jointly and in common; that the work done and improvements made on said claims were such as did develop said claims and each of them and that for each of the calendar years of 1887, 1888, and 1889 more than $100 worth of work was actually done on each of said claims by said Dyer and his grantee, the plaintiff herein.

"Tenth. That on Sunday night, the 9th day of June, 1889, while said plaintiff was in actual possession of said claims and working the same, by its agents and employees, the defendant William Haws went upon the grounds of said mining claims with two men, and wrongfully took possession of the same and the working upon the same, prepared to hold such possession by force, and did wrongfully keep the plaintiff and its employees from thereafter working on said mining claims, and wrongfully excluded them therefrom, and that said William Haws and Heber Timothy and their 307] grantees, the other *defendants therein, have ever since wrongfully excluded the plaintiff from the possession of said mining claims.

"Eleventh. That prior to the said 9th day of June, 1889, said William Haws was an employee of the plaintiff and its grantors working on said mining claims; that said Haws so worked from the 11th day of February, 1888, until the 13th day of August, 1888, and from October 24, 1888, to December 21, 1888, and again resumed work in the month of March, 1889, and continued to work for plaintiff up to and including the 1st day of June, 1889, when he voluntarily left the employ of plaintiff; that while at work for plaintiff in the year of 1888 said Haws formed the secret intention of taking possession of said mines and mining claims.

"Twelfth. That on or about the 7th day of June, 1889, said Haws procured the defendant Heber Timothy to join and assist him in making a location of the ground described in the complaint herein, which was then being actually possessed and worked by plaintiff, and on that day said Haws and Timothy, without right of entry on the ground, set sufficient stakes to mark the boundaries of the two claims, which they called 'Scottish Chief' and 'Ontario mine' lode mining claims; that they also posted on a stake placed near the place of discovery of plaintiff's aforesaid claims location notices for each of said claims; that the location notice of said Scottish Chief lode was signed by said Heber Timothy and William Haws, and recited that the location was a 'relocation' of the Antietam lode; that the said location notice of the Ontario mine lode was signed by said William Haws, and recited that the location was a 'relocation' of the Copper the Ace.

"Thirteenth. That on the 4th day of June, 1889, a mining district was organized including within its boundaries the ground heretofore described called the 'Carbonate district;' that said Scottish Chief and Ontario mine location notices were recorded on the 11th day of June, 1889, in the records of said Carbonate mining district.

"Fourteenth. That on or about the 12th day of September, 1889, while holding possession of said mining claims of plaintiff aforesaid, under the wrongful entry of said Haws aforesaid, *aided by said Timothy, with the consent [308 of said Haws and at his instigation, and for the purpose of omitting the name of said Haws from the location notices, in anticipation of proceedings being taken by plaintiff to regain possession of its said mining claims, set a discovery stake within the limits and boundaries of plaintiff's said mining locations and not far distant from the place of discovery of plaintiff's said mining claims, and then and there placed two notices of locations signed by said Heber Timothy, claiming to locate two mining claims under the respective names of 'Valao' and 'Copper King,' and set sufficient stakes and marks to describe and designate the boundaries of said mining locations and each of them.

"Fifteenth. That said Haws was to have and own by agreement made with said Timothy all of said Copper King and one half of said Valao; that said claims include substantially the same ground included in and covered by plaintiff's aforesaid claims.

"Sixteenth. That on the 9th day of August,

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1890, said William Haws, by an instrument in writing, conveyed to the defendant Heber Timothy his interest in the Scottish Chief and Ontario mine mining claims aforesaid, and that on the same day said Timothy conveyed to the defendant Michael E. Smith the aforesaid Scottish Chief and Ontario described in said deed as relocated September 12, 1889, as the Copper King and Valao lode claims, and that on the 11th day of August, 1890, said defendant Smith, by an instrument in writing, conveyed to the defendants Samuel R. Whitall, William V. R. Whitall, Edward Keith, and Frank A. Keith an undivided one half interest in said Valao and Copper King claims.

"Seventeenth. That on or about the 29th day of August, 1890, plaintiff had its aforesaid mining claims surveyed and stakes reset that sufficiently marked the boundaries of said claims and each of them and the place of discovery; that at the place of discovery plaintiff caused to be posted, on the 29th day of August, 1890, an addendum notice to each of the original notices of location, which said addendum notices were duly signed by the secretary of plaintiff and dated, and respectively described the claims by metes and bounds [309] as *ascertained by actual survey, and also by reference to the permanent workings of the claims; that said notices were recorded in the office of the county recorder of said county of Uintah on August 29, 1890.

"Eighteenth. That the description of said claims as given in said addendum notices is the same description as given in the complaint of the plaintiff herein; also that the official survey for patent of said mining claims of plaintiff was made in exact accordance with said description and the boundary stakes of said claims.

"Nineteenth. That in the months of August and September, 1890, and prior to the commencement of this action, the defendants wrongfully extracted and carried away 25 tons of ore taken from plaintiff's said mining claims, and sold all but 7 tons thereof for the net sum of $1,897.57, except as to the cost of hauling and extracting, amounting to $34 per ton."

From these findings the court deduced the following conclusions of law:

"1. That the plaintiff was at the time of the commencement of this action, and still is, the owner of and entitled to the possession of the mining claims particularly and specifically described in the complaint of the plaintiff herein, and called respectively 'Antietam lode' and 'Copper the Ace lode' mining claims, which said mining claims and each of them were at the time of the commencement of this action, and have ever since continued to be, and now still are, valid mining claims, embracing the premises described in the complaint herein, subject only to the paramount title of the United States.

"2. That the defendants or any of them or any person claiming under them have no title or interest in said premises whatsoever and had none at the time of the commencement of this action.

"3. That said plaintiff is entitled to a judgment or decree against said defendants for the possession of the Antietam lode and Copper the Ace lode' mining claims and premises embraced therein, as described in said complaint, and confirming its title to the same, and that the defendants have no right, title, or interest in said premises or any part thereof or *in [310] the ores extracted therefrom; also that plaintiff is entitled to the 7 tons of ore removed by the defendants and not disposed of, and also for $1,047.57 damages, and also for the costs of this action; also enjoining the said defendants and each of them, their servants, agents, and employees, and every one acting under them or any of them, from extracting or removing ore therefrom."

Upon these findings and conclusions a judgment was rendered in favor of the plaintiff, that it "recover from the defendants, William Haws, Heber Timothy, Edward W. Keith, Frank H. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, the possession of the Antietam lode and Copper the Ace lode mining claims, situated in the Carbonate mining district, in the county of Uintah, territory of Utah, and the premises embraced therein, and each and every part thereof, the same being specifically described in the complaint of the complainant herein, and confirming the title to said plaintiff in and to the same." There was also judgment for damages and costs in the sum of $1,692.17, and a decree for an injunction restraining the defendants from extracting or removing ore from the mines.

On December 3, 1890, the defendants filed their notice of intention to apply for a new trial on the following grounds:

"1. Irregularities in the proceedings of the court and an abuse of discretion in the court by which defendants were prevented from having a fair trial.

"2. Insufficiency of the evidence to justify the findings and decision.

"3. Newly discovered evidence material to defendants, and which could not with reasonable diligence have been discovered and produced at the trial.

"4. That the findings are against law.

"5. Errors in law occurring at the trial and excepted to by defendants."

On the day this notice was given the court extended the time for filing the "specifications of particulars in which the evidence is insufficient to support the findings and the affidavits as to the newly discovered evidence." When this period *elapsed the defendants pre- [311] sented their specifications of particulars (which was required by the Utah law, *Stringfellow* v. *Cain*, 99 U. S. 613 [25:422]), complaining only of the insufficiency of the evidence to support the findings numbered 3, 4, 5, 6, 10, 12, 14, 17, and 19. The affidavits relied on as to the newly discovered evidence, for the purpose of obtaining a new trial, were also filed. In support of the complaint as to the insufficiency of the evidence to sustain the findings specially objected to on that ground, there was filed an excerpt from the testimony, the certificate appended thereto reciting: "The foregoing, together with Exhibits C and D and the map Exhibit 3, is the substance of all the evidence tending to support the findings which are pointed out in defendant's specification of

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errors as not supported by the evidence and the substance of all the evidence pertaining to or illustrating defendant's assignments of error." Previously to the filing of this statement of the proof which related solely to the controverted findings, the defendant presented his "assignment as to errors of law occurring at the time of the trial, and duly excepted to by the defendants." The errors thus assigned were eleven in number, and all referred to the rulings of the court, in the progress of the trial, rejecting or admitting testimony. On the 18th of February, 1891, the application for a new trial was overruled, the order to that end reciting: "Said motion is heard upon the records and statements, and upon affidavits filed by the defendants in support of their motion." An appeal was taken to the supreme court of the territory, where the judgment was affirmed. 7 Utah, 515. The opinion of the court announced that the findings of the court below were sustained by the proof, and that, as these findings were supported by "competent, relevant, and material evidence," without reference to the action of the court admitting or rejecting testimony, it was unnecessary to determine whether error had been committed in such respect, since, if it had been, it was not reversible because not prejudicial. Subsequently, there was filed in the supreme court an assignment of errors, alleging that the court had erroneously affirmed the judgment below, when it should have re-[312] versed the same because of *errors committed by the trial court in admitting incompetent testimony. The matters referred to in the assignment thus filed in the supreme court are identical with those which were embraced in the assignment which had been made below on the application for a new trial, except that the eleventh alleged error assigned upon the appeal to the territorial appellate court is omitted from the latter assignment. Thereafter a paper was filed in the supreme court of the territory beginning as follows:

"This is to certify that on the trial of this cause in the trial court the following rulings of the court on the rejection and admission of evidence were made, all of which were excepted to by defendants and assigned by them as error on appeal to this court, to wit."

This was followed by a brief excerpt from the proceedings had before the trial court, purporting to show exactly what occurred when the rulings rejecting or admitting testimony were made. All the facts which are stated in this paper are also in the record in connection with the specification of errors presented and the assignment of errors made in the trial court on the appeal taken to the supreme court. Appended to the paper is the following certificate:

"The above statement embraces part of the testimony of the witnesses named, but not all, nor does it contain the testimony of other witnesses sworn in the case, but is correct so far as it goes, except showing the corrections and explanations appearing.

"October 12, 1891.

"James A. Miner, Judge.

"C. S. Zane, C. J."

The defendants below prosecute this appeal from the judgment of the supreme court of the territory of Utah.

Under the act of April 7, 1874 (18 Stat. at L. 27), our jurisdiction on appeal from the judgment of a territorial supreme court is limited to determining whether the facts found are sufficient to sustain the judgment rendered, and to reviewing the rulings of the court on the admission or rejection of testimony, *when ex [313] ceptions have been duly taken to such rulings. We cannot, therefore, enter into an investigation of the preponderance of proof, but confine ourselves to the findings and their sufficiency to support the legal conclusions which the court below has rested on them. *Stringfellow* v. *Cain*, 99 U. S. 610, 613 [25:421, 423]; *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 509 [33:433]; *Mammoth Min. Co.* v. *Salt Lake Foundry & Mach. Co.* 151 U. S. 447 [38:229]. The statement of facts contemplated by the statute is one to be made by the supreme court from whose judgment the appeal is taken. But where that court affirms the findings of the trial court, being thus adopted by the supreme court of the territory, they subserve the purpose of a finding of fact on the appeal to this court. *Stringfellow* v. *Cain*, *ubi supra*. Guided by this rule, we will examine the errors pressed upon our attention, considering first in order those which are general in their nature, and, second, those which it is claimed result from the action of the trial court in rejecting or admitting testimony.

1. The contention that the trial court did not consider the affidavits as to the newly discovered evidence presented for the purpose of obtaining a new trial, is fully answered by the order refusing the new trial, which recites "that it was heard upon the record and statement and upon the affidavits filed by the defendants in support of their motion." This takes the case entirely out of the principle announced in *Mattox* v. *United States*, 146 U. S. 140 [36:917]. That case involved a refusal to exercise discretion, whilst the contention here amounts to the assertion of a right to control a discretion when it has been lawfully exerted.

2. A further claim of error is that the findings are insufficient to support the judgment, because the Utah statute (2 Comp. Laws, § 3241) requires that "in an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it;" and that the mines in dispute are designated in the findings solely by reference to the descriptions contained in the complaint which it is asserted does not sufficiently identify the premises to enable an officer to execute a writ of *possession. If this proposition was [314] supported by the record, the necessary result would be that the judgment of the court below operates upon no property which can be identified; hence the defendant, and not plaintiffs in error, would be prejudiced thereby, and would be the only party entitled to complain. But the findings amply support the reference made in the judgment to the premises sued for, to wit, the "Antietam lode and Copper the Ace lode mining claims, situated in the Carbonate mining district in the county

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of Uintah, territory of Utah, and premises embraced therein, and each and every part thereof, the same being specifically described in the complaint herein." It is not doubtful that the decree and complaint taken together fully describe and furnish ample means for identification of the property to which defendand in error was adjudged to be entitled.

3. It was also urged, for the first time, upon the argument at bar, that as U. S. Rev. Stat. § 2310, provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the mine located, the complaint was fatally defective in not averring such a discovery prior to Dyer's alleged location, and that there was an entire absence of evidence to justify the trial judge in concluding as he did in his first finding that Dyer, "at and prior to the time of locating the claims, discovered and appropriated a mineral vein or lode of rock in place." The contention that the complaint did not aver discovery is without merit. No demurrer was filed, and so far as the record discloses, no objection was made to the admissibility of proof of discovery on the ground that it was not alleged, nor was error in this particular assigned in the lower court or in the supreme court of the territory or in the record as required by law. We might well dismiss the assertion that there was no evidence which justified the trial judge in stating in his first proposition of fact that there had been a discovery, with the answer that it amounts merely to a contention that the evidence did not justify the finding. The record, however, demonstrates the unsoundness of the contention. Under the law of Utah, those 315] against whom the judgment *was rendered in the trial court were obliged, on motion for a new trial, to specify what particular findings of fact were objected to as unsupported by the evidence. In obedience to this requirement, the defendant specified the findings which he charged were not borne out by the proof, and in so doing made no complaint as to the first finding which contains the matter now asserted here to have no support whatever in the proof. The practice in addition required the trial court to certify to the supreme court of the territory only "so much of the evidence as may be necessary to explain the particular errors or grounds specified and no more." *Stringfellow* v. *Cain*, 99 U. S. 601 [21. 421]. and such is the certificate annexed to the extracts from the evidence which made up the record taken to the supreme court of the territory. It therefore follows that the defendants below, after failing in the trial court to object to the first finding as unsupported by the evidence, and thereby securing the omission from the record of all the testimony supporting such finding, now seek to avail themselves of the absence of the proof which they have caused to be omitted from the record.

4. It is contended that the findings do not justify the decree because on their face it appears that the discovery by Dyer was merely of one vein, and as the claims located under this discovery were two in number and 3,000 feet in length, they were void because in excess of the quantity allowed by law. U. S. Rev. Stat. § 2320.

Pretermitting the question whether this contention is not in reality a mere assertion that the findings are not supported by the evidence, it is without merit. Obviously, if the legal proposition upon which it depends be well founded, as to which we express no opinion, it is equally applicable to the mining claims asserted by the plaintiff in error. The findings conclusively establish that the Haws and Timothy pretended locations, upon which the whole case as to the plaintiffs in error rests, were placed upon practically the same ground covered by the mining claims of the defendant in error; indeed, the finding is that they (the Haws' claims) were mere relocations of the existing mines, and therefore equal to them*[316 in length. It follows that if there was an excess of quantity as to the claims asserted, on the one hand, a like excess necessarily existed in the claim relied upon on the other. True the location by Haws was made, not only in his own name, but in the name of Timothy, thereby, on the face of such location, implying that there was not one location of 3,000 feet but two locations of 1,500 feet each, by different persons. The findings, however, completely dispel this situation, for they conclusively determine that Timothy was a mere instrumentality for Haws in the execution of his wrongful purposes, and hence that the two mines, which were apparently located in the name of Haws and Timothy, were in reality each located by Haws himself. But the findings go further than this; they absolutely preclude the possibility of a discovery or valid location by Haws or his confederate Timothy. The facts on this subject, established by the findings, are briefly these: Haws, an employee of the defendant in error, while engaged in such employment in working the mines by it located and of which it was in the actual possession, conceived the secret intention of taking possession of the property of his employers for his own benefit. In execution of this illegal purpose he procured the assistance of Timothy in making a so-called location on the ground which was then occupied by his employer and upon which he (Haws) was working as its servant. That they set stakes and posted notices so as to cover the claims already discovered and which he knew were being worked at the time these stakes were placed and notices posted, and that shortly after this wrongful driving of stakes, Haws, in the night-time, ousted the defendant in error from the possession which it enjoyed, and the illegal dispossession thus accomplished was thereafter maintained by force. The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary, but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the *most obvious conception of justice.[317 and good conscience. It proceeds upon the theory that a mere intruder and trespasser can not make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been by him committed. In

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Christy v. *Scott*, 55 U. S. 14 How. 282, 292 [14: 422, 426], this court, speaking through *Mr. Justice* Curtis, said:

"A mere intruder cannot enter on a person actually seised, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is still practiced (*Jackson* v. *Boston & W. R. Corp.* 1 Cush. 575), or by an ejectment (*Allen* v. *Rivington*, 2 Saund. 111; *Doe, Burrough*, v. *Read*, 8 East, 356; *Doe, Hughes*, v. *Dyball*, 1 Mood. & M. 346; *Jackson* v. *Hazen*, 2 Johns. 438; *Whitney* v. *Wright*, 15 Wend. 171), or he may maintain trespass (*Catteris* v. *Cowper*, 4 Taunt. 548; *Graham* v. *Peat*, 1 East, 246)."

So, also, in *Burt* v. *Panjaud*, 99 U. S. 180, 182 [25: 451, 453], it was said, *Mr. Justice* Miller expressing the opinion of the court: "In ejectment or trespass *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor prior to his eviction, is prima facie evidence of title, on which he can recover against a mere trespasser." The same principle was enforced in *Campbell* v. *Rankin*, 99 U. S. 261, 262 [25: 435, 436], and application of it to various conditions of fact is shown in *Atherton* v. *Fowler*, 96 U. S. 513 [24: 732]; *Belk* v. *Meagher*, 104 U. S. 279, 287 [26: 735, 738]; *Glacier Mountain S. Min. Co.* v. *Willis*, 127 U. S. 471, 481 [32: 172, 174].

There remains only to consider the errors which are asserted to have arisen from rulings of the trial court, admitting or rejecting testimony.

(*a*) The objections to the admissibility of the copies of Dyer's notice of location become wholly immaterial, in view of the findings on the subject of the actual location made by Dyer. The sixth finding establishes that there [318] was not at the* time the copies were left for record any mining district recorder, and that the rules and regulations of what had been known as the "Carbonate mining district," in which said claim was situated, had long prior to Dyer's location fallen into disuse, and were not then, and for a long time prior thereto had not been, in force and effect. In such event there was no statutory requirement that notices should be recorded. U. S. Rev. Stat. § 2324; *North Noonday Min. Co.* v. *Orient Min. Co.* 1 Fed. Rep. 522, 533. Moreover, the acts of Dyer, enumerated in the fourth finding, constituted a sufficient location by him of the two claims, as against subsequent locators, irrespective of the posting of notices. U. S. Rev. Stat. § 2324, merely required that the locations shall be distinctly marked on the ground, so that their boundaries can be readily traced. *Book* v. *Justice Min. Co.* 58 Fed. Rep. 109, 112 *et seq.* and authorities cited, p. 113.

(*b*) The testimony of McLaughlin, tending to show knowledge by Haws of Dyer's location, that he recognized it, also becomes immaterial, in view of the findings establishing the nature and extent of such location. The same reason is applicable to the objection made to the testimony of Doneher.

(*c*) It is contended that the district court erred in permitting two witnesses to testify as to the conversation had with Haws relative to his intention to take possession of the mines operated by the plaintiff. This evidence tended to support certain allegations contained in the second cause of action set out in the complaint, and appears material to such allegations; and was doubtless accepted as evidence in support of the fact, stated at the close of the eleventh finding of the trial judge, "that while at work for the plaintiff in the year 1888, said Haws formed a secret intention of taking possession of the mines and mining claims of plaintiff." There was no attack upon the sufficiency of the proof to sustain this finding: moreover, the testimony of Haws as contained in the record admits that he formed the intention to take possession under the suggestion that he considered that he had the right to make a relocation.

(*d*) Lastly, it is contended that the district court erred *in permitting the plaintiff to [319] prove that it had expended between $7,000 and $8,000 in working the mines, from the time it took possession until it was ousted therefrom by the defendant Haws. This testimony was offered to show good faith in working the property by the plaintiff company. We think it was competent, in view of the requirements of U. S. Rev. Stat. § 2324, "that on each claim located after May 10, 1872, and until a patent has been issued therefor, no less than $100 worth of labor shall be performed or improvements made during each year."

Judgment affirmed.

Mr. Justice **Gray** was not present at the argument and took no part in the decision of this case.

WILLIAM H. MARKHAM, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 319-326.)

Sufficiency of indictment—perjury—substance of offense.

1. An oath is sufficiently alleged in an indictment for perjury in taking it, where it is stated to have been taken before a special examiner of the pension bureau of the United States, as that officer had authority to administer the oath under U. S. Rev. Stat. § 4744, as amended by the act of July 25, 1882, and under the act of March 3, 1891.

2. Under U. S. Rev. Stat. § 5396, an indictment for perjury is sufficient after verdict, which states the officer before whom the alleged false oath was taken, that he was competent to administer an oath, gives the words of the alleged false statement, and charges that it was part of a deposi-

NOTE.—*The oath must be lawfully administered by competent authority, to convict of perjury.* See note to United States v. Curtis, 27: 534.

As to sufficiency of evidence to convict of perjury, see note to United States v. Wood, 10: 527.

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tion given by the accused before such officer and was material to an inquiry then pending before and within the jurisdiction of the United States Commissioner of Pensions, where the inquiry manifestly related to a claim of the accused for a pension on account of injuries received by him as a soldier.

3. U. S. Rev. Stat. § 1025, does not dispense with the requirement in § 5396 that an indictment for perjury must set forth the substance of the offense charged.

[No. 544.]

Submitted November 18, 1895. Decided December 16, 1895.

IN ERROR to the District Court of the United States for the District of Kentucky to review a judgment of that court convicting William H. Markham of the crime of perjury. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

The plaintiff in error was indicted in the district court of the United States for the district of Kentucky for the crime of perjury as defined in U. S. Rev. Stat. § 5392.

The defendant pleaded not guilty. The first and second counts related to certain statements by the accused, alleged to have been wilfully, falsely, and feloniously made, in a deposition given, under oath, before G. C. Loomis, a special examiner of the pension bureau of the United States, such statements being material to an inquiry pending before the Commissioner of Pensions in reference to a claim of the accused for a pension from the United States. The third count set out another statement of the accused in the same deposition, and charged that he did not believe it to be true.

The defendant was found guilty upon the fourth count of the indictment, which was as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that at Bowling Green, in the district aforesaid, on the seventh day of October, in the year of our Lord eighteen hundred and ninety-two, the matter of the hereinafter-mentioned deposition became and was material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States, at Washington, in the District of Columbia; whereupon said William H. Markham did then, at said Bowling Green, wilfully and corruptly take a solemn oath before G. C. Loomis, then and there a special examiner of the pension bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath, that a certain written deposition then and there by said Markham subscribed was then and there true, and in giving said deposition said Markham was asked by said Loomis a question in substance and effect as follows, to wit: 'Have you received any injury to forefinger of right hand since the war or since your discharge from the army?' (by which said question said 321]*Loomis referred and said Markham well understood said Loomis to refer to the right hand of said Markham) and in answer to said question said Markham then and there made and subscribed an answer and statement in substance and effect as follows, to wit: 'No, sir: I never have;' which said statement that said Markham never had received any injury to the forefinger of his right hand since his, said Markham's, discharge from the army was then and there material to said inquiry, and was then and there not true. Whereas in truth and in fact the said Markham had then and theretofore received an injury to the forefinger of his, said Markham's, right hand, as he, the said Markham, then and there very well knew. And so the jurors aforesaid upon their oaths aforesaid say that said Markham did commit wilful and corrupt perjury in the manner and form as in this count aforesaid, against," etc. There was no demurrer to the indictment, nor any motion to quash either of the counts.

The defendant moved for an arrest of judgment upon the following grounds: 1st. That the count upon which he was found guilty charged no offense under the statute. 2d. That its averments did not inform the court that any offense had been committed, nor show that Loomis, the examiner, was authorized to administer the oath alleged. 3d. That the averments did not set forth the proceeding or cause in which the defendant was charged to have given his deposition or made oath to the statement alleged to be false, in such manner as to show that the deposition and the alleged false statement were material to any inquiry or matter before the Commissioner of Pensions, nor to what said inquiry related, nor show that Loomis, special examiner, had any lawful authority to swear or require the defendant to swear to the deposition or statement averred to be false, nor for what purpose, nor upon what cause, or investigation of what claim, or of any claim pending before any department of the government or in any court. 4th. That it did not aver facts sufficient to show the materiality of the oath or statement alleged to have been made. 5th. That the words charged to have been sworn *to by [322 defendant were not averred to have been sworn to wilfully and corruptly. 6th. That it failed to aver what charge was under investigation.

The motion in arrest of judgment was overruled, and the accused was sentenced to make his fine to the United States by the payment of $5, and to be imprisoned at hard labor in the Indiana state prison, south, at Jeffersonville, Indiana, for the full period of two years from a day named. From that judgment the present writ of error was prosecuted.

Mr. **Samuel McKee** for plaintiff in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The contention that the indictment was insufficient in law cannot be sustained.

By U. S. Rev. Stat. § 4744, as amended by the act of July 25, 1882, chap. 349, it is provided: "The Commissioner of Pensions is authorized to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such pension or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing

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on such examinations to be guilty of fraud, either in the presentation or in procuring the allowance of such claims; and any person so detailed shall have power to administer oaths and take affidavits and depositions in the course of such examinations, and to orally examine witnesses, and may employ a stenographer when deemed necessary by the Commissioner of Pensions, in important cases, such stenographer to be paid by such clerk or person, and the amount so paid to be allowed in his ac-[323] counts." U. S. Rev. Stat. § 4744, *22 Stat. at L. 175. And by § 3 of the act of March 3, 1891, chap. 548, it was provided: "That the same power to administer oaths and take affidavits, which by virtue of section 4744 of the Revised Statutes is conferred upon clerks detailed by the Commissioner of Pensions from his office to investigate suspected attempts at fraud on the government through and by virtue of the pension laws, and to aid in prosecuting any person so offending, shall be, and is hereby, extended to all special examiners or additional special examiners employed under authority of Congress to aid in the same purpose." 26 Stat. at L. 1083.

In view of these enactments, the averment that the oath, charged to have been wilfully and corruptly taken, was taken "before G. C. Loomis, then and there a special examiner of the pension bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath," was sufficient, in connection with the statute, to inform the accused of the official character and authority of the officer before whom the oath was taken.

It is provided by U. S. Rev. Stat. § 5392, that "every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or other certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than $2,000, and by imprisonment at hard labor not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

And by section 5396 it is declared that "in every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, with-[324] out setting forth the bill, answer, *information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

The requirement that it shall be sufficient in an indictment for perjury to set forth the substance of the offense is not new in the statutes of the United States. It is so provided in the crimes act of April 30, 1790 (1 Stat. at L. 112, 116, chap. 9, § 18), and the latter act, in the particular mentioned, was the same as that of 23 Geo. II. chap. 11 (7 British Stat. at L. (ed. 1769) p. 221). Referring to the English statute and to the objects for which it was enacted, Mr. Chitty says that the substance of the charge is intended in opposition to its details. 2 Chitty, Crim. Law, 307; *Rex* v. *Dowlin*, 5 T. R. 311, 317.

Did the fourth count set forth the substance of the offense charged? It gave the name of the officer before whom the alleged false oath was taken; averred that he was competent to administer an oath; set forth the very words of the statement alleged to have been wilfully and corruptly made by the accused; and charged that such false statement was part of a deposition given and subscribed by the accused before that officer, and was material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States.

The question propounded to the accused, and to which he was alleged wilfully and corruptly to have made a false answer, manifestly pointed to an inquiry pending before the Commissioner of Pensions, in relation to himself as a former soldier in the army; that inquiry presumably related to a claim by him for a pension on account of personal injuries received by him in the service; and the general charge that the statement was made with reference to a pending inquiry before, and within the jurisdiction of, the Commissioner of Pensions, in connection with the distinct, though general, averment that such statement was material to that inquiry, was quite sufficient under the statute. Under the plea of not guilty the government was required to show the materiality of the alleged false statement, and in so doing must *necessarily have [325] disclosed the precise nature of the inquiry to which it related. And it may well be assumed, after verdict, that all such facts appeared in evidence, and that the accused was not ignorant of the nature of the inquiry to which his deposition related and to which the indictment referred.

It was not necessary that the indictment should set forth all the details or facts involved in the issue as to the materiality of such statement, and the authority of the Commissioner of Pensions to institute the inquiry in which the deposition of the accused was taken. In 2 Chitty's Criminal Law, 307, the author says: "It is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material to the matter in issue. But it is not requisite to set forth all the circumstances which render them material; the simple averment that they were so will suffice." In *Rex* v. *Dowlin*, above cited, Lord Kenyon said that it had always been adjudged to be sufficient, in an indictment for perjury, to allege generally that the particular question became a material question. So, in *Com.* v. *Pollard*, 12 Met. 225, 229, which was a prosecution for perjury, it was said that

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it must be alleged in the indictment that the matter sworn to was material, or the facts set forth as falsely and corruptly sworn to should be sufficient in themselves to show such materiality. In *State* v. *Hayward*, 1 Nott & McC. 546, 553, which was also a prosecution for perjury, the court, after observing that it should appear, on the face of the indictment, that the false allegations were material to the matter in issue, adjudged that it was not necessary "to set forth all the circumstances which render them material; the simple averment that they became and were so will be sufficient." Many other authorities are to the effect that the substance of the offense may be set forth without encumbering the indictment with a recital of its details and circumstances.

As the count in question set forth the words of the alleged false statement, and thereby made it impossible for the accused to be again prosecuted on account of that particular statement; as it charged that such statement was material to an inquiry pending before, and within the jurisdiction of, the Commissioner 326] *of Pensions; and as the fair import of that count was that the inquiry before the Commissioner had reference to a claim made by the accused under the pension laws, on account of personal injuries received while he was a soldier, and made it necessary to ascertain whether the accused had, since the war or after his discharge from the army, received an injury to the forefinger of his right hand,—we think that the fourth count, although unskilfully drawn, sufficiently informed the accused of the matter for which he was indicted, and therefore met the requirement that it should set forth the substance of the charge against him.

It is proper to add that U. S. Rev. Stat. § 1025, providing that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant," is not to be interpreted as dispensing with the requirement in § 5396 that an indictment for perjury must set forth the substance of the offense charged. An indictment for perjury that does not set forth the substance of the offense will not authorize judgment upon a verdict of guilty. *Dunbar* v. *United States*, 156 U. S. 185, 192 [39: 390, 393].

We perceive no error of law in the record, and the judgment is affirmed.

327] *LEHIGH MINING & MANUFACTURING COMPANY, *Plff. in Err.*,

v.

J. J. KELLY, JR., ET AL.

(See S. C. Reporter's ed. 327-355.)

Jurisdiction of circuit court.

Where a corporation was organized in another state than that in which the action was brought, by the stockholders and officers of a corporation of the latter state, and land was conveyed to the former by the latter corporation, without consideration, and only for the purpose of giving jurisdiction to the United States circuit court of an action to recover the land on the ground of the diverse citizenship of the parties, the arrangement was collusive and a fraud upon that court, and it properly dismissed the case for want of jurisdiction.

[No. 617.]

Submitted November 11, 1895. Decided December 16, 1895.

IN ERROR to the Circuit Court of the United States for the Western District of Virginia to review a judgment of that court dismissing for want of jurisdiction an action brought by the Lehigh Mining & Manufacturing Company, against J. J. Kelly, Jr., *et al.*, to recover the possession of lands. *Affirmed.*

See same case below, 64 Fed. Rep. 401.

Statement by *Mr. Justice* **Harlan:**

This action was brought in the circuit court of the United States for the western district of Virginia by the Lehigh Mining & Manufacturing Company, as a corporation organized under the laws of the commonwealth of Pennsylvania. Its object was to recover from the defendants, who are citizens of Virginia, the possession of certain lands within the territorial jurisdiction of that court.

*The defendants pleaded not guilty of [328 the trespass alleged, and also filed two pleas, upon which the plaintiff took issue.

The first plea was that "the Virginia Coal & Iron Company is a corporation organized and existing under the laws of Virginia; that as such it has been for the last ten years claiming title to the lands of the defendant J. J. Kelly, Jr., described in the declaration in this case, and said defendants say that, for the purpose of fraudulently imposing on the jurisdiction of this court, said Virginia Coal & Iron Company has during the year 1893 attempted to organize, form, and create under the laws of the state of Pennsylvania a corporation out of its (the Virginia Coal & Iron Company's) own members, stockholders, and officers, to whom it has fraudulently and collusively conveyed the land in the declaration mentioned for the purpose of enabling this plaintiff to institute this suit in this United States court, and said defendants say that said Lehigh Mining & Manufacturing Company is simply another name for the Virginia Coal & Iron Company, composed of the same parties and organized alone for the purpose of giving jurisdiction of this case on [to] this court; wherefore the defendants say that this suit is in fraud of the jurisdiction of this court and should be abated."

The second plea was that "said plaintiffs should not further have or maintain said suit against them, because they say there was no such legally organized corporation as the plaintiff company at the date of the institution

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NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor.—see note to M'Donald v. Smalley, 7: 287.

As to jurisdiction of United States courts over

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of this suit, and they say that the real and substantial plaintiff in this suit is the Virginia Coal & Iron Company, which is a corporation organized and existing under the laws of Virginia and a citizen of Virginia. And said defendants further say that said Virginia Coal & Iron Company, for the purpose and with the view of instituting and prosecuting this suit in the United States court and of conferring an apparent jurisdiction on said court, did by prearrangement, fraud, and collusion attempt to organize said Lehigh Mining & Manufacturing Company as a corporation of a foreign state, to take and hold the land in the declaration mentioned, for the purpose of giving this court jurisdiction of said suit; where-
329] fore defendants say that *the said plaintiff has wrongfully and fraudulently imposed itself on the jurisdiction of this court, has abused its process, and wrongfully impleaded these defendants in this court. Wherefore they pray judgment, etc., that this suit be abated and dismissed, as brought in fraud of this court's jurisdiction."

The cause was submitted by the parties upon the two pleas to the jurisdiction and upon a general replication to each plea, as well as upon an agreed statement of facts.

The agreed statement of facts was as follows: "1. That the land in controversy in this case was, prior to March 1, 1893, claimed by the Virginia Coal & Iron Company, and had been claimed by said last-named company for some twelve years prior to said date. 2. That said Virginia Coal & Iron Company is a corporation organized and existing under the laws of the state of Virginia, and is a citizen of Virginia. 3. That on March 1, 1893, said Virginia Coal & Iron Company executed and delivered a deed of bargain and sale to said Lehigh Mining & Manufacturing Company by which it conveyed all its right, title, and interest in and to the land in controversy to said last-named company in fee simple. 4. That said Lehigh Mining & Manufacturing Company is a corporation duly organized and existing under the laws of the state of Pennsylvania, that it was organized in February, 1893, prior to said conveyance, and is and was at the date of commencement of this action a citizen of the state of Pennsylvania, and that it was organized *by the individual stockholders and officers of the Virginia Coal & Iron Company.* 5. That *the purpose in organizing said Lehigh Mining & Manufacturing Company and in making to it said conveyance was to give to this court jurisdiction in this case*, but that said conveyance passed to said Lehigh Mining & Manufacturing Company all of the right, title, and interest of said Virginia Coal & Iron Company in and to said land, and that since said conveyances said Virginia Coal & Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of said Lehigh Mining & Manufacturing Company, and it has no interest therein whatever."

330] *It was also agreed that the two pleas should be tried by the court, without a jury, upon the above statement of facts, with the right in either party to object to any fact stated in it on the ground of irrelevancy or incompetency.

The plaintiff, by counsel, objected and excepted to the statement in the first part of the fifth clause of the foregoing statement, *viz.*, "that the purpose of organizing the Lehigh Mining & Manufacturing Company and in making it to said conveyance was to give to this court jurisdiction in this case," because the same was irrelevant and immaterial.

The circuit court, Judge Paul presiding, dismissed the action for want of jurisdiction in the circuit court. 64 Fed. Rep. 401.

Messrs. **R. A. Ayers, R. C. Dale, J. F. Bullitt,** *Jr.*, *J. L. White*, *A. L. Pridemore*, and *E. M. Fulton*, for plaintiff in error:

The fact that the plaintiff and defendants are citizens of different states, and that "said conveyance passed to said Lehigh Mining & Manufacturing Company all the right, title, and interest of said Virginia Coal & Iron Company in and to said land, and that since said conveyance said Virginia Coal & Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of the Lehigh Mining & Manufacturing Company, and has no interest therein whatever," gave to the circuit court jurisdiction, and the motive in making the conveyance is wholly immaterial, and will not be considered by the court.

Barney v. *Baltimore*, 73 U. S. 6 Wall. 280 (18: 825); *McDonald* v. *Smalley*, 26 U. S. 1 Pet. 620 (7: 287); *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 (12: 666); *Marion* v. *Ellis*, 10 Fed. Rep. 410; *Delaveaga* v. *Williams*, 5 Sawy. 573; *Hoyt* v. *Wright*, 4 Fed. Rep. 168; *Briggs* v. *French*, 2 Sumn. 251.

Messrs. **F. S. Blair** and **H. S. K. Morrison,** for defendants in error:

The record presents a jurisdictional question only based upon diverse citizenship of the parties, and it was obtained by collusion and a fraud upon the law.

Where no alienation is shown of property or abandonment of the occupancy of offices, and both are shown to have been once possessed, possession is presumed to continue.

2 Whart. Ev. § 1286; *Magee* v. *Scott*, 9 Cush. 148, 55 Am. Dec. 49.

The fact that a different name was given by request of these persons in another state for the purpose of forcing upon the United States the jurisdiction of this cause and depriving the courts of Virginia of their lawful jurisdiction, does not destroy the identity or accomplish the intent of the plaintiff, but upon the contrary establishes that it was done to evade the law. Clearly this is an artifice or device to evade the law that controls jurisdiction and deprives another of a legal right. Being such, it falls within the letter and spirit of cases adjudged to be fraudulent.

The William King, 15 U. S. 2 Wheat. 148 (4: 206); *Lee* v. *Lee*, 33 U. S. 8 Pet. 44 (8: 860); *Burdick* v. *Post*, 12 Barb. 186; *People*, *Cald-*

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common-law offenses, see note to United States v. Coolidge, 4: 124.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit,—see note to Roberts v. Lewis, 36: 579.

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well, v. *Kelly*, 35 Barb. 452; *Randall* v. *Howard*, 67 U. S. 2 Black, 590 (17: 271); *Butler* v. *Farnsworth*, 4 Wash. C. C. 101; *Morris* v. *Gilmer*, 129 U. S. 315 (32: 690).

Mr. Justice **Harlan** delivered the opinion of the court:

Some of the paragraphs of the agreed statement of facts are so drawn as to leave in doubt the precise thought intended to be expressed in them. But it is clear that the individual stockholders and officers of the Virginia corporation, in February, 1893, organized the Pennsylvania corporation; that immediately thereafter, on the 1st day of March, 1893, the lands in controversy, which the Virginia corporation had for many years claimed to own, and which, during all that period, were in the possession of and claimed by the present defendants, who are citizens of Virginia, were conveyed by it in fee simple to the Pennsylvania corporation so organized; and that the only object for which the stockholders and officers of the Virginia corporation organized the Pennsylvania corporation, and for which the above conveyance was **331**] made, was to *create a case cognizable by the circuit court of the United States for the western district of Virginia. In order to accomplish that object, the present action was commenced on the 2d day of April, 1893. Although the parties have agreed that the above conveyance passed "all of the right, title, and interest" of the Virginia corporation to the corporation organized under the laws of Pennsylvania, it is to be taken, upon the present record, and in view of what the agreed statement of facts contains, as well as of what it omits to disclose, that the conveyance was made without any valuable consideration; that, when it was made the stockholders of the two corporations were identical; that the Virginia corporation still exists with the same stockholders it had when the conveyance of March 1, 1893, was made; and that, as soon as this litigation is concluded, the Pennsylvania corporation, if it succeeds in obtaining judgment against the defendants, *can be required by the stockholders of the Virginia corporation*, being also its own stockholders, to reconvey the lands in controversy to the Virginia corporation without any consideration passing to the Pennsylvania corporation.

Was the circuit court bound to take cognizance of this action as one that involved a controversy between citizens of different states within the meaning of the Constitution and the acts of Congress regulating the jurisdiction of the courts of the United States? This question can be more satisfactorily answered after we shall have adverted to the principal cases cited in argument. The importance of the question before us, to say nothing of the ingenious and novel mode devised to obtain an adjudication of the present controversy by a court of the United States, justifies a reference to those cases.

The first case is that of *Maxwell* v. *Levy*, 2 U. S. 2 Dall. 381 [1: 424], decided in the circuit court of the United States for the Pennsylvania district. That was an action of ejectment. The lessor of the plaintiff was a *resident and citizen* of Maryland, the defendant being a resident and citizen of Pennsylvania. A bill of discovery was filed against the lessor of the plaintiff, in which it was alleged that the conveyance of the premises in controversy was made by one Morris, a citizen of* Pennsylvania, for no other purpose [**332** than to give jurisdiction to the circuit court. The answer to that bill admitted that "the lessor of the plaintiff *had given no consideration* for the conveyance; that his name had been used *by way only of accommodation to Morris*." Upon a rule to show cause why the action of ejectment should not be stricken from the docket, Mr. Justice Iredell held that the conveyance was "colorable and collusive, and therefore incapable of laying a foundation for the jurisdiction of the court." The full opinion is reported in 4 U. S. 4 Dall. 330 [1: 854].

In *Hurst* v. *McNeil*, 1 Wash. C. C. 70, 82,—which was ejectment in a circuit court of the United States, the parties being alleged to be citizens of different states,—one of the questions was as to the jurisdiction of the circuit court. Mr. Justice Washington said: "By the deed of the 15th January, 1774, from Timothy Hurst, Charles, Thomas, and John became entitled to the land therein conveyed, as tenants in common. The deed from Charles Hurst to Biddle, and the reconveyance to Charles, vested the legal estate in this land in Charles; but John and Thomas, it is admitted, were not thereby devested of their rights in equity, though they might be in law. Now the deed to John Hurst was meant to be a real deed or was merely fictitious, and intended to enable John Hurst to sue in this court. If the former, it was void, as the assent of the grantee was not given at the time, nor has it ever been since given; for, though the assent of a grantee to a deed, clearly for his benefit, may be presumed, yet, if a consideration is to be paid, as in this (£1,000 is mentioned), the assent must be proved, or nothing passes by the deed. If it was not meant as a real conveyance, then it may operate to pass to John Hurst a legal title to his own third, which had become vested in Charles, but to which John still retained an equitable title. As to any thing more, the deed cannot be supported; because, as to the rights of Charles and Thomas Hurst and John Baron, they remain unaffected by the deed to John; and *being merely a fictitious thing to give jurisdiction to this court*, it will not receive our countenance."

McDonald v. *Smalley*, 26 U. S. 1 Pet. 620, 624 [7: 287, 289], was a suit in equity *in the [**333** circuit court of the United States for the district of Ohio to obtain a conveyance of a tract of land situated in that state—the plaintiff, McDonald, being a citizen of Alabama and deriving title from one McArthur, a citizen of Ohio, and the defendants, Smalley and others, being citizens of Ohio. The circuit court dismissed the case for want of jurisdiction and the judgment was reversed by this court. Chief Justice Marshall, speaking for the court, said: "This testimony, which was all that was laid before the court, shows, we think, *a sale* and conveyance to the plaintiff, which was *binding* on both parties. McDonald could not have maintained an action for his debt nor McArthur a suit for his land. His title to it

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was extinguished *and the consideration was received.* The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be *a real* transaction, and the real as well as nominal parties to the suit are citizens of different states. . . . The case depends, we think, on the question whether the transaction between McArthur and McDonald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage."

In *Smith* v. *Kernochen*, 48 U. S. 7 How. 198, 216 [12: 666, 673], which was ejectment brought in the circuit court of the United States for the southern district of Alabama, the plaintiff, a citizen of New York, was the assignee *for value* of a mortgage upon the premises executed by the owner in fee to an Alabama corporation to secure a sum of money. It was charged that the motive of the corporation in making the assignment was to obtain a decision of the Federal courts upon certain matters in dispute between it and the owner in fee of the premises. One of the questions to be determined was whether any title passed to the plaintiff which the circuit court could enforce, if it appeared that the transfer of the mortgage was for the purpose of giving jurisdiction to **334**] that court and to enable the *company to prosecute its claim therein, and if it also appeared that the plaintiff was privy to such purpose when he took the assignment. This court, speaking by *Mr. Justice* Nelson, said: "But the charge [to the jury], we think, may also be sustained upon the ground on which it was placed by the court below. For, even assuming that both parties concurred in the motive alleged, the assignment of the mortgage, having been properly executed *and founded upon a valuable consideration*, passed the title and interest of the company to the plaintiff. The motive imputed could not affect the validity of the conveyance. This was so held in *McDonald* v. *Smalley*, 26 U. S. 1 Pet. 620 [7: 287]. The suit would be free from objection in the state courts. And the only ground upon which it can be made effectual here is, that the transaction between the company and the plaintiff was fictitious and not real, and the suit still, in contemplation of law, between the original parties to the mortgage. The question, therefore, is one of proper parties to give jurisdiction to the Federal courts, not of title in the plaintiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted. The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, *his name being used merely for the purpose of jurisdiction.* The suit is then, in fact, a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same state, jurisdiction of course cannot be upheld. *McDonald* v. *Smalley*, 26 U. S. 1 Pet. 625 [7: 289]; *Maxwell* v. *Levy*, 2 U. S. 2 Dall. 381 [1: 424], 4 U. S. 4 Dall. 330 [1: 854]; *Hurst* v. *McNeil*, 1 Wash. C. C. 70, 80; *Briggs* v. *French*, 2 Sumn. 251.

The next case is *Jones* v. *League*, 59 U. S. 18 How. 76, 81 [15: 263, 264]. The plaintiff, League, claimed to be a citizen of Maryland. The defendants were citizens of Texas. The action, which was trespass to try title to land, was brought in the district court of the United States for the district of Texas, in which state the land was situated. League claimed under a deed by one Power, a citizen of Texas. This court, speaking by *Mr. Justice* McLean, said: "In this case jurisdiction is claimed by the citizenship of the parties. The plaintiff avers that he is a citizen of Maryland, and that the defendants are citizens of Texas. In one of the pleas it is *averred that the [**335** plaintiff lived in Texas twelve years and upwards and that for the purpose of bringing this suit, he went to the state of Maryland, and was absent from Texas about four months. The change of citizenship, even for the purpose of bringing a suit in the Federal court, must be with the bona fide intention of becoming a citizen of the state to which the party removes. Nothing short of this can give him a right to sue in the Federal courts held in the state from whence he removed. If League was not a citizen of Maryland, his short absence in that state, without a bona fide intention of changing his citizenship, could give him no right to prosecute this suit. But it very clearly appears from the deed of conveyance to the plaintiff, by Power, that it was *only colorable, as the suit was to be prosecuted for the benefit of the grantor*, and the one third of the lands to be received by the plaintiff was in consideration that he should pay one third of the costs, and superintend the prosecution of the suit. The owner of a tract of land may convey it in order that the title may be tried in the Federal courts, but the conveyance must be made bona fide, so that the prosecution of the suit shall not be for his benefit. The judgment of the district court is reversed for want of jurisdiction in that court."

In *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280, 288 [18: 825, 827], which was a suit in equity in the circuit court of the United States for Maryland for a partition of real estate and for an account of rents and profits, etc., it appeared that certain persons, citizens of the District of Columbia, conveyed their interest in the property to a citizen of Maryland. It was admitted that the conveyance was made *for the purpose of conferring jurisdiction*, was *without consideration*, and that the grantee, *on the request of the grantors, would reconvey to the latter.* *Mr. Justice* Miller, speaking for the court, said: "If the conveyance by the Ridgeleys of the district to Samuel C. Ridgeley, of Maryland, had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. *McDonald* v. *Smalley*, 26 U. S. 1 Pet. 620 [7: 287], and several cases since, have well established this rule. But in point of *fact, that conveyance [**336** did not transfer the real interest of the grantors. It was made without consideration, with a distinct understanding that the grantors re-

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tained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the court. And it is now equally well settled that the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more."

None of these cases sustain the contention of the plaintiffs. All of them concur in holding that the privilege of a grantee or purchaser of property, being a citizen of one of the states, to invoke the jurisdiction of a circuit court of the United States for the protection of his rights as against a citizen of another state—the value of the matter in dispute being sufficient for the purpose—cannot be affected or impaired merely because of the motive that induced his grantor to convey, or his vendee to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which the title passed without the grantor or vendor reserving *or having* any right *or power* to compel or require a reconveyance or return to him of the property in question. We adhere to that doctrine.

In harmony with the principles announced in former cases, we hold that the circuit court properly dismissed this action. The conveyance to the Pennsylvania corporation was without any valuable consideration. It was a conveyance by one corporation to another corporation—the grantor representing certain stockholders, entitled collectively or as one body to do business under the name of the Virginia Coal & Iron Company, while the grantee represented *the same stockholders*, entitled collectively or as one body to do business under the name of the Lehigh Mining & Manufacturing Company. It is true that the technical legal title to the lands in controversy is, for the time, in the Pennsylvania corporation. It is also true that there was no formal agreement upon the part of that corporation "as an artificial being, invisible, intangible, and existing only in contemplation of law," that the title should ever be reconveyed to the Virginia cor- [337] poration. But *when the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record (*Grace* v. *American Cent. Ins. Co.* 109 U. S. 278, 283 [27: 932, 934]; *Börs* v. *Preston*, 111 U. S. 252, 255 [28: 419, 420]),—we cannot shut our eyes to the fact that there exists what should be deemed an equivalent to such an agreement, namely, the right *and power* of those who are stockholders of each corporation to *compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation. In other words, although the Virginia corporation, as such, holds no stock in the Pennsylvania corporation, the latter corporation holds the legal title, subject *at any time* to be devested of it by the action of the stockholders of the grantor corporation who are also its stockholders. The stockholders of the Virginia corporation,—the original promoters of of the present scheme, and, presumably, when a question of the jurisdiction of a court of the United States is involved, citizens of Virginia,—in order to procure a determination of the controversy between that corporation and the defendant citizens of Virginia, in respect of the lands in that commonwealth, which are here in dispute, assumed, as a body, the mask of a Pennsylvania corporation for the purpose, and the purpose only, of invoking the jurisdiction of the circuit court of the United States, retaining the power, in their discretion, and after all danger of defeating the jurisdiction of the Federal court shall have passed, to throw off that mask and reappear under the original form of a Virginia corporation—their right, in the meantime, to participate in the management of the general affairs of the latter corporation not having been impaired by the conveyance to the Pennsylvania corporation. And all this may be done, if the position of the plaintiffs be correct, without any consideration passing between the two corporations.

It is not decisive of the present inquiry that under the adjudications of this court the stockholders of the Pennsylvania corporation—the question being one of jurisdiction—must be conclusively presumed to be citizens of that commonwealth. *Nor is it material, if [338 such be the fact, that the Pennsylvania corporation could not have been legally organized under the laws of that commonwealth in February, 1893, unless *some* of the subscribers to its charter were then citizens of Pennsylvania. We cannot ignore the peculiar circumstances which distinguish the present case from all others that have been before this court. The stockholders who organized the Pennsylvania corporation were, it is agreed, the same individuals who at the time were the stockholders of the Virginia corporation. And under the rule of decision adverted to, the stockholders of the Virginia corporation, just before they organized the Pennsylvania corporation, as well as when the Virginia corporation conveyed the legal title, were presumably citizens of Virginia. If the rule which has been invoked be regarded as controlling in the present case, the result, curiously enough, will be that *immediately prior* to February, 1893,—before the Pennsylvania corporation was organized,—the stockholders of the Virginia corporation were, presumably, citizens of Virginia; that, a few days thereafter, *in* February, 1893, when they organized the Pennsylvania corporation, the same stockholders became, presumably, citizens of Pennsylvania; and that, on the 1st day of March, 1893, at the time the Virginia corporation conveyed to the Pennsylvania corporation, the same persons were presumably citizens, at the same moment of time, of both Virginia and Pennsylvania.

It is clear that the record justifies the assumption that there was no valuable consideration for the conveyance to the Pennsylvania corporation. Why should a *valuable* consideration have passed at all, when the stockholders of the grantor corporation and the stockholders of the grantee corporation were, at the time of the conveyance, the same individuals? Could it be expected that those stockholders, acting as one body, under the name of the Virginia Coal & Iron Company, would take money out of one pocket for the purpose of putting it into another pocket which they had and used only while acting under the name of the Lehigh Mining & Manufacturing Company? A valuable consideration cannot be presumed merely

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because the agreed statement of facts recites 339] that the *Virginia corporation executed and delivered a deed of "bargain and sale" conveying all its right, title, and interest to the Pennsylvania corporation. In view of the admitted facts, that recital must be taken as meaning nothing more than that the deed was, in form, one of bargain and sale, conveying the technical legal title. The deed cannot be regarded even as a deed of gift, unless we suppose that a body of stockholders, acting under one corporate name, solemnly made a *gift* of property to *themselves* acting under another corporate name. When it is remembered that the plaintiff in error stipulates that all that was done had for its sole object to *create a case cognizable in the Federal court, which would otherwise have been cognizable only in a court of Virginia*, it is not difficult to understand why the agreed statement of facts failed to state, in terms, that a valuable consideration was paid by the grantee corporation.

The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—*and no other purpose is stated or suggested*—of creating a case for the Federal court, must be regarded as a mere device to give jurisdiction to a circuit court of the United States and as being, in law, a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case.

This conclusion is a necessary result of the cases arising before the passage of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137). The 5th section of that act provides that if, in any suit commenced in a circuit court, it shall appear to the satisfaction of that court, at any time after such suit is brought, that it "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, *or* that the parties have been *improperly or collusively made* or joined, either as plaintiffs or defendants, *for the purpose of creating a case* cognizable . . . under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit." This part of the act of 1875 340] was not superseded *by the act of 1887, amended in 1888. 25 Stat. at L. 434, chap. 866. Its scope and effect were determined in *Williams* v. *Nottawa*, 104 U. S. 209, 211 [26: 719, 720], and *Morris* v. *Gilmer*, 129 U. S. 315 [32: 690]. In the first of those cases the court, referring to the act of 1875, said: "In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction."

The organization of the Pennsylvania corporation and the conveyance to it by the Virginia corporation, for the sole purpose of creating a case cognizable by the circuit court of the United States is, in principle, somewhat like a removal from one state to another with a view *only* of invoking the jurisdiction of the Federal court. In *Morris* v. *Gilmer*, just cited, the court said: "Upon the evidence in this record, we cannot resist the conviction that the plaintiff had no purpose to acquire a *domicil or settled home* in Tennessee, and that his sole object in removing to that state was to place himself in a situation to invoke the jurisdiction of the circuit court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his new suit. He was therefore a mere sojourner in the former state when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103, where Mr. Justice Washington said: 'If the removal be for the purpose of committing *a fraud* upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a bona fide intention of changing his domicil, however frequent and public his *declara- 341 tions to the contrary may have been.'" 129 U. S. 328, 329 [32: 694, 695].

Other cases in this court show the object and scope of the above provision in the act of 1875. In *Farmington* v. *Pillsbury*, 114 U. S. 138, 139, 145 [29: 114-116],—which was a suit upon coupons of bonds issued in the name of Farmington, a municipal corporation of Maine, the bonds themselves being owned by citizens of that state,—it appeared that the bonds were purchased and held by such citizens while a suit was pending in one of the courts of Maine to test their validity. The state court decided that they were void and inoperative. After that decision coupons of the same amount, gathered up and held by citizens of Maine, were transferred, by their agent, to Pillsbury, a citizen of Massachusetts, under an arrangement by which he gave his promissory note for $500, payable in two years from date with interest, and agreed, "as a further consideration for said coupons," that if he succeeded in collecting the full amount thereof he would pay the agent, as soon as the money was gotten from the corporation, 50 per cent of the net amount collected above the $500. Pillsbury then brought his suit on these coupons, he being a citizen of Massachusetts, against the town of Farmington, in the circuit court of the United States for the district of Maine. Here was, in form, a sale and delivery of coupons for a valuable consideration. This court regarded the whole transaction as a sham, and speaking by Chief Justice Waite, said: "It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one half of what he collects for the use of his name

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and his trouble in collecting. It is true the transaction is *called a purchase* in the papers that were executed, and that the plaintiff gave his note for $500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. No *money was paid*, and as the note was not negotiable, it is clear the *parties intended to keep the control of the whole matter* 342] *in their own hands*, so that if the plaintiff failed to recover the money he could be released from his promise to pay." The court, adopting the language of Mr. Justice Field, in *Detroit* v. *Dean*, 106 U. S. 537, 541 [27:300, 302], adjudged the transfer of the coupons to be "a mere contrivance, a pretense, the result of a collusive arrangement to create" in favor of the plaintiff "a fictitious ground of Federal jurisdiction." Referring to the above provision in the act of 1875, the court, after declaring it to be a salutary one, said that "it was intended to promote the ends of justice, and is equivalent to an express enactment by Congress that the circuit courts shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, *nor* of suits in which the parties have been improperly *or collusively made* or joined *for the purpose of creating a case cognizable under the act*." p. 144 [116].

These principles were reaffirmed in *Little* v. *Giles*, 118 U. S. 596, 603 [30: 269, 271], in which *Mr. Justice* Bradley, speaking for the court, said that under the act of 1875, where the interest of the nominal party is "simulated and collusive *and created for the very purpose of giving jurisdiction*, the court should not hesitate to apply the wholesome provisions of the law."

The case before us is one that Congress intended to exclude from the cognizance of a court of the United States. The Pennsylvania corporation neither paid nor assumed to pay anything for the property in dispute, and was invested with the technical legal title for the purpose only of bringing a suit in the Federal court. As we have said, that corporation may be *required* by those who are stockholders of its grantor, and who are also its own stockholders, at any time, and *without receiving therefor any consideration whatever*, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts of the state in which the land lies. It should be regarded as a case of an improper and collusive making of parties for the purpose of creating a case cognizable in the circuit court. If this action were not declared collusive, within the meaning of the act of 1875, then the provision 343] making it the duty of the *circuit court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the circuit courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance.

The judgment is affirmed.

Mr. Justice **Shiras** dissenting:

In April, 1893, the Lehigh Mining & Manufacturing Company, asserting itself to be a corporation organized and existing under the laws of the state of Pennsylvania, and a citizen and resident of said state, brought, in the circuit court of the United States for the western district of Virginia, an action of ejectment for a tract of land in Wise county, state of Virginia, and within the jurisdiction of that court, against J. J. Kelly, James C. Hubbard, and others, all of whom were averred to be citizens of the state of Virginia and residents of the western district thereof.

The defendants filed two special pleas which were traversed by replications. The record shows that subsequently the cause was submitted to the court on the issues thus made and with an agreed statement of facts, and that the court, on May 30, 1893, sustained the pleas, found that it had no jurisdiction of the case, and dismissed the action for want of jurisdiction, but without prejudice. Upon exceptions duly taken, this judgment was brought to this court.

It is admitted, in the agreed statement of facts, that the Lehigh Mining & Manufacturing Company was, in February, 1893, *duly organized* as a corporation of the state of Pennsylvania, and was existing as such at the time of the commencement of this action.

The Constitution of Pennsylvania, of which we take judicial notice, provides in the 7th section of article 3 that such *a corporation [344 cannot be created by any local or special law, and we are thus given to know that the company in question was organized under a general law of the state. On resorting to that law, being the act of April 29, 1874 (1 Purdon's Dig. 335), and of the contents of which we also take judicial notice, we find it provided that to become duly organized as a mining and manufacturing company the charter must be subscribed by five or more persons, three of whom at least must be citizens of Pennsylvania; that the certificate must set forth that ten per centum of the capital stock has been paid in cash to the treasurer of the intended corporation; and these facts as to citizenship and the payment of the requisite proportion of the capital in cash must be sworn to by at least three of the subscribers. Upon such proof the governor is authorized to direct letters patent to be issued, but no corporation shall go into operation without first having the name of the company, the date of the incorporation, the place of business, the amount of capital paid in, and the names of the president and treasurer registered in the office of the auditor general of the state. While, therefore, it is stated in the agreed statement of facts that the said company was organized by the individual stockholders and the officers of the Virginia Coal & Iron Company, such statement is by no means inconsistent with the other statement that the Lehigh Mining & Manufacturing Company was duly organized, and therefore included in its membership citizens of Pennsylvania.

The presumption, therefore, must be that the Lehigh Mining & Manufacturing Company was, in all respects, a corporation regularly and legally organized, and the concession of the agreed statement is that, *as matter of fact*, at least three of its corporators are citizens of the state of Pennsylvania. As matter

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of law, as we shall presently see, all of its corporators are to be indisputably deemed, for the purpose of jurisdiction in the circuit court of the United States, citizens of that state.

The record, therefore, discloses that a regularly organized body corporate of the state of Pennsylvania, seeking to assert its title to a tract of land situated in Wise county, Virginia, 345] *as against certain citizens of Virginia in possession of said tract, and having brought an action of law in the circuit court of the United States, has been dismissed from that court for alleged want of jurisdiction.

Such want of jurisdiction is not apparent on the face of the record, apart from the allegations contained in the special pleas. That the circuit court of the United States has jurisdiction of a dispute about the title to land between a corporation of another state and citizens of the state where the land is situated is, of course, now settled beyond controversy. After a long dispute, the history of which we need not here follow, it was finally decided in *Louisville, C. & C. R. Co.* v. *Letson*, 43 U. S. 2 How. 497 [11: 353], that "a corporation created by and transacting business in a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business is sufficient to give the circuit court jurisdiction." Accordingly, in that case, a plea to the jurisdiction, alleging that some of the corporators of the defendant company, which was a corporation of the state of South Carolina, were citizens of New York, of which latter state the plaintiff was a citizen, was on demurrer overruled. In *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 296 [17: 133], the court, speaking by *Chief Justice* Taney, said: "Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and that *no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.* . . . After these successive decisions, the law upon this subject must be regarded as settled; and a suit by or against a corporation in its corporate name as a suit by or against citizens of the state which created it."

If these cases correctly state the law, was it 346] competent *for the court below, upon the facts agreed upon, to disregard the corporate character of the plaintiff company, and to find that it was composed, in a jurisdictional sense, of citizens of Virginia? It is true that the defendants, in their second plea, alleged that "there was no such legally organized corporation as the plaintiff company at the date of the institution of this suit." But, as we have seen, the statement of facts agreed upon after the pleas were filed states that the plaintiff company was a duly organized corporation of the state of Pennsylvania, and was existing as such at the time of the bringing of the suit.

Assuming, then, as we have a right to do, that the corporate existence of the plaintiff company is conceded, and that, under the authorities, the members of the company are to be deemed citizens of the state of Pennsylvania, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the circuit court, were there any other facts which justified the action of the court below in dismissing the action for want of jurisdiction?

It is said that because it is conceded, in the agreed statement of facts, that the land in controversy had been claimed by the Virginia Coal & Iron Company, a corporation organized under the laws of the state of Virginia, and that said company had executed and delivered a deed of bargain and sale to the Lehigh Mining & Manufacturing Company, by which it conveyed all its right, title, and interest in and to the land in controversy to the Lehigh Mining & Manufacturing Company in fee simple, and because it is admitted that the Pennsylvania company was organized by the individual stockholders and officers of the Virginia company, and that the purpose in organizing said Lehigh Mining & Manufacturing Company and in making to it said conveyance was to give the circuit court jurisdiction in the case, that the legal effect of such a state of facts would constitute a fraud upon the court, and would justify it in dismissing the suit.

It is difficult to see, in the first place, how this could be a case of *fraud*. The facts were conceded, not concealed nor *falsely stated. [347 It would be one thing to say that an acknowledged state of facts failed to confer jurisdiction; another thing to say that such acknowledged state of facts, though formally conferring jurisdiction, constituted fraud on the court, not because untrue and pretended and intended to deprive a court of jurisdiction, but because intended to bring a legal cause of action within its jurisdiction. We have seen that, *ex necessitate* and as matter of fact, there were citizens of Pennsylvania who had, as members of a corporation of that state, an interest in the subject matter of the suit; and we have seen that, by a well-settled proposition of law, the Pennsylvania company must, for jurisdictional purposes, be indisputably deemed to be wholly composed of citizens of the state that created it. How, then, in the absence of misstatement or suppression of facts, can it be said that the Pennsylvania company was guilty of any fraud in invoking the jurisdiction of the Federal court?

I submit that the *true* question, under the pleadings and statement of facts, was whether the transaction, whereby title to the land in dispute was granted and conveyed by the Virginia company to the Pennsylvania company, was an actual one, was really what it purported to be. If the conveyance by the Virginia company really and intentionally conferred its title on the Pennsylvania company, so that the latter company could legally assert its title against the parties in possession in a state court, no reason existed why the same cause of action might not be asserted in a Federal court; that, if the transaction were an actual one, and the conveyance one intended to vest an absolute title, unqualified by any trust, the jurisdiction of the circuit court val-

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idly attached has been frequently declared, even if the *purpose* was to make a case cognizable by the Federal court.

McDonald v. *Smalley*, 26 U. S. 1 Pet. 620 [7: 287], was a case where a citizen of Ohio, under the apprehension that his title to lands in that state could not be maintained in the state court, and being indebted to a citizen of Alabama, offered to sell and convey to him the land in payment of the debt, stating in the letter by which the offer was made that the title would **348**] most *probably be maintained in the courts of the United States, but would fail in the courts of the state. The Alabama citizen accepted the conveyance, and afterwards gave to a third party his bond to make a quitclaim title to the land, on condition of receiving $1,000. The circuit court of the United States for the district of Ohio, in which the grantee filed, as a citizen of Alabama, a bill in equity, held that, upon the above state of facts, the court had no jurisdiction to entertain the suit. But this court held otherwise and reversed the judgment. *Chief Justice* Marshall, for the court, said:

"It has not been alleged and certainly cannot be alleged, that a citizen of one state, having title to lands in another, is disabled from suing for those lands in the courts of the United States by the fact that he derives his title from a citizen of the state in which the lands lie. Consequently, the single inquiry must be whether the conveyance from McArthur to McDonald was real or fictitious. . . . This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties. . . . McArthur's title was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different states. The only part of the testimony which can inspire doubt respecting its being an absolute sale is the admission that the plaintiff gave his bond to a third party for a quitclaim title to the land, on paying him $1,100. We are not informed who this third party was, nor do we suppose it to be material. The title of McArthur was vested in the plaintiff and did not pass out of him by this bond. A suspicion may exist that it was for McArthur. The court cannot act upon this suspicion. But suppose the fact to be avowed, what influence could it have upon the jurisdiction of the court? It would convert the conveyance, which on its face ap- **349**] pears to be absolute, into a *mortgage. But this would not affect the question. In a contest between the mortgagor and mortgagee, being citizens of different states, it cannot be doubted that an ejectment or a bill to foreclose may be brought by the mortgagee, residing in a different state, in a court of the United States. Why, then, may he not sustain a suit in the same court against any other person being a citizen of the same state with the mortgagor? We can perceive no reason why he should not. The case depends, we think, on the question whether the transaction between McArthur and McDonald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage.

In *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 [12: 666], where a mortgagee, a citizen of Alabama, assigned the mortgage to a citizen of New York, both parties concurring in the motive to have the question involved passed upon by a Federal court, it was held that "*the motive imputed could not affect the validity of the conveyance.* This was so held in *McDonald* v. *Smalley*, 26 U. S. 1 Pet. 620 [7: 287]. The suit would be free from objection in the state courts; and the only ground upon which it can be made effectual here is that the transaction between the company and plaintiff was fictitious and not real, and the suit still, in contemplation of law, between the original parties to the mortgage. The question, therefore, is one of proper parties to give jurisdiction to the Federal courts, not of title in the plaintiff. *That* would be a question on the merits, to decide which the jurisdiction must first be admitted. The true and only ground of objection in all these cases is, that the assignor, or the grantor, as the case may be, is the *real party* in the suit, and the plaintiff on the record but nominal and colorable, his *name* being used merely for the purpose of jurisdiction."

So in *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280 [18: 825], the court said: "If the conveyance by the Ridgeleys of the district to Samuel C. Ridgeley, of Maryland, had really transferred the interest of the former to the latter, *although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose.* *McDonald v. Smalley, 26 U. S. 1 Pet. 620 [**350** [7: 287], and several cases since have well established this rule."

If, then, anything can be regarded as settled, it is that the *motive or purpose* of securing a right of action in a Federal court by a conveyance or assignment will not defeat the jurisdiction, if the conveyance or assignment be real, and not fictitious.

It therefore follows in the present case that the concession in the agreed statement of facts, that the purpose was to give jurisdiction to the circuit court, will not defeat that jurisdiction unless it appears that the conveyance was not real but fictitious. This presents a question of fact. Stated in direct terms, the question is this, given a Pennsylvania corporation, indisputably composed of citizens of that state, and a conveyance in fee simple to such company of a tract of land, situated in the state of Virginia, by a corporation of that state, the land being in possession of citizens of the latter state, was this apparent jurisdiction defeated by the admitted facts? It has been established by the cases cited that the mere purpose or intention to put the claim into an owner who would be entitled to go into a Federal court would not be objectionable if the conveyance were an actual one, and where the interest asserted belonged wholly to the plaintiff.

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Hence, the only matter now to determine is, What was the character of the conveyance in the present case? It was, in form, a deed of bargain and sale purporting to convey a fee simple. It is admitted in the agreed statement of facts that "said conveyance passed to said Lehigh Mining & Manufacturing Company *all the right, title, and interest of said Virginia Coal & Iron Company in and to said land, and that since said conveyance said Virginia Coal & Iron Company has had no interest in said land, and has not and never has had any interest in that suit, and that it owns none of the stock of said Lehigh Mining & Manufacturing Company, and has no interest therein whatsoever.*"

It is contended, in the opinion of the majority, that "it appears, in view of what the agreed statement of facts contains, as well as what it omits to disclose, that the conveyance 351] *was without any valuable consideration, and that, as soon as this litigation is concluded, the Pennsylvania corporation, if it succeeded in obtaining judgment against the defendants, can be required by the stockholders of the Virginia corporation, being also stockholders of the Pennsylvania corporation, to reconvey the land in controversy to the Virginia corporation."

This contention, and the fate of the case turns upon it, can be readily met. It assumes two facts, neither of which are found in the record, and both of which, if found, would be immaterial. First, it is said that the conveyance was without any valuable consideration. But it is distinctly admitted that the Virginia company "executed and delivered a deed of bargain and sale to the Lehigh Mining & Manufacturing Company, by which it conveyed all its right, title, and interest in the land in controversy in fee simple." It is not found that no consideration was given, and in the absence of such a finding the presumption would be that a deed of conveyance under seal, and granting an estate in fee simple, implies a consideration. But it is unnecessary to consider this, because it is wholly immaterial whether the grantee paid a consideration or not. The deed, even if it were a deed of gift, was executed and delivered, and an executed gift is irrevocable. Nor does it concern the defendants whether the grant by deed was or was not for a valuable consideration.

The very question came up in the case of *De Lavaga* v. *Williams*, 5 Sawy. 573, in the circuit court of the district of California, and where it was urged that no consideration was ever paid, and that the deed was executed to enable the suit to be brought in the circuit court of the United States. But the court said, by *Mr. Justice* Field: "There is no doubt that the sole object of the deed to the complainant was to give jurisdiction, and that the grantor has borne and still bears the expenses of the suit, but neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property, if he chooses so to do. And the court will not, at the suggestion of a stranger to the title, inquire into the motives which induced the grantor 352] to *part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of Congress to proceed in the Federal courts for the protection of his rights. It is only when the conveyance is executed to give the court jurisdiction, and is accompanied with an agreement to retransfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud upon the court. Here there was no such agreement, and it will be optional with the complainant to retransfer or retain the property. He is by the deed the absolute owner of the interest conveyed, and can only be deprived of it by his own will, and upon such considerations as he may choose to exact."

The only operation that could be given to the absence of proof of an actual consideration would be to create a suspicion of a secret trust. But this is negatived in the present case by the admission that a deed in fee simple was executed and delivered, and that by it the entire title, interest, and right of the grantor company passed to the Pennsylvania corporation, and that "since said conveyance said Virginia Coal & Iron Company has had no interest in said land, and has not and never has had any interest in this suit."

It is admitted, in the opinion of the majority, that "the legal title to the lands in controversy is in the Pennsylvania corporation, and that there was no formal agreement or understanding upon its part that the title shall ever be reconveyed to the Virginia corporation." But it is said that "there exists what should be deemed an equivalent to such an agreement, namely, the right and power of those who are stockholders of each corporation to compel the one holding the legal title to convey, without a valuable consideration, that title to the other corporation." This seems to me to be a strained conjecture. Stock in a corporation is continually changing hands, and to suppose that, at the end of a pending litigation, the holders will be the identical persons who held it at the beginning is too uncertain and fanciful to form a basis for a judicial action. As was well said by *Mr. Justice* Grier, in *Marshall* v. *Baltimore & O. R. Co.* 57 U. S. 16 How. [353 327, 328 [14: 959]: "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name. . . . It is not reasonable that representatives of numerous *unknown and ever-changing associates* should be permitted to allege the different citizenship of one or more of these stockholders," in order to defeat the jurisdiction of Federal courts.

Some expressions used in the opinion of the court below, and likewise in the majority opinion, seem to imply that the act of March 3, 1875 (18 Stat. at L. 470), has operated to change the law in respect to the jurisdiction of the circuit courts of the United States. I do not so understand the purpose of that enactment. I have supposed that it only operates as a rule of practice. As the law previously stood, if the face of the record disclosed a suit between citizens of different states, and thus within the jurisdiction of the circuit court, it

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was necessary to traverse the averment of citizenship by a plea in abatement, and if the defendant went to trial on a plea to the merits he could not afterwards question the truth of such averment. *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 [12:666]; *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280 [18:825].

But since the passage of the act of March 3, 1875, "it is competent for the court at any time, during the trial of the case, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered." *Hartog* v. *Memory*, 116 U. S. 588 [29:725].

It is not perceived that the legal rights of owners of property are in any wise affected by this law, and it is still true, as was said in *Barry* v. *Edmunds*, 116 U. S. 550 [29:729], that "the order of the circuit court dismissing the cause for want of jurisdiction is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or **354**] hearing of a cause, would receive *impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, we would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, shall appear to the satisfaction of the court."

As, then, the plaintiff company is conceded to be a duly organized and existing body corporate of the state of Pennsylvania; as the land in dispute is within the jurisdiction of the court, and the defendants in possession thereof are citizens of the state of Virginia; and as it is conceded that, by a deed of conveyance in fee simple, the Virginia company passed all its right, title, and interest in said land, and has since had "no interest in said land or in the suit,"—I think the jurisdiction of the circuit court ought not to be defeated by the conjecture that the persons owning the stock of the corporation when the deed of conveyance was made might continue to own it years afterwards when the suit should terminate, and might choose, as such owners, to cause another transfer and conveyance of the land to be made. Such conjectures are very far from furnishing for judicial action that "legal certainty" which in *Barry* v. *Edmunds* is said to be the proper basis upon which to deprive parties of their right of access to the national tribunals.

If we are permitted to enter into the realm of supposition, it is easy to suggest that the present stockholders, so far as they are citizens of Virginia, might dispose of their stock in good faith and absolutely to citizens of Pennsylvania. Then, upon another action brought in the same court, the same pleas being interposed, it would be competent, according to the views which prevail in the present case, to meet the pleas by a replication averring that the individual stockholders are citizens of Pennsylvania, and thus the jurisdiction would be sustained. What, in such a case, would have become of the long-settled *rule that the [**355** status, as to citizenship, of the individual stockholders is not a matter of allegation and proof? Has the court retraced its steps, and can state corporations be turned out of the Federal courts on a plea that one or more of the stockholders is a citizen of the same state in which the litigation is pending?

Mr. Justice **Field** and *Mr. Justice* **Brown** concur in this dissent.

GEORGE PIERCE and JOHN PIERCE, *Plfs. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 355-357.)

Compelling election of count of indictment—admission of testimony—confession.

1. Where two counts of an indictment for murder differ only in stating the manner in which the murder was committed, it is in the discretion of the court whether the prosecution shall be compelled to elect upon which count to proceed.
2. Testimony which did not prejudice the party excepting, but, if material, was in his favor, is not ground of error.
3. The mere presence of officers is not an influence to exclude a confession; it is not inadmissible because the party is in custody, if not extorted by inducements or threats.

[No. 648.]

Submitted November 19, 1895. Decided January 6, 1896.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting George Pierce and John Pierce of murder. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

The plaintiffs in error were indicted for the murder on January 15, 1895, in the Cherokee Nation, in the Indian country, of one William Vandeveer, a white man and not an Indian. There were two counts in the indictment. The first charged the murder to have been committed with a gun, and the second charged it to have been committed "with a certain blunt instrument." The jury found both defendants guilty of murder as charged in the first count, and they were accordingly both sentenced to death.

Submitted on the record by plaintiffs in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice* **Brown delivered the [**356** opinion of the court:

This case was submitted upon the brief of the attorney general, and upon the material

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parts of the record. Defendants did not appear at the hearing.

1. The first error assigned is to the refusal of the court to compel the government to elect upon which count of the indictment it would proceed. The two counts differ from each other only in stating the manner in which the murder was committed. Testimony was introduced upon the trial tending to show that deceased had been shot in the forehead, and also hit on the head with a hammer. The question whether the prosecution should be compelled to elect was a matter purely within the discretion of the court. *Pointer* v. *United States*, 151 U. S. 396 [38: 208].

2. As no exceptions were taken to the charge of the court, and but one to the admission of testimony, the bill of exceptions, which was very voluminous, was not printed in full; but the charge of the court and the testimony of the defendants were printed, as well as an abstract of the testimony of a single witness, Andrew Brown, who testified that on Monday evening, January 19, he saw the two defendants with another man close to his place; that they were traveling with a mule team and a covered wagon, with a gray mare and colt following; that before daylight next morning he saw the same outfit, except there was no third man with defendants; that he went for his nearest neighbor, a Mr. West, and with him searched the place where the defendants had camped, finding blood all around; that Mr. West took up a blanket, and something like a pint of blood ran out of it; he just dropped it and said: "Brown, what kind of blood is that?" The answer to this was objected to, and the objection overruled, and an exception taken. The witness answered: 'I don't know what kind of blood it is; it is blood.' He says: 'Maybe they have killed one of my hogs.' I says: 'We will see.'" This testimony clearly did not tend to prejudice the defendants, and, if it were material at all, bore rather in their favor than against them.

357] *3. The admission of certain statements made by the defendants while they were under arrest and handcuffed was also objected to. No exception was taken to the admission of this testimony, and the court properly held that the mere presence of officers is not an influence. Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that such confessions are not extorted by inducements or threats. *Hopt* v. *Utah*, 110 U. S. 574, 588 [28: 262, 266]; *Sparf* v. *United States*, 156 U. S. 51, 55 [39: 343, 345]. The so-called confessions show merely that the defendants acted in a somewhat suspicious manner when first arrested, saying, "If we killed him, you prove it; . . . that is for us to know, and you to find out,"—and that they refused to tell their names. There was clearly no objection to this testimony.

No exception was taken to the charge, and after a careful reading of it, we see nothing of which the defendants were justly entitled to complain.

The judgment is therefore affirmed.

EDWARD B. BARTLETT ET AL., *Plfs. in Err.*,
v.
WILLIAM LOCKWOOD ET AL.

(See S. C. Reporter's ed. 357-369.)

Review of state decision—Federal question.

1. This court has not jurisdiction to review upon writ of error the decision of a state court upon a question of fact.
2. The decision of a state court that the collector of a port had the right to send rags to the proper warehouse for disinfection, being in favor of, and not against, the validity of the authority set up and claimed under the laws of the United States by the plaintiff in error, presents no Federal question.

[No. 95.]

Argued December 3, 4, 1895. Decided January 6, 1896.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court in favor of the plaintiffs, Wm. Lockwood *et al.*, against defendants, Edward B. Bartlett *et al.*, for a conspiracy to have certain cargoes of rags belonging to the plaintiffs condemned as unclean and infectious property. *On motion to dismiss. Dismissed.*

See same case below, 130 N. Y. 340.

Statement by *Mr. Justice* **Brown:**

This was a motion to dismiss a writ of error sued out by the firm of E. B. Bartlett & Co., defendants in the court below, to review a judgment obtained against them in the supreme court of New York by the firm of Lockwood & McClintock, for a conspiracy to have certain cargoes of rags belonging to the plaintiffs condemned as unclean and infectious property. With the firm of E. B. Bartlett & Co. was also impleaded as defendant Dr. William M. Smith, sued as an individual, but alleged to be at the time of the transaction health officer of the port of New York.

The complaint alleged in substance that in May, 1885, plaintiffs imported by ship Vigilant from Japan, and by barque Battaglia from Leghorn, about 3,000 bales of rags, of which plaintiffs were entitled to the possession and control; that the defendant Smith, the health officer of the port, with intent to injure plaintiffs, conspired with the firm of Bartlett & Co. to have such rags condemned as unclean and infectious property, and to require them to be disinfected under a process used by Bartlett & Co. so that they would be entitled to charge plaintiffs therefor, and to hold such rags until such charges were paid; that Smith, under color of his office, wrongfully and unlawfully caused such rags to be taken from the vessels,

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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and transferred to the place of business of said Bartlett & Co. for the purpose of having the same disinfected, although he, as well as Bartlett & Co., knew that the rags were clean and free from any infectious matter, were not dangerous to health, and did not require to be disinfected; that by reason of such wrongful conspiracy and acts the rags were taken by Bartlett & Co. and kept by them from June 5 to October 1, during which time they were partially subjected to a pretended process of disinfection, which was ineffectual and worthless for any real purpose of disinfection, and which greatly damaged and injured the rags, but which process was fraudulently and collusively approved of by said Smith, with intent to give Bartlett & Co. the monopoly of the dis-
359] infection of *rags, so that they might be able to extort from plaintiffs and others large sums of money for such so-called disinfection; that plaintiffs protested against such conduct, demanded possession of their rags, which defendants refused to deliver until the charges for the transfer and disinfection were paid,—by reason of which acts plaintiffs suffered large damages.

The answer of defendants, Bartlett & Co., denied the conspiracy charged in the complaint; admitted defendant Smith to be the health officer, but denied "that he had full charge and control over vessels and cargoes coming into the port, except as authorized by the statutes of the state of New York and the regulations of the United States and the port of New York."

The action was tried in the supreme court before a jury, and a verdict rendered for the plaintiffs as against the defendant firm of Bartlett & Co. for $8,000, the jury disagreeing as to the defendant Smith. Judgment having been entered upon this verdict, defendants appealed to the general term, which, upon a hearing before three judges, directed that, upon plaintiffs' stipulating to reduce the original judgment in the sum of $1,675.16, the judgment as to the residue be affirmed. The stipulation was given, and the judgment reduced accordingly. Defendants appealed from this judgment to the court of appeals, which ordered that the judgment should be reversed, and a new trial granted unless plaintiff stipulated to reduce the recovery of damages to $3,182.52. 130 N. Y. 340. The case being remitted to the supreme court, and the plaintiffs having given the stipulation required by the judgment of the court of appeals, judgment was entered in favor of the plaintiffs for $3,914.05, to review which judgment defendants sued out this writ of error.

Mr. **Henry W. Goodrich** for plaintiffs in error:

The case involves "an authority exercised under the United States, and the decision is against its validity. . . . Such a decision was necessary to the judgment."

The question was raised by the issues in the pleadings, by the motions to dismiss on the opening of the plaintiffs' counsel, by the motion to dismiss at the close of the plaintiffs' case, and by the motion to dismiss at the close of the defendants' case at the trial court. The appeal taken from the judgment entered at the trial court raised the question of the authority of the Treasury Department, and the decision of the court of appeals discussed this question and held adversely to the power of the Treasury Department.

The court of appeals held that the plaintiffs in error had the right to hold the goods for lighterage and storage charges under the authority exercised by the Treasury Department and the collector, but they had no right to hold the goods under such authority for disinfection charges. The latter holding was error.

Private bonded warehouses are public storehouses, and collectors are authorized to retain, as part of their emoluments, sums received for the deposit of importations in such bonded warehouses under the same provisions applicable to public storehouses.

United States v. *Macdonald*, 2 Cliff. 271; *Clark* v. *Peaslee*, 1 Cliff. 545

The Federal question presented is this: Has the Treasury Department the right, under U. S. Rev. Stat. § 4792, to order the disinfection of the rags in question? and, second, whether specific designation of the place and manner of such disinfection is required to be given by the health officer of the port.

The court held as follows:

"The collector, under his authority, in view of the regulation for disinfection of the rags on the two vessels adopted by the health officer, was justified in directing, as he did, the sending of the rags to these places, and the expenses of such transfer were presumptively a lien upon the property to which they related. No specific order or direction of the health officer is essential for that purpose; it is sufficient that it was done pursuant to regulations within his power, made by him."

Thus, it will be seen that the question is squarely presented as to whether the collector had the right to order the disinfection, the court of appeals having held that the collector was justified in sending the goods for disinfection, and that the charges incurred therefor were correct charges and a lien upon the goods, but that he could not order the disinfection without the specific direction of the health officer, and hence that the charges for disinfection were unlawful.

Messrs. **Charles W. Bangs** and *Francis Lynde Stetson*, for defendants in error:

If, irrespective of the insufficiency of the assignment of errors filed upon the allowance of the writ of error, the determination of this court as to its jurisdiction to review the final judgment of the state court is dependent upon the issues and questions raised by the pleadings in the action, then this court clearly has no jurisdiction to re examine such judgment.

Crary v. *Devlin*, reported only in U. S. Sup. Ct. Rep. 23 L. ed. 510, cited in *Dower* v. *Richards*, 151 U. S. 670 (38: 310).

The decision of the highest court of the state was not against any title, right, privilege, or immunity set up or claimed, or against any authority, or the validity of any authority, exercised under the United States

Lockwood v. *Bartlett*, 130 N. Y. 340.

The decision therefore of the court of appeals, the highest court of the state in which a decision could be had, was not against the validity of any law or of any authority exercised

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by the collector pursuant to any law of the United States, but was in support of such authority; and distinctly on the ground that, as a matter of fact the health officer had not given any specific directions or orders for the disinfection of the rags by Bartlett & Co.

This court will not review or re-examine the judgment or decision of the state court upon questions of fact, which were exclusively within its jurisdiction,—either as to what the health officer of the port actually did in regard to the disinfection of the rags in question, or as to his power and authority in the premises, he being exclusively a state officer.

Dower v. *Richards*, 151 U. S. 659 (38: 306); *Wiscart* v. *Dauchy*, 3 U. S. 3 Dall. 327 (1: 622); *Hyde* v. *Booraem*, 41 U. S. 16 Pet. 169 (10: 925); *United States* v. *King*, 48 U. S. 7 How. 833 (12: 934); *Parks* v. *Turner*, 53 U. S. 12 How. 39 (13: 883); *Arthurs* v. *Hart*, 58 U. S. 17 How. 6 (15: 30); *Jeffries* v. *Mutual L. Ins. Co.* 110 U. S. 305 (28: 156); *Campau* v. *Lewis*, 70 U. S. 3 Wall. 106 (18: 211); *Hall* v. *Jordan*, 82 U. S. 15 Wall. 393 (21: 72); *Merced Min. Co.* v. *Boggs*, 70 U. S. 3 Wall. 304 (18: 245); *Carpenter* v. *Williams*, 76 U. S. 9 Wall. 785 (19: 827); *Crary* v. *Devlin*, reported only in U. S. Sup. Ct. Rep. 23 L. ed. 510; *Republican Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315 (23: 515); *Martin* v. *Marks*, 97 U. S. 345 (24: 940); *Kenney* v. *Effinger*, 115 U. S. 577 (29: 498); *Quimby* v. *Boyd*, 128 U. S. 488 (32: 502).

Mr. Justice **Brown** delivered the opinion of the court:

There is certainly nothing in the pleadings in this case to indicate a Federal question. It is **361**] simply an action of *conspiracy to injure the plaintiffs, and it does not appear from the complaint that the validity of any statute of the United States, or of any authority exercised under the United States, was drawn in question. The answer of the principal defendants, Bartlett & Co., sets up no claim of privilege or immunity under any statute of the United States or any authority exercised thereunder. Indeed, there is nothing anywhere in the record to indicate that any Federal statute or authority was specially set up or claimed in the state court.

Error, however, is assigned to the action of the court in holding that, under the statutes of the United States, neither the Treasury Department nor the collector had a right to order the disinfection of the plaintiffs' rags, and also in holding that the rags were not disinfected under the order of such department or the collector of customs.

The real question is whether the acts of which plaintiffs complain were done in pursuance of Federal or state authority, or were the unauthorized acts of the defendants themselves. While, under its power to regulate foreign and interstate commerce, the authority of Congress to establish quarantine regulations, and to protect the country as respects its commerce from contagious and infectious diseases, has never in recent years been questioned, such power has been allowed to remain in abeyance; and Congress, doubtless in view of the different requirements of different climates and localities and of the difficulty of framing a general law upon the subject, has elected to permit the several states to regulate the matter of protecting the public health as to themselves seemed best. Their power to do this was recognized by this court in *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455 [30: 237]. Congress has also confirmed such power by requiring (U. S. Rev. Stat. § 4792) that "the quarantines and other restraints established by the health laws of any state, respecting any vessels arriving in or bound to any port or district thereof, shall be duly observed by the officers of the customs revenue, . . . and that all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, *and as they [**362** shall be directed, from time to time, by the Secretary of the Treasury."

Upon the trial it was shown that the Vigilant arrived at the New York quarantine May 30, 1885, with 2,920 bales of rags belonging to the plaintiffs. The health officer passed her at quarantine, and gave her a permission to proceed, which stated as follows with respect to the cargo: "Cargo general (rags excepted). The vessel has permission to proceed." There was some dispute as to whether the words "rags excepted" were a limitation upon the permission of the vessel to proceed or a qualification of the words "general cargo." The testimony of the health officer indicated that it meant that the vessel was to be allowed to proceed to her dock and discharge her cargo other than rags. Both parties evidently acted upon the theory that these words did not require an unloading of the rags at quarantine, as the vessel was allowed to proceed and did proceed to her dock, and on June 1 a permit was granted by the proper health officer of the city of New York "to land and store said rags, provided the same be not broken from the bulk in the bales they are now in." Thereupon plaintiffs went to the customhouse to enter the goods, but the collector declined to receive the entry, and plaintiffs went with their counsel to Washington to lay the matter before the Secretary of the Treasury.

At this time the subject, so far as it came within the jurisdiction of the Federal authorities, was regulated by two circulars issued by the Secretary of the Treasury, the first of which bore date of November 15, 1884, and prohibited "the unlading in the United States of old rags shipped from and after the 20th instant from foreign ports or countries now or hereafter known to be infected with contagious or epidemic diseases;" and further provided that "no old rags shall be landed at any port of the United States except upon a certificate of the United States consular officer at the port of departure that such rags were not gathered or baled at, or shipped from, any infected place or any region contiguous thereto." The second circular, dated December 22, 1884, modified previous circulars, and directed that "no old rags, *except those afloat [**363** on or before January 1, 1885, on vessels bound directly to the United States, shall be landed in the United States from any vessel, nor come into the United States by land from any foreign country, except upon disinfection, at the expense of the importers, as provided in this

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circular, or as may hereafter be provided." Certain processes of disinfection were specified in this circular, and other directions given for landing and storing rags for the purpose of disinfection.

A letter bearing date January 12, 1885, addressed to the collector of customs at New York, in reference to the landing and storage of rags to be disinfected, approved of the selection of the Baltic stores in Brooklyn, which belonged to the defendants, Bartlett & Co., as a proper place for that purpose, and directed that "where rags requiring disinfection form part of a cargo, they will be placed on lighters as fast as discharged, and the lighter loads will be taken to the place above designated." It appeared from this letter that Mr. Bartlett, one of the defendants, had written a letter to the department, touching the selection of a warehouse for the storage and disinfection of old rags; that the matter had been referred to the health officers of New York and Brooklyn, both of whom agreed as to the propriety of designating the Baltic stores for that purpose. Two days after this letter was written, and on January 14, the collector of the port made a general order that "on the entry of old rags shipped on and after the 1st instant, and which have not been disinfected prior to importation, the permit to land will have written on the face thereof directions to the inspector to send the rags to the Baltic stores in Brooklyn, by bonded lighters, for disinfection;" and further providing that, upon evidence that the rags had been satisfactorily disinfected, an order for their delivery would be made.

These were the regulations in force at the time plaintiffs made their visit to Washington. The Secretary of the Treasury, upon examining the law upon the subject, became satisfied that there was no statute which gave him any authority except in aid of the health [364] officers of the ports (U. S. Rev. *Stat. § 4792), and in accordance with such conclusion he telegraphed the collector of customs on June 5, that "as to rags per Vigilant, from Japan, which importers claimed were mostly on board prior to January 1st, you are directed to submit all to health officer Smith, and to be governed by him in the matter." On June 6 the collector wrote to the health officer notifying him of the receipt of this telegram, and asking to be advised whether, in his judgment, as health officer of the port, the rags might, with safety to the public health, be allowed to be landed, and, without disinfection, to go into consumption. In reply to this, the health officer wrote upon the same day detailing the result of many medical conferences and sanitary investigations, and stating that he did not claim that it was necessary for the protection of the public health that all rags should be disinfected, although it was "impossible to determine what may and what may not be admitted with absolute assurance of safety," and concluding that it seemed advisable that for the present the rule for the disinfection of rags should be general, and that the rags on the Vigilant should not be an exception to the rule.

He did not, however, give any positive directions that the rags should be disinfected, and testified upon the stand that he gave no order that these rags should be disinfected, either at Bartlett's store or elsewhere.

Before, however, the Secretary of the Treasury had acted in the matter, and before his telegram to the collector of June 5 had been sent, a general order was issued by the collector on June 3, directing the inspector on the Vigilant to allow to be landed and sent "to the public store No. —, E. B. Bartlett's, South, all merchandise for which no permit or order shall have been received by him contrary to this direction," with certain exceptions, that did not include rags, in the body of the paper, although the words, "Rags, A. W. H.," were written across the face of it. On June 9 the collector made a further order that "the inspector in charge of the ship Vigilant from Hiogo, Japan, under general order made June 3, 1885, will allow to be landed and will send on bonded lighters to Baltic stores (E. B. Bartlett & Co.'s, South) for *disinfection, [365] all rags for which no permit shall have been received, and will make returns thereof, as of an order or permit."

On the following day, June 10, the Secretary of the Treasury, pursuant to his conclusion that there was no statute which gave him any authority in respect to the landing and disinfecting of imported rags, except in aid of the health officer, issued a circular or order to all collectors of customs in the following terms: "Whereas it has been conclusively shown to the department that, under existing laws, no general regulation can be legally framed whereby the disinfection of old rags can be accomplished in foreign ports to the satisfaction of the several health authorities, Therefore it is ordered—

"1. That all circulars of this department concerning the disinfection of imported old rags are hereby revoked, and that all old rags hereafter imported from foreign countries shall only be admitted for entry at the customhouse upon the production of permits from the health officers at the ports of importation, duly authorizing the landing of the same.

"2. Vessels carrying old rags, arriving at any United States quarantine, will be detained by the quarantine officers, and held subject to the order of the proper health authorities at the port of destination."

On the same day Dr. Smith, the health officer of New York, gave a certificate that the rags per ship Vigilant from Hiogo, Japan, "to be disinfected, are not from a cholera-infected port."

The rags were accordingly, and in pursuance of the collector's instructions of June 9, taken to the Baltic stores and there disinfected by the defendants, who paid the lighter's charges, made out a bill for these as well as for disinfecting and storage, amounting to $4,904.90, for which they claimed a lien upon the property.

The case of the Battaglia did not differ materially from that of the Vigilant. The barque arrived and was entered at the customhouse on June 6, 1885, with 150 bales of rags belonging to the plaintiffs. On June 9 a general order was made, allowing the discharge of the cargo, but "omitting rags." *On June 11 the [366] Secretary of the Treasury wrote to the collector at New York, stating that the consignees desired to be covered by the circular of June

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10, which placed the control of the disinfection with the health officer, and that the department had no objection to this. On June 13 the collector inclosed a copy of this letter to the health officer, inquiring of him whether he would designate the place and process appropriate. From a letter written by the collector to the Secretary of the Treasury June 19, 1885, it would appear that the Brooklyn commissioner of health refused to allow the unloading of the rags in Brooklyn unless they were approved by the health officer, and that he therefore ordered, under U. S. Rev. Stat. § 2880, the unloading of the rags and their transfer by bonded lighter to Robbin's Reef, for disinfection, provided the health officials of New York city would permit such transfer from the Battaglia to the bonded lighter. On June 17 the health officer certified that the rags were "to be disinfected at Robbin's Reef' if health commissioner of Brooklyn will not give permit for Baltic stores." The charge for the lighterage of these rags and for their disinfection and storage amounted to $409.25, for which amount defendants claimed a lien upon them.

As we have observed already, there is nothing in the record from which a Federal question can be raised in this case. If we look beyond the record, to the opinions of the court, we find that the general term held—

1. That the Revised Statutes did not authorize the collector to take possession of these rags as unclaimed goods and store them in a private bonded warehouse, such as the Baltic stores.

2. That the acts of the collector could not be justified by §§ 4792 and 4793, requiring him to aid in executing the health laws of the state.

3. That the health officer did not directly order the seizure of these rags, their conveyance to the Baltic stores in the one case and to Robbin's Reef in the other, and their disinfection by the disinfecting company, the defendants.

4. That the collector, having no power to 367] send any but *unclaimed goods to the public stores, could not refuse a permit for these goods to land, and cause them to be sent to the public stores to be disinfected at the expense of the owner, and if he did so, he, as well as all other persons who detained the goods because of nonpayment of these unauthorized charges, became liable in damages for such unauthorized detention.

5. That the act of the collector, being without authority, could confer no authority upon defendants to hold the goods until the charges incurred because of the unauthorized acts of the collector were paid.

Had the matter rested here it might perhaps have been claimed that the state court had ruled adversely to an authority exercised under the United States, but on appeal to the court of appeals the judgment of the general term was varied to the extent of holding that the defendants were liable only for detaining the goods until the charges for disinfection were paid. That court held in substance:

1. That the direction of the collector that the rags be sent to the Baltic stores and Robbin's Reef was pursuant to the requirement that they should be disinfected, and pursuant to the direction of the Secretary of the Treasury, and in aid of the health officer in the execution of his official power.

2. That the work of disinfection was not conducted under the supervision or control of the health officer, nor pursuant to his employment of the defendants, and that the health officer had testified that he never gave any order for the disinfection of the rags, and that the defendants assumed to do this work without any direction of the health officer, and without approval by him of the efficiency of the work or the charges resulting from it.

3. That this objection was not applicable to the charges for lighterage and storage, and that the collector was justified in directing, as he did, the sending of the rags to these places, and the expense of such transfer was a lien upon the property.

4. That the charges for lighterage paid by the defendants, according to the custom in such cases, and for the storage for *the [368 time the rags properly remained with them, were a lien upon the property.

5. That, so far as defendants required payment for the further claim for disinfection as a condition of the delivery, they were chargeable with duress of property, and that the plaintiffs were entitled to recover this amount from them.

The result, then, of this summary of the case, is briefly this:

The defendants claimed as a Federal question that they had set up as a defense to this action an authority exercised under the United States, *viz.*, an authority given by the collector of customs to disinfect these rags.

In relation to this, the general term held that the Revised Statutes gave no authority to the collector to take possession of these goods and retain possession of them and that his seizure of the goods, and causing them to be sent to the Baltic stores, was an unauthorized act, and if he caused them to be disinfected, he became liable in damages.

The court of appeals, however, held that the direction of the collector that the rags should be sent to the places where they were taken was pursuant to the requirement that they should be disinfected, and in aid of the health officer in the execution of his official power, by the observance of the regulations made by him; that *the collector gave no order for their disinfection;* that the health officer gave no such order; and that the defendants assumed to disinfect them without authority, and hence their charges therefor were illegal; but that, as the collector had properly sent them the goods for such action as the health authorities might see fit to take, the plaintiffs became liable for storage and lighterage.

It follows, then, that as the court of appeals ruled, as matter of fact, that the collector never ordered the rags to be disinfected (a ruling which is not reviewable here, *Dower* v. *Richards*, 151 U.S. 658 [38: 305]; *Re Buchanan*, 158 U. S. 31 [39: 884]; *Israel* v. *Arthur*, 152 U. S. 355 [38: 474]), and, as a matter of law, that he had the right to send them to the proper warehouse for disinfection, it appears that the ruling was in favor of, and not against, the validity of the authority set up and claimed

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369]under *the laws of the United States. We may add in this connection that, as it clearly appears that the collector had no authority to order the goods to be disinfected, we think the court of appeals was correct in holding that his somewhat ambiguous order for June 9, directing that the goods should be sent to the Baltic stores for disinfection, should be considered as an order to send the goods for disinfection in case such disinfection were ordered by the health officer. The disinfection, if ordered at all, was ordered by the health officer, and the charges for this are all for which the defendants were held liable. Whether such order was ever given by the health officer was a question solely within the jurisdiction of the state court.

The writ of error must therefore be dismissed.

SARAH VAN WAGENEN ET AL., *Appts.*,
v.
RUFUS K. SEWALL.

(See S. C. Reporter's ed. 369-373.)

Certificate of jurisdiction.

The absence of a certificate of the question of jurisdiction is fatal to an appeal to this court from a United States district court where the only question of jurisdiction was raised by a demurrer which was in substance only a general demurrer to the bill for want of equity.

[No. 140.]

Argued and Submitted December 20, 1895. Decided January 6, 1896.

APPEAL from a decree of the District Court of the United States for the Northern District of Florida sustaining a demurrer to a petition for a review and reversal of certain proceedings and of a decree rendered in another case ordering a survey of a grant. *Dismissed.*

Statement by *Mr. Justice* **Brown:**

This was a petition by Sarah Van Wagenen and others for the review and reversal of certain proceedings in the case of *John M. Hanson* 370] v. *The United States*, and of a decree *rendered therein, ordering a survey of the Hanson or Miles grant, made by the surveyor general upon the petition of one Greely, assignee in bankruptcy of Hanson, which said survey had been approved by a decree of the district court of April 13, 1889.

The petition set forth that the petitioners were the owners in fee of an undivided one-third interest in this grant, which contained 16,000 or more acres, situate in the county of Dade, which undivided interest originally belonged to one Hedrick, one of the original petitioners in the case of *Hanson* v. *United States;* and that petitioners were also the owners in fee of the whole grant by purchase from the state of Florida; that such grant was originally made by the Spanish government to one Samuel Miles on July 19, 1818, was surveyed and set off to him in 1815, and in 1840 was confirmed to Hanson, Segui, and Hedrick; that upon appeal to the Supreme Court of the United States, the title of the claimants and the decree of the court below were affirmed (41 U. S. 16 Pet. 196 [10: 935]); but that the Supreme Court set aside the survey as irregular, and ordered the surveyor general of the territory to make a new survey, and remanded the case to the superior court of East Florida for that purpose; that in accordance with such mandate and decree of the Supreme Court a new survey was made, returned to the land office of the territory, and the grant then platted from said survey; that such survey was subsequently confirmed and approved of by the said superior court, whose decree in that regard has never been reversed, appealed from, or set aside, but still remains in force; and that, by such action and decree, that court exhausted all its jurisdiction under the acts of Congress, and could neither do nor perform any other matter or thing relative thereto.

The petitioners further averred that, in 1885, one Greeley, claiming to be assignee in bankruptcy of Hanson, and one Agatha O'Brien, claiming to be the administratrix of Bernardo Segui, also claiming an undivided one-third interest in the grant, did by petition in the said cause of *Hanson* v. *United States*, to the district court for the northern district of Florida, allege, as well as in the petition of Rufus K. Sewall, *who was made a party thereto, [371 that said grant had never been surveyed, nor had any survey ever been confirmed or approved, as directed by the Supreme Court and the superior court of the territory; and did pray that the survey might be had in accordance with the decree of such courts; and that, in pursuance of such petition, the district court, in 1885, ordered the then surveyor general to make such survey, which was in fact made, returned to the court in accordance with this order, and in 1889 was confirmed—all without notice to the petitioners—and as they averred, beyond the jurisdiction and power of the court; that the same was invalid, by reason of the fact that the court had no jurisdiction in the premises, having exhausted all jurisdiction and powers it possessed under its previous decree confirming the survey made in 1851; that the allegations contained in the petition of Greeley were untrue in averring that no survey had been made; that neither the representatives of Segui, nor Greeley, as assignee of Hanson, had any right in the grant; that the new survey was unjust to the petitioners, in that it greatly changed the lines of the original survey, and reduced largely the area of the grant, and in other respects affected the just rights of the petitioners.

Wherefore petitioners prayed that all of such proceedings for the new survey be vacated and

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NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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set aside as absolutely null and void, and for further relief, etc.

On January 6, 1892, Sewall appeared by his solicitors, and demurred to the petition upon two grounds: First, that the record and proceedings attached to and made a part of the petition showed that a proper and final decree had been made in the cause, adjudicating fully all the issues made therein; and, second, that the court had no power or jurisdiction to grant the petitioners the relief prayed for therein.

This demurrer having been sustained by the court, the petitioner Sarah Van Wagenen prayed for a rehearing upon the ground that the final decree made in 1851 fully and finally disposed of the cause, and exhausted the jurisdiction of the court, etc.; and that the court had no power, by proceedings taken in 1885, to order a resurvey.

372] *This petition for a rehearing having been denied, petitioner appealed to this court.

Mr. **H. H. Buckman** for appellants.

Mr. **Rufus K. Sewall,** appellee, for himself.

Mr. Justice **Brown** delivered the opinion of the court:

As this appeal was taken long after the act of March 3, 1891, establishing the court of appeals, went into effect, it should have been taken to the court of appeals of the fifth circuit, unless the case be one within the 5th section of the act, wherein the jurisdiction of the court is in issue. In such cases, however "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." There is an entire absence of such certificate in this case,—an absence which was held to be fatal to the appeal in *Maynard* v. *Hecht*, 151 U. S. 324 [38: 179]; *Moran* v. *Hagerman*, 151 U. S. 329 [38: 181]; *Colvin* v. *Jacksonville*, 157 U. S. 368 [39: 736]; and *Davis & R. Bldg. & Mfg. Co.* v. *Barber*, 157 U. S. 673 [39: 853]. It is true that in *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322 [39: 438], we held that the certificate was not necessary, inasmuch as it appeared in the decree that the question involved was only a question of jurisdiction, and the judgment not only recited that the court considered it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction, but the district judge certified in the bill of exceptions that it was "held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed," and, in the order allowing the writ of error, certified in effect that it was allowed "upon the question of jurisdiction." So, also, in *Shields* v. *Coleman*, 157 U. S. 168 [39: 660], where the court below, granting the appeal, said, "this appeal is granted solely upon the question of jurisdiction," and made further provisions for determining what part of the record should be certified to this court 373] under the *appeal, we held this to be a sufficient certificate of a question of jurisdiction under the act.

In this case, however, the only question of jurisdiction is raised by the demurrer of Sewall to the petition, which is upon two grounds: First, that the proper and final decree had been made adjudicating all the issues in the cause; and second, that the court had no power or jurisdiction to grant the petitioners relief. This, however, is in substance only a general demurrer to the bill for the want of equity.

In the petition of Sarah Van Wagenen for a rehearing it is alleged that a final decree was rendered in 1851 fully and finally disposing of the cause, which exhausted all the jurisdiction of the court, and that it was beyond its power and jurisdiction to vacate the survey ordered by such decree by the subsequent proceedings taken in 1885. It is very doubtful whether the question thus raised by her of the authority to vacate and set aside a previous decree of the court did not involve a power to exercise a jurisdiction already vested rather than a question of jurisdiction itself, within the meaning of the act of March 3, 1891. *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170, 180 [37: 1041, 1043].

In any event, however, we cannot be required to search the record to ascertain whether the petition was dismissed for the want of equity, or for some other reason. *Shields* v. *Coleman*, 157 U. S. 168, 177 [39: 660, 663]. Indeed, it appears to have been the very object of the 5th section of the act of 1891 to have the question of jurisdiction plainly and distinctly certified to us, or at least to have it appear so clearly in the decree of the court below that no other question was involved, that no further examination of the record would be necessary.

The appeal is accordingly dismissed.

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*UNION MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*, [374
v.
ELIZABETH KIRCHOFF.

(See S. C. Reporter's ed. 374-378.)

Final decree.

A decree which remands a case to the court below for further judicial proceedings in conformity with the opinion of the appellate court is not final for the purpose of a writ of error to this court.

[No. 132.]

Argued December 19, 1895. Decided January 6, 1896.

IN ERROR to the Supreme Court of Illinois to review a decree of that court affirming the decree of the Appellate Court of that State which reversed a decree of the Circuit Court of Cook County, Illinois, with directions to enter a decree in accordance with the opinion

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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of the Appellate Court, in a suit brought by Elizabeth Kirchoff against the Union Mutual Life Insurance Company, to enforce specific performance of an agreement to convey land. *Dismissed.*

See same case below, 128 Ill. 199, 83 Ill. App. 607, 133 Ill. 368.

Statement by *Mr. Justice* **Brown:**

This was a bill in equity originally filed by Elizabeth Kirchoff, June 12, 1882, in the circuit court of Cook county, Illinois, against the appellant, to enforce the specific performance of a certain agreement for the conveyance to her of two lots of land in the city of Chicago. The prayer of the bill was subsequently amended by the addition of a clause praying that the plaintiff might be allowed to redeem the premises according to the terms of said agreement.

The controversy between these parties has been the constant subject of litigation since July, 1878, and in one form or another has been twice to the appellate court of Illinois, and three times to the supreme court of the state. The facts are somewhat complicated, but so far as necessary to the disposition of this case may be summarized as follows:

On May 8, 1871, Julius Kirchoff, being engaged in the distillery business in Chicago, borrowed $60,000 of the Union Mutual Life Insurance Company, and to secure the payment thereof, executed, together with his wife Elizabeth and her mother Angela Diversey, a joint judgment note for $60,000 and a trust deed covering certain real estate in Chicago belonging to Kirchoff and his wife, and certain other property, including a farm in Cook county, owned by Mrs. Diversey. The money received from the loan was put in the bank to the credit of the firm of Kirchoff Bros. & Co., which soon after failed.

375] *In 1876, default having been made in the payment of interest and taxes, judgment was taken against Mrs. Diversey on the note, after certain unsuccessful negotiations towards funding the indebtedness into a new loan at a lower rate of interest, and on July 11, 1878, proceedings were commenced in the circuit court of the United States to foreclose the trust deed. The bill in addition sought to cure a misdescription of the property belonging to Mrs. Diversey, who filed an answer denying the right of the company to cure the misdescription, and averring that the notes and mortgage were procured from her by misrepresentation.

From this time the relation of the parties seems to have remained unchanged until June, 1879, when an agreement was reached by which the company released to Mrs. Diversey its claim upon 40 acres of the land belonging to her, and she executed to it a warranty deed for the remainder of the premises. About the same time, Mrs. Kirchoff and her husband executed a quitclaim deed of all the property belonging to them and included in the mortgage. The deed from Mrs. Diversey was immediately placed on record, but the deed from the Kirchoffs was withheld by the agent and attorney of the insurance company.

It was claimed by Mrs. Kirchoff that, during the negotiations which culminated in the execution of the above deeds, it was agreed that the insurance company should reconvey to her two lots included in her deed, one of which was then occupied as a homestead, the other cornering upon it but facing the other way; that the price at which the reconveyance should take place was their valuation at a previous appraisement made by one Rees, *viz.*, $7,500 and $2,500 respectively, and that Mrs. Kirchoff was to execute in payment therefor her notes for $10,000, extending over a period of ten years, bearing interest at 6 per cent, and secured by a mortgage upon the two lots. It seems there were certain intervening claims on one of the lots, growing out of a sheriff's deed, executed pursuant to a sale on a judgment against Mrs. Kirchoff, rendered subsequently to the original trust deed but prior to the deed from Kirchoff and wife to the company, *which rendered [376 necessary a further prosecution of the foreclosure proceedings, in order that the company might obtain a good title to the premises, so as to convey a clear title to Mrs. Kirchoff and take from her a mortgage which would be a first lien thereon. It is claimed that this matter was explained to Mr. Kirchoff, her husband and agent, and he was assured that the prosecution of the foreclosure proceedings would not in any manner affect the agreement which had been made, but that, as soon as the company got a deed from the master in chancery, it would carry out its part of the contract by conveying to Mrs. Kirchoff the premises in question, and would then take the mortgage from her. She alleged that, relying upon this agreement, no defense was made to the foreclosure proceedings by her, and the same were prosecuted to a decree, and the master's deed issued thereon to the insurance company January 21, 1882. The object of the bill in this case was to insist upon this right of redemption in accordance with its terms.

The insurance company, on the other hand, contended that an inspection of the record showed that no such agreement was ever concluded, and that the state court was bound by the decree of the Federal court foreclosing the mortgage, and had no jurisdiction to review it. It was not disputed that propositions similar to the so-called agreement were discussed between the Kirchoffs and the agents of the insurance company, or that assurances were given by the latter of the probable willingness of the insurance company to sell the land on the terms named; but it is claimed that when the insurance company was advised of the proposition, it was instantly and unequivocally declined, and this action of the company communicated to Mrs. Kirchoff in time to prevent any injury to her from the quitclaim deed. That, after having been thus fully advised, she elected to deliver the deed, and in that manner get the benefit of the release from her indebtedness.

A demurrer was filed to the bill, which was overruled, when defendant answered, denying the agreement for redemption set forth in the bill, and also setting up the statute of frauds as a defense. The case coming on for a hearing upon pleadings *and proofs, the bill [377 was dismissed for want of equity. An appeal was taken to the state supreme court, which

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was dismissed upon the ground that the case should have gone to the appellate court. 128 Ill. 199. Whereupon the complainant sued out a writ of error from the appellate court of the first district of Illinois to the circuit court of Cook county, and upon a hearing in the appellate court the decree of the circuit court was reversed, with directions to enter a decree in accordance with the opinion of the appellate court. 33 Ill. App. 607. This opinion was not sent up with the record in this case. From the decree of the appellate court, the insurance company prosecuted an appeal to the supreme court of the state, which affirmed the decree of the appellate court. 133 Ill. 368. To reverse that decision, this writ of error was sued out.

Messrs. **E. Parmalee Prentice,** *Frank L. Wean,* and *J. H. Drummond* for plaintiff in error.

Messrs. **George R. Daley,** *William S. Harbert,* and *Ira W. Buell* for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

From the briefs of counsel and the reports of the case in the Illinois reports, we are informed that, upon the affirmance by the supreme court of the decree of the appellate court, the case was remanded to the circuit court of Cook county, where an accounting was taken and a decree entered in accordance with the opinion of the appellate court. From that decree the company is said to have appealed to the appellate court of the first district, which affirmed the decree of the circuit court. 51 Ill. App. 67. Whereupon the insurance company again appealed to the supreme court of the state, which again affirmed the decision of the appellate court. 149 Ill. 536. But as the writ of error from this court was not taken to reverse that decree, but to reverse **378**] the first decree *of the supreme court, affirming the decree of the appellate court, we are concerned only with the questions arising upon that decree, and more particularly with its finality. It will be observed that it simply affirms the decree of the appellate court, but upon reference to that decree, we find that it reverses the decree of the circuit court of Cook county, "with directions to that court to enter an order and decree in conformity with the opinion filed herein." As this opinion was not sent up with the record, we have no means of knowing judicially what it was, though we are informed by the briefs of counsel that an accounting was ordered and taken in the circuit court.

Obviously the decree, to review which this writ of error was sued out, was not a final decree. The finality of decrees is a subject which has been so much discussed in the decisions of this court that it is useless to do more than to cite the cases of *Lodge* v. *Twell,* 135 U. S. 232 [34: 153], and *McGourkey* v. *Toledo & O. C. R. Co.* 146 U. S. 536 [36: 1079], wherein most of the prior cases are reviewed.

This case is not one for nice distinctions, since the rule is well-nigh universal that, if the case be remanded by the appellate court to the court below for further judicial proceedings, in conformity with the opinion of the appellate court, the decree is not final. Especially is this the case when the opinion to which the new decree is required to conform does not appear. *Brown* v. *Marion Nat. Bank* (*Brown* v. *Baxter*) 146 U. S. 619 [36: 1106]; *Houston* v. *Moore,* 16 U. S. 3 Wheat. 433 [4: 428]; *Bostwick* v. *Brinkerhoff,* 106 U. S. 3 [27: 73]; *Johnson* v. *Keith,* 117 U. S. 199 [29: 888]; *Rice* v. *Sanger,* 144 U. S. 197 [36: 403]; *Meagher* v. *Minnesota Thresher Mfg. Co.* 145 U. S. 608 [36: 834]; *Hume* v. *Bowie,* 148 U. S. 245 [37: 438] *Werner* v. *Charleston,* 151 U. S. 360 [38: 192].

The writ of error is therefore dismissed.

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*WILLIAM WALLACE KIRBY ET AL., *Appts.*, v. MARIA E. TALLMADGE. [379

(See S. C. Reporter's ed. 379-389.)

Notice of title—joint occupation.

1. Where land is occupied by two persons, as, for instance, by husband and wife, and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other.
2. But where the land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom have title by record, such joint occupation is notice of the wife's title to a purchaser from a third person holding a record title.

[No. 96.]

Argued December 5, 1895. Decided January 6, 1896.

APPEAL from a decree of the Supreme Court of the District of Columbia affirming the decree of the court below in favor of Maria E. Tallmadge, plaintiff, against Wm. Wallace Kirby *et al.,* setting aside a deed and a deed of trust as fraudulent and void and as a cloud upon her title. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a bill in equity filed by Maria E. Tallmadge against the appellants to set aside and remove, as a cloud upon her title, a deed made by the appellants, Richard H. Miller, Elizabeth Houchens, and Ella A. Goudy, claiming to be heirs at law of one John L. Miller, deceased, dated August 30, 1888, and purporting to convey to the appellant Kirby the property therein described. The bill further prayed for the cancelation of a trust deed executed by the appellant Kirby and his wife to the defendants Willoughby and Williamson, and for an injunction against all the

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NOTE.—*As to conveyances between husband and wife upheld in equity,* see note to Bank of United States v. Lee, 10: 81.

What necessary to constitute adverse possession; requisites of,—see note to Ricard v. Williams, 5: 398.

As to mortgagor's possession, not adverse, see note to Higginson v. Mein, 2: 664.

As to the occupancy necessary to constitute adverse possession, see note to Ewing v. Burnet, 9: 624.

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defendants except Kirby, restraining them from negotiating certain notes given by Kirby for the purchase of said lots, etc.

The facts disclosed by the testimony show that, in 1882, Mrs. Tallmadge, the appellee, purchased of one Bates, for a home, lots Nos. 77 and 78, in square 239, in the city of Washington, with the improvements thereon, for the sum of $10,000, $5,000 of which were paid in cash, the residue to be paid in five instal-
380] ments of $1,000 *each. Instead of taking the title to the property in herself, she furnished the money to John L. Miller, a friend of the family, who paid the $5,000 cash with the money thus furnished, and at her request took the title in his own name, and executed notes for the deferred payments, which he secured by a deed of trust upon the property. Subsequently, and in June, 1883, Miller also purchased with the funds of Mrs. Tallmadge the adjoining lot No. 76, taking title in his own name, and executing a deed of trust for the deferred payments, amounting to $1,266.

Mrs. Tallmadge took immediate possession of the premises, and has occupied them as her own from that day to the time the bill was filed, paying taxes, improvements, and interest on encumbrances, reducing the principal $2,266, and holding open and notorious possession under her claim of title.

Mr. Miller, who claimed no title or right to the premises in himself, on December 27, 1883, by a deed signed by himself and wife, conveyed the legal title to Mrs. Tallmadge, but this deed, through inadvertence or otherwise, was not recorded until October 4, 1888. Mr. Miller died in February, 1888, and by his will, which was dated December 1, 1880, devised his estate to his widow.

On June 16, 1888, defendants Miller, Houchens, and Goudy, collateral heirs of John L. Miller, who had made a contract with the defendants Willoughby and Williamson to give them one quarter of whatever they could get for them out of the estate of Miller, filed a bill in the supreme court of the district against the widow and executor of Miller, the holders of the notes given by him, and the trustees in one of the deeds of trust, praying for a partition or sale of the property, the admeasurement of the widow's dower, and for a charge upon the personal estate of Miller for the unpaid purchase money of the property.

To this bill the widow of John L. Miller made answer that her husband never had any interest in the property in question; that the title was taken in his name for Mrs. Tallmadge; and that long before his death he had by deed duly conveyed it to her, and that neither she
381] nor his estate had or had ever *had any interest in the property. In August, 1888, the pendency of this suit coming to the knowledge of Mrs. Tallmadge, she sent the original deed from Miller to her, then unrecorded, by Mr. Tallmadge to Willoughby and Williamson, solicitors for Miller's heirs, who examined and made minutes from it.

On August 30, 1888, Houchens, Goudy, and Miller, who had filed the bill for partition, executed a deed conveying the property to the appellant Kirby, subject to the dower rights of Mrs. Miller, for a consideration of $12,000, $3,000 of which were said to have been paid in cash and $9,000 by notes secured by a mortgage or trust deed upon the property to Willoughby and Williamson as trustees. Kirby thereupon claimed the property as an innocent purchaser without notice of the prior deed. He at once gave notice to Mr. Tallmadge that he would demand rent for the property at the rate of $1,000 per annum.

On receipt of this notice Mrs. Tallmadge filed this bill to cancel and set aside the deed and deed of trust. Answers were filed by the defendants and testimony taken by the plaintiff tending to show the facts alleged in her bill. Neither of the appellants took proof, nor did they or either of them offer themselves as witnesses, but stood upon their answers.

Upon final hearing, the court below, in special term, rendered a decree in accordance with the prayer of the bill, setting aside the deed and deed of trust as fraudulent and void, from which decree defendants appealed to the general term, which affirmed the decree of the court below, and further directed that Miller, on the demand of Kirby, return to him the $3,000 which Kirby claimed to have paid and which Miller admitted to have received.

From this decree defendants appealed to this court.

Messrs. **W. Willoughby, John T. Morgan,** and *L. Cabell Williamson*, for appellants:

No inference is to be deduced from possession when it is consistent with the possessory title on record. To have it received as equivalent to actual notice it must appear affirmatively to have been open, visible, exclusive, and unambiguous, such as is not liable to be misunderstood or misconstrued.

Jones v. *Smith*, 1 Hare, 43; *Dey* v. *Dunham*, 2 Johns. Ch. 182; 4 Kent, Com. 8th ed. 179; 1 Story, Eq. Jur. § 398.

It must be such a notice as, with attending circumstances, will affect the subsequent purchaser with actual fraud. A notice enough merely to put the party on inquiry is not sufficient to break in upon the registry act.

2 Sugden, Vendors, 987; *Spofford* v. *Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Sibley* v. *Leffingwell*, 8 Allen, 584; *Howes* v. *Wiswell*, 8 Me. 94; *Dooley* v. *Wolcott*, 4 Allen, 406.

The mere occupation is not sufficient notice, but only that it may be taken in connection with other direct evidence that the purchaser had actual notice.

Pomroy v. *Stevens*, 11 Met. 247; *Mara* v. *Pierce*, 9 Gray, 306; *McMechan* v. *Griffing*, 3 Pick. 149, 15 Am. Dec. 198; *Beatie* v. *Butler*, 21 Mo. 313, 64 Am. Dec. 234.

But in this case the complainant did not visibly occupy the premises. The occupation was by her husband. So it would appear to the public, and so in fact it was. All the cases hold that occupation by some other person than the one holding the unrecorded deed is no notice of title of such holder.

Harris v. *Arnold*, 1 R. I. 125; *Rogers* v. *Jones*, 8 N. H. 264; *Beatie* v. *Butler*, *supra*; *Pomroy* v. *Stevens*, 11 Met. 244; *LeNeve* v. *LeNeve*, 2 Lead. Eq. Cas. 122; *Thompson* v. *Rose*, 8 Cow. 266; *Nelson* v. *Henry*, 2 Mackey, 259, 10 Watts, 18-28; *Flagg* v. *Mann*, 2 Sumn. 555; *Farnsworth* v. *Childs*, 4 Mass. 640, 3 Am. Dec. 249; *Fair* v. *Stevenot*, 29 Cal. 486; *Williamson* v. *Brown*,

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15 N. Y. 365; *Townsend* v. *Little*, 109 U. S. 504 (27: 1012); *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417 (35: 1063).

Mr. **John C. Fay**, for appellee:

Where the defense in such a case as this is that the defendant is an innocent purchaser without notice, "the answer must state that the defendant's vendor was seised in fee and was in possession at the time of his purchase. And this must not only be averred in the answer but the answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it." It must be established affirmatively by the defendant independently of his oath.

Boone v. *Chiles*, 35 U. S. 10 Pet. 211, 212 (9: 400, 401).

Open, notorious, adverse possession under claim of title was notice.

Hiern v. *Mill*, 13 Ves. Jr. 120; *Daniels* v. *Davison*, 16 Ves. Jr. 253; *Gouverneur* v. *Lynch*, 2 Paige, 300; *Grimstone* v. *Carter*, 3 Paige, 486, 24 Am. Dec. 230; *Brown* v. *Anderson*, 1 T. B. Mon. 201; *Buck* v. *Holloway*, 2 J. J. Marsh. 180; *Landes* v. *Brant*, 51 U. S. 10 How. 375, 376 (13: 461); *Lea* v. *Polk County Copper Co.* 62 U. S. 21 How. 493 (16: 203); *Hughes* v. *United States*, 71 U. S. 4 Wall. 236 (18: 305).

Mr. Justice **Brown** delivered the opinion of the court:

The controversy in this case arises from the fact that the deed from John L. Miller to Mrs. Tallmadge, which was given December 27, 1883, was not put upon record until October 4, 1888. In the meantime, and in February, 1888, Miller, in whose name the property had been taken for the benefit of Mrs. Tallmadge, died; and on August 30, 1888, Houchens, Goudy, and Richard Henry Miller, collateral heirs of John L. Miller, executed a deed of the property, subject to the dower rights of Miller's widow, to defendant Kirby for an expressed consideration of $12,000, of which $3,000 are said to have been paid down in cash, and $9,000 in notes payable to Willoughby and Williamson. Kirby now claims to be an innocent purchaser of the property, without notice of the prior deed from John L. Miller to Mrs. Tallmadge.

There are several circumstances in this case which tend to arouse a suspicion that Kirby's purchase of the property was not made in good faith. Within three months after the probate of the will of John L. Miller, his collateral heirs, Houchens, Goudy, and Richard H. Miller, who had made a contract with Willoughby and Williamson to give them one quarter of whatever they could get for them out of the estate of Miller, filed a bill for the partition of real estate and to set off the widow's dower. His widow, Lola, answered, admitted that her husband did not purchase the lands described in the bill, and alleged that he had conveyed them away in his lifetime.

Mrs. Tallmadge, hearing of this suit, instead of appearing formally therein, submitted her deed from Miller to the solicitors for the complainants in the partition suit, who did not amend their bill or make her a party, but apparently allowed the suit to drop, inasmuch as the complainants, being heirs of John L. Miller, took only his actual interest in the land, of which, owing to his deed to Mrs. Tallmadge in his lifetime, nothing remained at his death. Shortly thereafter, the *complainants [383 in that suit, who must have been well aware that they had no title to the property, executed a deed to Kirby of all their interest in the land for a consideration of $12,000, subject to the dower right of Mrs. Miller, the debts of John L. Miller, and so much of the notes of $5,000 as were unpaid after applying his personal estate. Kirby alleges in his answer that he examined the premises twice and approached the house, but never seems to have entered it, and apparently took up with the first proposition made to him to buy it, without any of the bargaining that usually precedes the consummation of a sale of property of that value. While he avers in his answer, and Miller admits, the payment of $3,000 in cash, defendants introduced no testimony whatever in support of their case, but relied solely upon their answers. As they had it in their power to explain the suspicious circumstances connected with the transaction, we regard their failure to do so as a proper subject of comment. "All evidence," said Lord Mansfield in *Blatch* v. *Archer*, Cowp. 63, 65, "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. *McDonough* v. *O'Neil*, 113 Mass. 92; *Com.* v. *Webster*, 5 Cush. 295, 316, 52 Am. Dec. 711. It is said by Mr. Starkie, in his work on Evidence (vol. 1, p. 54): "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

But the decisive answer to the case of bona fide purchase made by the defendant Kirby is that Mrs. Tallmadge had, ever since the original purchase of the land by Miller in 1882, been in the open, notorious, and continued possession of the property, occupying it as a home. The law is perfectly well *settled, both [384 in England and in this country, except, perhaps, in some of the New England states, that such possession, under apparent claim of ownership, is notice to purchasers of whatever interest the person actually in possession has in the fee, whether such interest be legal or equitable in its nature, and of all facts which the proposed purchaser might have learned by due inquiry. 2 Pom. Eq. Jur. § 614; Wade, Notice, § 273. The same principle was adopted by this court in *Landes* v. *Brant*, 51 U. S. 10 How. 348, 375 [13: 449, 461], in which it was held that "open and notorious occupation and adverse holding by the first purchaser, when the second deed is taken, is in itself sufficient to warrant a jury or court in finding that the purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under; and that he,

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the subsequent purchaser, was bound by that title, aside from all other evidence of such possession and holding." The principle has been steadily adhered to in subsequent decisions. *Lea* v. *Polk County Copper Co.* 62 U. S. 21 How. 493, 498 [16: 203, 205]; *Hughes* v. *United States*, 71 U. S. 4 Wall. 232, 236 [18: 303, 304]; *Noyes* v. *Hall*, 97 U. S. 34 [24: 909]; *McLean* v. *Clapp*, 141 U. S. 429, 436 [35: 804, 807]; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417 [35: 1063].

Defendants' reply to this proposition is that the occupancy in this case, being that of a husband and wife, is by law referable to the husband alone as the head of the family; that the purchaser was not bound by any notice except such as arose from the possession of the husband, and that, as he had no title to the property, Kirby was not bound to ascertain whether other members of the family had title or not. There are undoubtedly cases holding that occupation by some other person than the one holding the unrecorded deed is no notice of title in such third person, and that the apparent possession of premises by the head of a family is no notice of a title in a mere boarder, lodger, or subordinate member of such family, or of a secret agreement between the head of a family and another person. As was said by this court in *Townsend* v. *Little*, 109 U. S. 504 [27: 1012]: "Where possession is relied upon as giving constructive notice it must be open and unambiguous, and not liable to be misunder-[385] stood or misconstrued. *It must be sufficiently distinct and unequivocal, so as to put the purchaser on his guard." In this case one James Townsend bought and took possession of a public house in Salt Lake City, and lived in it with his lawful wife and a plural or polygamous wife, the latter, who was the appellant, taking an active part in conducting the business of the hotel. He subsequently ceased to maintain relations with the appellant as his polygamous wife, but, being desirous of having the benefit of her services, both concealed this fact. He made a secret agreement with her that if she would thus remain she should have a half interest in the property. He afterwards acquired his legal title to the property without a disclosure of the secret agreement. His interest therein having subsequently passed into the hands of innocent third parties for value, without notice of appellant's claim under the secret agreement, it was held that the joint occupation of the premises by herself and Townsend, under the circumstances, was not a constructive notice of her claim, and that she had no rights in the premises as against a bona fide purchaser without notice. There were evidently two substantial reasons why appellant's possession was not notice of her rights. First, James Townsend took the legal title to himself in 1873 and held it until 1878, when the purchase was made; and, second, his agreement with the appellant was not one with his lawful, but his polygamous, wife, and was also a secret one. The case is obviously not one of a joint occupation by a husband and his lawful wife, neither of them having any title thereto.

In the case of *Thomas* v. *Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740, it was held that, where real estate is ostensibly as much in the possession of the husband as the wife, there is no such actual possession by the wife as will impart notice of an equitable interest possessed by her in the land, to a purchaser at execution sale *under a judgment against her husband*, in whom the legal title apparently was at the time of the rendition of the judgment. This case is also a mere application of the rule that if there be any title to the land in one who is in possession of it, the possession will be referred to that title, or, as *said in 2 Pomeroy's [386] Equity Jurisprudence, § 616: "Where *a* title under which the occupant holds has been put upon record, and his possession is consistent with what thus appears of record, it shall not be a constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, but has had no actual notice beyond what is thereby disclosed." That the court did not intend to hold that a joint occupation by a husband and wife is in no case notice of more than the occupation of the husband is evident from the subsequent case of *Iowa Loan & Trust Co.* v. *King*, 58 Iowa, 598, in which the court said: "It cannot, we think, be doubted that possession of real property by a husband and wife together will impart notice of the wife's equities as against all persons other than those claiming under the husband, their possession being regarded as joint by reason of the family relation." In this case the occupation was by a husband and wife, and it was held that such possession was notice of a title in the wife to a life estate in the property as against the holder of a mortgage given by a son, who was a member of the family as a boarder, lodging a part of the time in his mother's house and a part of the time elsewhere,—the legal title being in the son.

In the case of *Lindley* v. *Martindale*, 78 Iowa, 379, the title to the lands was in a son of the plaintiff, who resided on a portion of them, while plaintiff and her husband resided on another portion. The lands had for a long time been cared for either by the husband or the son, and it was held that one who, upon being told that the title was in the son, took a mortgage from him to secure a loan, which was used for the most part to pay off prior encumbrances placed on the land by the son, was not charged with the alleged equities of plaintiff by reason of her claimed possession of the land, the court holding that her possession was not such as the law requires to impart notice. The case is not entirely reconcilable with the last.

In *Harris* v. *McIntyre*, 118 Ill. 275, a widow furnished her bachelor brother money with which to buy a farm for their joint use, the title to be taken to each in proportion to the *sums advanced by them, respectively. [387] He, however, took a conveyance of the entire estate to himself and they both moved upon the place, he managing the land and she attending to the household duties. The deed was recorded, and he borrowed money, mortgaged the land to secure the loan, and appeared to the world as the owner for a period of over ten years, during which time the sister took no steps to have her equitable rights enforced or asserted. It was held that her pos-

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session, under such circumstances, was not such as would charge a subsequent purchaser from her brother with notice of her equitable rights. Here, too, the record title was strictly consistent with the possession.

In *Rankin* v. *Coar*, 46 N. J. Eq. 566, a widow who occupied part of a house in which she was entitled to dower, while her son, the sole heir at law, occupied the rest of the house, released her dower therein to her son by deed duly recorded. It was held that her continued occupation thereafter would not give notice to one who took a mortgage from the son, of a title in her to a part of the house occupied by her, acquired by an unrecorded deed to her from her son contemporaneous with her release of dower. "Possession," said the court, "to give notice or to make inquiry a duty, must be open, notorious, and unequivocal. There must be such an occupation of the premises as a man of ordinary prudence, treating for the acquisition of some interest therein, would observe, and, observing, would preceive to be inconsistent with the right of him with whom he was treating, and so be led to inquiry."

So in *Atwood* v. *Bearss*, 47 Mich. 72, the title to property upon the record appeared to be in the wife. Her husband's previous occupation had been under her ownership and in right of the marital relation, and nothing had transpired to suggest that she had made the property over to him. She had, however, given him a deed, which was not put upon record. It was held that his continuance in possession was no notice of this deed, since it was obviously consistent with the previous title in herself.

Indeed, there can be no doubt whatever of the 388] proposition *that, where the land is occupied by two persons,—as, for instance, by husband and wife,—and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other. In such case the purchaser, finding title in one, would be thrown off his guard with respect to the title of the other. The rule is universal that if the possession be consistent with the record title, it is no notice of an unrecorded title. But, where the land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom has title by record, we think that in view of the frequency with which homestead property is taken in the name of the wife, the proposed purchaser is bound to make some inquiry as to their title.

The case of *Phelan* v. *Brady*, 119 N. Y. 587, is an instance of this. In this case a suit was brought to foreclose a mortgage upon certain premises given by one Murphy, who held an apparently perfect record title to the property. It appeared, however, that before the execution of the mortgage Murphy had conveyed the premises to one Margaret Brady, who was in possession and with her husband occupied two rooms in the building on the premises. She also kept a liquor store in a part thereof. The other rooms she leased to various tenants, claiming to be the owner, and collecting the rents. Her deed was not recorded until after the giving of the mortgage. It was held that her actual possession under her deed, although unrecorded and its existence unknown to plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. This case goes much farther than is necessary to justify the court in holding that Mrs. Tallmadge's possession was notice in the case under consideration, as the actual occupation of the wife was only of two rooms in a tenement house containing forty-three apartments.

If there be any force at all in the general rule that the possession of another than the grantor puts the purchaser upon inquiry as to the nature of such possession, it applies with peculiar cogency to a case like the present, where the slighest inquiry, either of the husband or wife, would have revealed the actual facts. Instead of making such inquiry, Kirby turns *his back upon every source of informa- [389 tion, does not even enter the house, makes no examination as to whether the property was in litigation, and buys it of collateral heirs of Miller, subject to his widow's dower if he had had the title, to an unpaid mortgage, and to the chances of the property being required for the payment of Miller's debts. It is clear that a purchase made under such circumstances does not clothe the vendee with the rights of a bona fide purchaser without notice.

We see no reason for impeaching the original purchase of the land by Mrs. Tallmadge. Her account of the transaction is supported by the testimony of all the witnesses, as well as by the receipts and other documentary evidence. Her failure to cause the deed to be recorded is not an unusual piece of carelessness, nor is it an infrequent cause of litigation. Under the circumstances of the case, it raises no presumption of fraud. What motives she may have had for taking the title to the property in the name of Mr. Miller is entirely immaterial to the present controversy, although it appears from her testimony that she was possessed of money in her own right, and took this method of investing it.

The decree of the court below is therefore affirmed.

IOWA CENTRAL RAILWAY COMPANY,
Plff. in Err.,
v.
STATE OF IOWA.

(See S. C. Reporter's ed. 389-394.)

Immunity of citizens—state law—denial of jury trial.

1. It is not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another.
2. Provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, the mere question of whether it is by a motion or ordinary action in no way renders the proceeding not due process of law.
3. For a state court to refuse a jury trial is not a denial of a right protected by the United States

NOTE.—*As to what is "due process of law,"* see note to Pearson v. Yewdall, 24: 436.

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Constitution, even though it may have been clearly erroneous to construe the laws of the state as justifying the refusal.

[No. 128.]

Submitted December 18, 1895. Decided January 6, 1896.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that court directing the operation by the Iowa Central Railway Company of a railroad and that a mandatory injunction issue. *Dismissed for want of jurisdiction.*

See same case below, 71 Iowa, 410, 60 Am. Rep. 806.

Statement by *Mr. Justice* **White:**

In 1880 the Central Iowa Railway Company, which had become the owner, through foreclosure proceedings, of the railroad of the Central Railway Company of Iowa, leased to the Burlington, Cedar Rapids, & Northern Company about 11 miles of said road, which lay between Manly Junction and Northwood, the northern terminus of the Central company's road. The Burlington company took exclusive possession of the leased premises. In 1881 the citizens of Northwood made application to the state railroad commissioners for an order requiring the Central Iowa Railway Company to operate such leased portion of its road, and after due notice a hearing was had before the commissioners, and, in 1883, the order prayed for was granted. As the company failed to obey, an action was brought, pursuant to Iowa Laws 1884, chap. 133, to compel compliance with the order of the commissioners. The state district court rendered a decree against the railroad company, and on appeal after a hearing and overruling of a motion for rehearing, the supreme court of the state, in October, 1887, entered a decree ordering, adjudging, and decreeing that the Central Iowa Railway Company operate such leased portions of its line, and enjoining the Burlington company from interference therewith. The opinion of the supreme court is reported in 71 Iowa, 410, 60 Am. Rep. 806.

During the pendency of this litigation, however, foreclosure proceedings were instituted in the circuit court of the United States for the southern district of Iowa against the Central Iowa Railway Company, and, while the cause was pending in the supreme court of Iowa, on the appeal of the company a receiver of its property was appointed. A decree of foreclosure was entered and in September, 1887, the road was sold. Subsequently, the purchaser **391**] assigned his purchase to *the Iowa Railway Company, a corporation of Iowa, which company thereafter made conveyance to plaintiff in error herein, an Illinois corporation, and the receiver surrendered possession to it on May 30, 1889.

In August, 1889, the attorney general of the state of Iowa filed a petition in the supreme court of the state, in the name of the state as plaintiff, against the Iowa Central Railway Company, alleging the entry of the decree of October, 1887, above referred to; that thereafter the Iowa Railway Company had become the successor, assignee, and grantee of the Central Iowa Railway Company, and was operating and running its line contrary to the terms and provisions of the decree and in violation thereof. A mandatory injunction was prayed to compel the defendant to obey the command and order contained in said decree.

A copy of said petition, with notice of an intention to apply for an order to show cause why the order and decree referred to should not be obeyed, was served upon the railway company. That company filed its answer and amendments thereto, which, in substance, set forth that it was not a party to the suit in which the decree was rendered; that the Central Iowa Railway Company at the time of the entering of the decree was dead, to all intents and purposes, by reason of the fact that a receiver had theretofore been appointed, and the road of the company sold under foreclosure; that defendant was not the successor, assignee, or grantee of said Central Iowa Railway Company and had not been adjudged so to be; that no demand had been made upon it to perform the decree, and that a mandatory writ ought not to be issued until it had an opportunity of testing in a regular manner the right of the state to require the performance of the decree in question. The defendant also filed a demand for a jury trial. Thereupon a motion was made on behalf of the state to enter the order prayed for in the petition, upon the ground that the defendant in its answer had not shown cause why such order should not be made, and for the further reason that from the record and pleadings in the proceeding it appeared that the plaintiff was entitled to such order. Plaintiff's motion for *judgment [**392** was granted, and on October 26, 1891, an entry was made in the cause in the words and figures following: "In this cause the court, being fully advised in the premises, file their written decision and find that plaintiff is entitled to an order for the operation of the road by defendant as prayed for, and that a writ issue accordingly. It is further considered by the court that the defendant pay the costs of this court, taxed at $22.75, and that execution issue therefor."

The cause was then brought to this court by writ of error.

Mr. **Anthony C. Daly** for plaintiff in error.

Mr. **Milton Remley,** Attorney General of Iowa, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The contention of the plaintiff in error is that the proceeding instituted against it in the supreme court of Iowa was an action for mandamus, and that no such action could lawfully be brought to compel it to operate the leased portion of its road until its legal duty to do so had been previously determined by the verdict of a jury. There was no assertion that the court below had no jurisdiction over the subject-matter. Nowhere in the answer or in the amendments to the answer filed on behalf of the company was it claimed that the proceeding was violative of the Constitution of the United States, or assailed any right, title, privilege, or immunity specially set up or claimed under that Constitution. Indeed,

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there was no mention of any right thereunder until the filing of a brief for defendant entitled "Defendant's Resistance and Objection to Plaintiff's Motion to Enter Order Prayed for in the Petition," in the 9th paragraph whereof it was claimed that it would be a violation of the 14th Amendment of the Constitution of the United States to grant the order prayed for upon the motion in question. It is apparent that this defense merely asserted that 393] the rights of the corporation as a *citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the 14th Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words. Whether the court of last resort of the state of Iowa properly construed its own Constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice in no way depending upon the Constitution of the United States or upon any act of Congress. *Ludeling* v. *Chaffe*, 148 U. S. 301, 305 [36:313, 314].

As said by this court, speaking through *Mr. Chief Justice* Fuller, in *Leeper* v. *Texas*, 139 U. S. 462, 468 [35:225, 227]: "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied." There was a "regular course of administration" in the case at bar, as that term was employed in the case cited.

It is manifest that it was never contemplated by the framers of the Constitution that this 394] court should sit in review, as an *appellate court, of such a question as that presented by the record in the case at bar, *viz.*, whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff.

It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the state as justifying the refusal. *Brooks* v. *Missouri*, 124 U. S. 394 [31:454]; *Ex parte Spies*, 123 U. S. 131, 166 [31:80, 86].

Writ of error dismissed for want of jurisdiction.

WILLIAM P. SPALDING, *Plff. in Err.*, *v.* WILLIAM CHANDLER.

(See S. C. Reporter's ed. 394-407.)

Indian reservation—power of President—act of 1852—right of pre-emption.

1. Public land accepted as an Indian reservation by both parties to an Indian treaty providing therefor is exempted from pre-emption as effectually as though it was specifically designated as a reservation by boundaries in the treaty itself.
2. The authority to set aside land for public uses, conferred upon the President by the act of March 1, 1847, does not empower him to interfere with an Indian reservation existing by force of a treaty.
3. The act of 1852, granting to the state of Michigan the right of locating a canal through an Indian reservation, extinguished so much of it as was granted to the state for that purpose, leaving the remaining portions of it to continue to exist, so as to prevent any pre-emption claim thereto.
4. Upon the extinguishment of an Indian title to a reservation during the operation of the act of September 4, 1841, the land was, by the 10th section of that act, not subject to pre-emption.

[No. 86.]

Argued December 2, 1895. Decided January 6, 1896.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment of that court affirming the judgment of the Circuit Court of the County of Chippewa in said State in favor of defendant in a suit in equity brought by Wm. P. Spalding, plaintiff, against Wm. Chandler, defendant, to establish a trust in plaintiff's favor in certain lands which had been patented by the United States to defendant, and to have defendant ordered to execute a conveyance of the legal title. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John C. Donnelly** and **A. C. Raymond** for plaintiff in error.

Mr. **John H. Goff** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Plaintiff in error by a bill in equity filed in the circuit court of the county of Chippewa, state of Michigan, sought *to have a trust [395 declared in his favor in certain lands at Sault Ste. Marie, Michigan, at one time a part of what was known as the "Indian Reserve," which land had been patented by the United States to the defendant, and to have the de-

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* —see note to Worcester v Georgia, 8: 483.

As to pre-emption rights, see note to United States v. Fitzgerald, 10: 785.

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fendant ordered to execute a conveyance of the legal title.

The facts in the case, as developed upon the trial, were as follows: On June 26, 1820 (7 Stat. at L. 206), the Chippewa tribe of Indians ceded to the United States 16 square miles of land. The tract ceded commenced at the Sault and extended 2 miles up and the same distance down the river with a depth of 4 miles, including a portage, the site of the village of Sault Ste. Marie, and the old French fort. Schoolcraft, American Lakes, 140. One of the objects of the expedition which effected the signing of the treaty was to prepare the way for an American garrison at the Sault. Schoolcraft, American Lakes, 135. At the time of the signing of the treaty there were about forty lodges of Chippewa Indians, containing a population of about two hundred souls, resident at the Sault, who subsisted wholly upon the whitefish which were very abundant at the foot of the falls near by the village. Schoolcraft, American Lakes, 133. The village settlement of the whites consisted of about fifteen or twenty buildings. Schoolcraft, American Lakes, 132. By the third article of the treaty it was provided that "the United States will secure to the Indians a perpetual right of fishing at the falls of St. Mary's and also a place of encampment upon the tract hereby ceded, convenient to the fishing ground, which place shall not interfere with the defenses of any military work which may be erected, nor with any private rights." The military post of Fort Brady was established on a part of the tract within a few years following the execution of the treaty.

On March 24, 1836 (7 Stat. at L. 491), the Ottawa and Chippewa Nations ceded to the United States a large tract of territory, including in its general limits the 16 square miles above mentioned. By article 3 of this treaty the right of fishing and encampment was preserved to the Indians in the following words: "It is understood that the reservation for 396] *a place of fishing and encampment, made under the treaty of St. Mary's, of the 16th of June, 1820, remains unaffected by this treaty." In 1845, under the directions of the surveyor general for the Northwest Territory, a survey was made at Sault Ste. Marie, and upon the map of said survey was noted the territory occupied by the military, as shown by the stockade or high posts around such occupation, and also the ground then in the occupation of the Indians under the treaty of 1820, and each of said reservations was respectively noted upon the map as the "Military Reserve" and the "Indian Reserve." At the time of the making of the survey of 1845 there was no occupation of the Indian reserve other than by Indians, and a raceway bounded the reserve on the south.

By an act approved March 1, 1847 (9 Stat. at L. 146), Congress established the Lake Superior land district in Michigan, embracing therein, among other land, the territory ceded by the Chippewas under the treaty of 1820, and provision was made for a geological survey and examination of the lands therein. It was provided in the closing sentence of § 2 that all nonmineral lands within said district should "be sold in the same manner as other lands under the laws now in force for the sale of the public lands, excepting and reserving from such sales section 16 in each township for the use of schools and such reservations as the President shall deem necessary for public uses."

On April 3, 1847, pursuant to the recommendation of the Secretary of the Treasury, based upon a communication from the Commissioner of the General Land Office, acting on the suggestion of the fifth auditor of the Treasury, the President ordered that certain described lands in the northern peninsula of Michigan, or so much thereof as might be found necessary, should be reserved for public uses, and in said described land was included the north fractional half of fractional township 47 north, of range 1 east, which embraced the Indian reserve in question, as also the site of Fort Brady.

On August 25, 1847, as the result of a report of Brigadier General Brady, commanding the fourth military department, the acting Secretary of War made application to the Commissioner *of the General Land Office "to [397 cause to be reserved from sale the sections colored in red on the enclosed plat, embracing sections 4, 5, and 6 of township 47, range 1 east, and an additional tract adjoining the last-named section on the west not designated by number on the plat." On August 27, 1847, the Commissioner wrote to the Secretary of the Treasury, calling his attention to the fact that sections 4, 5, and 6 of township 47 north, range 1 east, had been reserved for public uses by the President on April 3, 1847, and requested that the Secretary make application "to the President for an order for the reservation of fractional sections 1 and 2, township 47 north, range 1 west, under the same act, for the use of Fort Brady." On August 30, 1847, this communication was transmitted to the President by the Secretary of the Treasury, together with a diagram exhibiting the location of the lands, and the President was asked to give his sanction to the proposed reservation. The request was complied with. Sections 1 and 2, township 47 north, range 1 west, lay to the westward of the Indian reserve, and the military post as then occupied was east of the Indian encampment.

The report of General Brady above referred to accompanied a plat prepared under his direction by Lieutenant Westcott, commandant at Fort Brady, of land which had been surveyed for military purposes. General Brady stated in his report:

"In making this reserve, I kept in view the probability that some day the government might build there a permanent work.

"As you have in your letter of instructions to me on this subject desired me to give my views in relation to that post, I shall merely observe that I believe that the best interests of the government and that of the community at large would be benefited by the government not offering for sale any of the lots fronting on the line of the canal from the reserve to the head of the rapids, believing, as I most assuredly do, that the day is not far distant when a canal will be made there, if not by the general government, by Michigan and the adjoining states. The quantity of the land that

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it will require to receive the rocks and other [398] materials that will be taken out of *a ship canal there no one can know, and until the canal is made those lots had better remain with the present owner. Should they go into the hands of individuals before the canal is completed, great would be the expense to get back the land necessary for the completion of this important work."

The village of Sault Ste. Marie was incorporated by the legislature of Michigan in 1849 (Mich. Laws 1849, pp. 336, 337), and included within its boundaries the military reserve of Fort Brady and the Indian reserve.

This act of incorporation was repealed in 1851, but while in force, to wit, on September 26, 1850, an act was approved (9 Stat. at L. 469) which provided for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan. By § 2 of the act, the Commissioner of the General Land Office was authorized to cause the register and receiver of the land office at Sault Ste. Marie to be furnished with a map, on a large scale, of the lines of the public surveys at the Sault Ste. Marie. And it was further provided in said section that "it shall be the duty of the Secretary of War to direct the proper military officer, on the application of the register and receiver, to designate or cause to be designated upon the map aforesaid the position and the extent of lots necessary for military purposes, as also the position and the extent of any other lots or lots which may be required for other public purposes, and also the position and the extent of the Indian agency tract and of the Indian reserve." Specific directions with regard to the survey and map in question were also given in the 7th section of the act.

On February 15, 1853, the Commissioner of the General Land Office acknowledged receipt of a communication from the register and receiver at Sault Ste. Marie, of date 24th of September, 1852, wherein it had been suggested that a modification be made of the western boundary of the military reservation, so as to obviate a conflict with town and town lot claims; and the Commissioner advised the register and receiver that the Secretary of War had approved of the Westcott survey as the true limits of the military reservation. In their report of April 4, 1853, on the settlement of land [399] claims at Sault Ste. *Marie, the register and receiver, under the head of "Reservations," say: "In accordance with the 2d section of said act (September 26, 1850) and the instructions, the military reservation of Fort Brady, according to 'Westcott's survey,' so called, the Indian reserve, the Indian agency reserve, and the Ste. Marie's canal reservation, of 400 feet in width, as located by Capt. Canfield on the 14th of October, 1852, acting under authority from the governor of Michigan, have been designated on the plat of the public survey of said village accompanying our abstracts, and our adjudications have been confined strictly to claims outside of said reservation, and in no instance have we confirmed claims, or any portion of the same, within said reservations."

The survey under the act of 1850 is known as the Whelpley survey. As the map of survey indicates, the limits of the military reserve shown by the survey embraced simply the land required for the then use and occupation of the fort, and not the land reserved in 1847 by the orders of the President. The military reserve noted on the Whelpley map lay outside of and to the east of the Indian reserve. Pending the settlement of the claims of settlers on the lands of Sault Ste. Marie, under this act of 1850, an act of Congress was approved August 26, 1852 (10 Stat. at L. 35), granting to the state of Michigan the right of way and a donation of public lands for the construction of a ship canal around the falls of St. Mary. The work of constructing this canal was begun in 1852, and it was completed in the year 1855, and, as authorized and constructed, extended entirely across the Indian reserve as delineated on the 1845 and Whelpley maps of surveys, cutting the reservation into three parts, two of which lay north of the canal and one south of the canal.

In 1855 the Chippewa Indians released to the United States (11 Stat. at L. 631) the privileges retained by them under the treaty of 1820. The language employed was: "The said Chippewa Indians surrender to the United States the right of fishing at the falls of Sault Ste. Marie, and of encampment convenient to the fishing grounds, secured to them by the treaty of June 16, 1820."

*On September 10, 1859, one Byron D. [400] Adsitt built a small house on one of the tracts north of the canal, went into possession of the same, fenced a portion of the land, and planted a small garden. A month thereafter he paid $45.63 to the register of the land office at Marquette, Michigan, and entered for pre-emption "the lot designated on the maps of the United States survey in the land office at Marquette, Michigan, as 'Indian reserve' (subject to all the provisions, requirements, and conditions of the act of Congress entitled 'An Act Granting to the State of Michigan the Right of Way and a Donation of Public Land for the Construction of a Ship Canal around the Falls of St. Mary's in Said State'), in section 6, township 47 north of range 1 east." The described land was said to contain 36.50 acres of land, be the same more or less. The papers in the case were forwarded to the Commissioner of the General Land Office at Washington, who replied on April 9, 1860, that the claim was canceled because the land claimed was not subject to pre-emption, and the register was directed to note the cancelation on his books and plats, and to notify Adsitt to make application for a refunding of his payment. The Commissioner called the attention of the register to a previous letter of June 9, 1853, by which two claims were canceled because within the "reservation for Fort Brady," as made by the President's order of September 2, 1847, heretofore referred to.

The evidence introduced at the trial was to the effect that this tract called the "Indian reserve" was occupied by the Indians to the knowledge of witnesses from 1845 to 1885, the Indians living at first in wigwams and latterly in log houses, and about the time of Adsitt's attempted pre-emption the Indians had at least a half dozen houses on the reserve north of the canal, those located there being employed at fishing in the rapids or in carrying people over the rapids, and selling their catch of fish to the

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post, villagers, and those passing through the canal in boats. They were not known to raise any crops from the land. The ground was rocky, and not suitable for agricultural purposes.

On August 7, 1860, Adsitt, for the expressed 401] consideration *of $1, conveyed by quitclaim deed all his right and title in the lands in question to plaintiff in error. Spalding, however, testified that the actual consideration paid by him was not less than $100. He did not occupy the property.

On May 17, 1881, the defendant located what was known as Porterfield scrip on the particular tract in the reserve upon which Adsitt had erected the house. Upon learning of the application for a patent, complainant recorded the deed from Adsitt, and mailed a written protest against the issuance of a patent to the land department at Washington. The Commissioner of the General Land Office replied to Spalding, by letter of date January 18, 1882, informing him that Adsitt's entry had been canceled April 9, 1860, and directed him to apply for a refunding of the purchase money, inclosing blanks therefor. On December 15, 1883, a patent for the land (9.10¼ acres) was issued to defendant in error. Between the fall of 1887 and the spring of 1888 a canal was dug to furnish power, and an electric-light plant was constructed upon the tract. The aggregate cost of the plant, with the machinery therein, was in the neighborhood of $50,000. Spalding knew of the improvements as they progressed, but took no steps to assert his alleged rights until the filing of the bill in this action, November, 1888. The testimony for the defense tended to show that the land was of no value except for the purpose of water power.

Upon the hearing of the cause in the Chippewa circuit court, a decree was entered for the defendant and on appeal the judgment was affirmed by the supreme court of the state. The cause was then brought into this court by writ of error.

While we are strongly inclined to the opinion that the circumstances of this case are not such as should call into active exercise the powers of a court of equity on behalf of the complainant, even though his grantor, upon his attempted entry of the Indian reserve, was entitled to a patent upon the certificate issued to him by the receiver of the land office at Marquette, we have concluded to dis-402] pose of the case on the ground *upon which the supreme court of the state based their affirmance of the judgment of the trial court, to wit, that the land sought to be pre-empted was land which had been an Indian reservation, the Indian title to which had been extinguished while the pre-emption act of September 4, 1841 (5 Stat. at L. 453), was in force. By the 10th section of that act it was provided that no "Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act . . . shall be liable to entry under and by virtue of the provisions of this act."

The reasons for the exemption from pre-emption of land which had been used as an Indian reservation are clearly set forth in the opinion of this court, speaking through *Mr. Justice* Miller, announced in *Root* v. *Shields*, Woolw. 340. He said (p. 362):

"Whenever a town springs up upon the public lands, adjoining lands appreciate in value. The reasons are obvious, and the fact is well known. So, too, when a railroad is built through a section of country, the same result follows. So, too, in respect of lands which have been reserved for the use of an Indian tribe, when the Indian title is extinguished the same may be said. While such lands are held as a reserve, population flows up to their boundaries and is there stayed; it of course constantly grows more and more dense, so that when the reserve is vacated the lands have increased in value, and are always eagerly sought after. The other classes of land mentioned in the exception, as, for instance, those on which are situated any known salines or mines, have some intrinsic value above others. Now, all these classes of lands are excepted from the operation of the act, and for the one common and obvious reason, that, being of special value, the government desires to retain the advantage of their appreciation, and is unwilling that any individual, because of a priority of settlement, which certainly can be of but brief duration, should, to the exclusion of others equally meritorious, reap benefits which he did not sow."

It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation *of this government vested in the United[403 States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit, until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

By the treaty of June 16, 1820, the Indians ceded to the United States a tract of land lying between the Big Rock and Little Rapid in the river St. Mary's, and running back from the river so as to include 16 square miles of land, but by the 3d article of the treaty it was provided that the "United States will secure to the Indians a perpetual right of fishing at the falls of St. Mary's, and also a place of encampment upon the tract hereby ceded, convenient to the fishing grounds, which place shall not interfere with the defenses of any military work which may be erected, nor with any private rights." It is not necessary to determine how the reservation of the particular tract subsequently known as the "Indian Reserve" came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. This view is confirmed by the provisions of the 2d article of the treaty of August 2, 1855 (11 Stat. at L. 631), by which

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treaty, in the 1st article thereof, "the Indians surrendered to the United States the right of fishing at the falls of St. Mary's, and of encampment convenient to the fishing grounds, secured to them by the treaty of June 16, 1820." By said 2d article it was provided that "the United States will appoint a commissioner, who shall, within six months after the ratification of this treaty, personally visit and examine the said fishery and place of encampment, and determine the value of the interest of the Indians therein as the same originally existed."

But whether the Indians simply continued to [404] encamp where *they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians,—is immaterial. The clear duty rested upon the government to see that a tract was reserved for the purposes designated in the treaty. *United States* v. *Carpenter*, 111 U. S. 347, 349 [28: 451, 452]. If a survey was necessary for that purpose, it was the duty of the government to cause such survey to be made (*United States* v. *Carpenter*, *supra*); and it appears from the evidence that in 1845, in a survey made by the authority of the government, the exterior boundaries of the Indian reservation were delineated upon the map of the survey then made, and such boundaries were subsequently adopted in the survey under the act of 1850. The fact, therefore, is undisputed that the 39 acre tract attempted to be pre-empted by Adsitt was accepted by both parties to the treaty of 1820 as a place of encampment, in conformity to the treaty of 1820, convenient to the fishing grounds, and a place which did not interfere with the defenses of any military work then or thereafter contemplated to be erected, or with any private rights. If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty, or indirectly through the medium of a duly authorized excutive officer.

It is fairly to be implied from the language employed in the 3d article of the treaty of 1820, that an encampment location retained, selected, or assigned, as the case might be, reserved for the use specified in the treaty of 1820, should not thereafter be appropriated by the government for other uses than the defenses of any military work. Private rights could not, without the authority of Congress, be ac- [405] quired in the *tract during the occupancy of the reservation under the treaty, for the lands in question lost their character as public lands in being set apart or occupied under the treaty, and became exempt from sale and pre-emption. *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 116, 118 [38: 377, 379, 380].

On the trial below there was no attempt to prove that Congress ever made provision for the erection of military works which rendered necessary an intrusion upon the fishing encampment. The land actually appropriated for the then use of Fort Brady was located considerably to the east of the Indian reserve, and private settlements were made upon the intervening lands. The general grant of authority conferred upon the President by the act of March 1, 1847 (9 Stat. at L. 147), to set apart such portion of lands within the land district then created as were necessary for public uses, cannot be considered as empowering him to interfere with reservations existing by force of a treaty. The land was appropriated in a sense which exempted it from a reservation made in such general terms,—at least so long as the Indian right of user remained unextinguished.

In the absence of express authority to set apart for public uses lands already reserved and appropriated for a particular use, we cannot infer an intention in the grant of power contained in the act of 1847 to authorize interference with the Indian reservation, particularly when such appropriation, as the record shows, was not made for then existing public necessities, but, as the letter of General Brady set out in the statement of facts shows, was merely a provision contemplated for the possibilities of the future, both with reference to a canal and the enlargement of military works, neither of which projects had then been sanctioned by Congress. The purposes of the treaty could not be defeated by the action of executive officers of the government. *United States* v. *Carpenter*, 111 U. S. 347 [28: 451]. As a matter of fact, therefore, the Indian reserve continued to exist and to be used for the purposes for which it came into existence, long after the President's orders of 1847. As stated, the reserve was not extinguished or the rights of the Indians to the use of the tract destroyed or curtailed by those orders, *and if the res- [406] ervation for public uses and for the purposes of Fort Brady, made by the President's orders, was valid, the operation of those orders, so far as the Indian reserve was concerned, was clearly postponed until after the extinguishment of the reserve either by a voluntary cession to the government, a cessation or abandonment of the use, or the arbitrary exercise by Congress of its power to appropriate the same. The existence of the reserve, however, was expressly recognized by Congress in the act of September 25, 1850, authorizing the ascertainment and settlement of claims to lands at Sault Ste. Marie. The map of the survey ordered to be made by the village was required to have noted upon it the boundaries, not only of the military reserve, but of the Indian reserve. We conclude, therefore, that, until the treaty of August 2, 1855, this Indian reservation was not extinguished. It is true that the act of August 26, 1852 (10 Stat. at L. 35), which granted to the state of Michigan the right of locating a canal through the public lands, known as the military reservation at the falls at St. Mary's river in said state, authorized by such description the location of the canal mainly across and through the Indian reserve. It seems probable that the bill in question was

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drafted after consultation and with the approval of the War Department, the officials of which department had in 1847 sought the reservation by the President of lands at Sault Ste. Marie, in the belief that a canal was not a far-distant possibility, and the designation of the land in question as the military reservation may properly be ascribed to that source. There is nowhere contained in the act, however, an allusion to the treaty of 1820, or an express declaration of an intention to interfere with the Indian reserve or the rights of the Indians in any portion of the reserve. And the express recognition by Congress of the existence of the reserve, contained in the act of 1850, under which proceedings were being had at the time of the passage of the act of 1852, for a survey of the village and a map of the same, with the notation thereon of the various reservations, forbids the assumption that Congress no longer regarded the Indian reserve as in existence. Whatever the reason, howev-
407] er, for *the omission to make mention of the Indian reserve, the power existed in Congress to invade the sanctity of the reservation and disregard the guaranteee contained in the treaty of 1820, even against the consent of the Indians, party to that treaty; and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the state for canal purposes. *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 116, 117 [38: 379].

As to the remaining portions of the reserve, however, the use and the right of use by the Indians continued, and, until they surrendered that right by the treaty of 1855, the reserve continued to exist. If the reservations made by the orders of 1847 were not then operative, it is clear that upon the extinguishment of the Indian title to possess and occupy the reserve the land stood simply in the category of lands included within an Indian reservation, the title to which had been extinguished by the United States during the operation of the act of September 4, 1841, and, consequently, by the 10th section of that act (5 Stat. at L. 456) the land was not subject to pre-emption. It follows that the attempted pre-emption by Adsitt in 1859 was illegal, the Commissioner of the General Land Office properly ordered the cancelation of the entry certificate, the plaintiff in error acquired no right to the land in question by the quitclaim deed of Adsitt, and hence his bill was properly dismissed. *The judgment of the supreme court of the state of Michigan is therefore affirmed.*

408] SAM HICKORY, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 408-425.)

Assignments of error—concealment of flight of accused—erroneous charge—presumption of guilt—testimony of accused.

1. Assignments of error which do not state the precise language used by the court, yet indicate the subject-matter in the charge to which the exceptions relate with sufficient clearness to enable this court, from a mere inspection of the charge, to ascertain the particular matter referred to,—are sufficient.
2. Acts of concealment and the flight of an accused are competent evidence as tending to establish guilt, yet they are not alone conclusive, nor do they create a legal presumption of guilt.
3. A charge which magnifies and distorts the proving power of the facts on the subject of concealment, and makes the weight of the evidence depend on the manner in which it was done, and, with the context of the charge, practically instructs that the facts were, under both divine and human law, conclusive proof of guilt,—is erroneous.
4. An instruction which is tantamount to saying to the jury that flight creates a legal presumption of guilt, so strong and so conclusive that it is their duty to act on it as an axiomatic truth, is erroneous, although qualified by words that there may be exceptions to the rule.
5. An instruction to the jury as to the testimony on his own behalf of the accused on trial for murder, which substantially says to them: The circumstances as to the killing and concealment cannot be bribed, but the defendant can be; therefore you must consider that these circumstances outweigh his testimony,—is erroneous.

[No. 491.]

Submitted March 5, 1895. Decided January 6, 1896.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting Sam Hickory of murder. *Reversed with directions for a new trial.*

No counsel for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Sam Downing, *alias* Sam Hickory, and Thomas Shade, were indicted in October, 1891, for the murder in the Indian territory of a white man by the name of Joseph Wilson. Downing, who was at the time of the alleged killing nineteen years old, was tried and convicted, and the case was brought by error here. The verdict and judgment were reversed and the case was remanded for a new trial. *Hickory* v. *United States*, 151 U. S. 303 [38: 170]. On the trial, the defendant was again found guilty of murder, and the case for the second time comes here by error. The assignments of error are twelve in number, and all relate to errors alleged to have been committed by the trial court in the charge given to the jury. The charge covers twenty pages of the printed record. To correctly understand the merits of the various assignments of error it is necessary to briefly refer to the testimony, which is stated in a condensed form in the bill of exceptions.

The testimony for the prosecution tended to show that Wilson, the deceased, was a deputy marshal and had a warrant for the arrest of the accused upon the charge of taking whiskey into the Indian country. With this warrant he started to a house where he expected to find Hickory, being *accompanied by John [**410**

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Carey. Wilson and Carey proceeded together until just before reaching this house. Carey then informed Wilson that he would go no further with him, as he did not wish to be known in the neighborhood in connection with the arrest. It was then arranged between them that Carey should remain in the woods while Wilson should continue on to the house and make the arrest. Wilson had with him "a large white handle pistol," and told Carey that if he found the accused he would fire off his pistol after arresting him, in which case Carey would meet him, "close to Brown's on the prairie." Wilson then proceeded on his way, and Carey remained in the woods awaiting the signal agreed upon. In about half an hour Carey heard the firing of "a gun," then "two guns" went off together, then there were several shots "which sounded as if they were fired by one man, and as if he was taking his time to fire." Carey waited for Wilson until sundown, and as he did not then come he (Carey) went to the house of Squirrel Carey and "told him about hearing the shooting and that Wilson was to fire his pistol, but he did not say how many times." The government also introduced proof showing that some days afterwards the body of Wilson was found in a gulch or ravine, and there was a gunshot wound straight through the body; that the skull was fractured, and that there was a contused wound or bruise at the base of the brain. The person of the deceased had not been rifled, and on it were found his watch and papers, among the latter the warrant for the arrest of Hickory.

Further testimony was introduced tending to show that an examination of the house where Wilson had gone to arrest the accused disclosed spots of blood on the porch, in the house, on the door, and in the yard at several places, and on a wagon standing in the yard, and that efforts had been made to conceal these spots of blood. There was also testimony showing bullet marks in the house; that "certainly one and probably two shots were fired from a southeasterly direction where the marshal likely was at the commencement of the shooting, towards the front door, one striking a corner 411] *post and the other the wall near the door. Two shots had been fired from the inside of the house through the front door, as shown by the holes. One shot had been fired from the large front room, glancing the middle door shutter, which was open, and going into the wall of the rear room, and another had gone into the wall of said rear room opposite the center of the middle door."

Testimony was further offered tending to show that Wilson's horse was found dead some distance from the house, and the witnesses could not tell whether "its throat had been cut or eaten by wild animals, as they had been working on it." It was also shown that when Wilson went to the house he had a pistol, a bridle, and a saddle, on which a coat was strapped, and these things were not found. The government then further introduced testimony tending to show that the accused had told three or more witnesses "that he shot the deceased, and hit him the first shot, but did not kill him, and that Tom Shade, who was there with defendant, knocked the deceased in the head with an axe; that after the killing an attempt had been made to destroy the blood spots in the house and yard." It further introduced testimony tending to show that after the killing the accused was "'scouting,' that is, avoiding arrest." Upon this proof the case for the prosecution was rested. The accused, after introducing testimony tending to rebut the alleged confession by showing that he was not in the place named at the time it was stated the confession had been made, then testified in his own behalf, admitting the killing of Wilson, and giving substantially the following account of the occurrence: He was in the yard hitching up a team of horses for the purpose of hauling a load of posts, when Wilson came into the yard and asked him his name, which he gave him, and thereupon Wilson put him under arrest and read the warrant to him; that he replied, "All right," and unharnessed the horses and turned them loose; that Wilson asked him whether he was going to ride one of the horses, and he replied, "No," that they did not belong to him; that thereupon Wilson asked him who was the owner of the horses, and he said the owner was not there, *but lived in the [412 neighborhood. Wilson told him to take one of the horses and they would ride to the owner's house, and if he would not consent to Hickory riding away on it, it could be returned. He again said all right, and put the bridle on the horse, Wilson telling him to hurry up and get his saddle; that he started to go into the house after his saddle, and when he was about three steps from the porch he heard the fire of a gun, and turning around saw Wilson with a revolver in his hand and smoke coming from it; that he did not run after the first shot, but walked on towards the house, when a second shot was fired just as he was about to enter the front door; that he went into the house and shut the front door, intending to go out through a side-room door and run off. When he had gotten about as far as the middle door of the side room he discovered Wilson coming in through the outside door of the side room with his pistol raised at him (indicating the pointing of a pistol); that he then ran to the east side of the front room, got his gun, and went to the front door. The marshal then appeared at the middle door of the side room, exposing himself just enough to shoot, which he did; and that he (the accused) returned the fire, which was followed by further firing between them. The marshal then disappeared from the door and went into the yard and fell down close by the wagon. He (the accused) ran off and remained half an hour, and on coming back found the marshal dead; he became frightened and did not know what to do, and, indeed, did not know all that he did do; he put the body of the marshal on the wagon, and hauled it about a mile and a half from the house, and then threw it out at the head of the gulch. When he returned after doing this he found the marshal's horse wounded in the knee. He took off the saddle, and bridle and hid them, and also the coat which was tied to the saddle and the marshal's pistol and belt. The accused also introduced a witness to the killing, a woman by the name of Ollie Williams, his mistress. She testified to the

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marshal's coming up to the place where the accused was standing in the yard with the wagon and horses; to the accused starting towards the house. She said that the marshal, who 413] was right *by a tree, then shot at him; that she did not see how the marshal held his pistol the first time he shot; that the accused was going into the door when the two shots were fired; that the marshal came around the outside room door with a pistol in his hand, and told her to get out of the way; that she went a quarter of a mile off, and had nothing to do with the moving of the body of the deceased. The accused, moreover, introduced the testimony of a physician who had examined the body of the deceased, and who contradicted the statement that there was a fracture in the skull of the deceased, and said there were two scalp wounds, one on the top of the head and the other in the back; "they had the appearance of some blunt substance striking the head, or the head striking the substance."

The opinion formed by us as to three of the assignments of error will render an examination of the others unnecessary. The three which we will consider are as follows:

"4th. Because the court in commenting on the inculpatory testimony as to the acts of the defendant with reference to the body of the deceased, the alleged killing of the horse, in reference to what is charitable or brutal conduct, gives undue prominence to the inculpatory facts, without summing up all the testimony as well for as against the defendant in reference to this branch of the case."

"7th. Because the court, a second time in the charge in going over the alleged conduct of the defendant subsequent to the killing, and his conduct in flight, gives undue prominence to the inculpatory facts, and gives them in a way that has the effect of an argument against the defendant, and is not a proper, full summing up of the facts upon this branch of the case."

"11th. Because the court bears upon and gives undue prominence to the flight of defendant, and treats it absolutely as true that defendant concealed the blood, killed the horse, and destroyed the evidence of the alleged killing."

It is contended by the defendant in error that of these assignments the fourth and seventh are not sufficiently specific to merit consideration, 414] because they do not point out the *exact words in the charge of the court complained of. The assignments are in exactly the same language as were the exceptions taken during the trial and which the record declares "the defendant presented at the time." Whilst it is true that the assignments do not in terms state the precise language used by the court, they yet indicate the subject-matter in the charge to which the exceptions relate with sufficient clearness to enable us from a mere inspection of the charge to ascertain the particular matter referred to. In considering, when this case was previously before us, a similar objection to the adequacy of an exception, we said: "The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court, before the retirement of the jury, as to enable the judge to correct error, if there be any, in his instructions to them; and this is also requisite in order that the appellate tribunal may pass upon the precise question raised, without being compelled to read the record to ascertain it." It is here unquestionable on the very face of the bill of exceptions that the objections were reserved before the retirement of the jury, and that the trial court was fully aware of their import and had the opportunity to make such corrections, if any, as its judgment may have deemed necessary to prevent the charge from being misunderstood by the jury. This is made clear, not only by the language of the bill of exceptions, but also by the charge itself, which contains a statement by the court, entirely inconsistent with a possibility of there having been any surprise or misconception. The court said:

"There is a little bit of history on that, and I apprehend the gentlemen won't take any exception to reading from this book (the Bible). There are a great many exceptions filed here to almost everything said by the court, but I hope they won't take any exception to this."

The first comments of the court upon the facts in reference to concealment (covered by the fourth assignment), and its instruction as to the weight to be given the proof of the subject of the flight of the accused (covered by the eleventh assignment), are so connected in the charge as to cause the examination *of the one to [415 necessarily involve the other. We shall therefore examine at the same time the errors complained of in these two assignments.

First. Errors complained of in the fourth and eleventh assignments.

The language of the charge to which these assignments relate immediately follows the reference made by the court to the number of exceptions reserved, and is in these words:

"And there is another fact that is so common that I have but to remind you of it, because that which makes up your common knowledge you can use in the investigation of these cases, and it is this: There is no man who has arrived at the years of discretion who has not been so created that he has that in his mind and heart which makes him conscious of an act that is innocent upon his part, and his conduct when connected with an act of that character will be entirely different from the conduct of a man who is conscious of wrong and guilt. In the one case he has nothing to conceal; in the one case his interest and self-protection, his self-security, prompts him to seek investigation, to see to it that it is investigated as soon as possible. This is no new principle. I say it is as old as the days of the first murder. There is a little bit of history on that, and I apprehend the gentlemen won't take any exception to reading from this book. There are a great many exceptions filed here to almost everything said by the court, but I hope they won't take any exception to this. There is a little bit of history illustrative of the conduct of men:

"'And Cain talked with Abel, his brother; and it came to pass, when they were in the field, that Cain rose up against Abel, his brother, and slew him.

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"'And the Lord said unto Cain, Where is Abel, thy brother? And he said, I know not. Am I my brother's keeper?

"'And He said, What hast thou done? The voice of thy brother's blood crieth unto Me from the ground.'

"'Am I my brother's keeper From that day to the time when Professor Webster murdered his associate and concealed his remains, this concealment of the evidence of crime has been regarded by the law as a proper fact to be 416] taken into consideration *as evidence of guilt, as going to show guilt, as going to show that he who does an act is consciously guilty, has conscious knowledge that he is doing wrong, and he therefore undertakes to cover up his crime.

"Now, there may be exceptions to the general rule. General as it is, it may have its exceptions, but the question for you to pass upon is whether or not, in the first place, there were acts upon the part of this defendant, either while acting alone or in concert with others assisting him, that looked towards concealing this act of the killing of Wilson; what these acts were; if they were cruel, if they were unnatural, if they were barbarous, if they were brutal, you still have a right, and it is your duty, to take them into consideration. If they were of that character you are to bring to bear your observation in life that men who are conscious of innocence do not usually characterize their conduct after a killing by that sort of acts. You are to see what the acts were. You are to take into account the concealment of this body, the concealment of this horse, the killing of the horse, and the concealing of everything that pertained to that man, the effort to wipe out the blood stains left there where they might be evidences of killing, where they might be discovered afterwards as evidences of the killing. All these things are facts that you must take into account; and not only that, but the law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it in this case. Therefore the law says that if after a man kills another that he undertakes to fly, if he becomes a fugitive from justice, either by hiding in the jurisdiction, watching out to keep out of the way of the officers, or of going into the Osage country out of the jurisdiction, that you have a right to take that fact into consideration, because it is a fact that does not usually characterize an innocent act."

It is undoubted that acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be 417] considered as alone conclusive, or *as creating a legal presumption of guilt; they are mere circumstances to be considered and weighed, in connection with other proof with that caution and circumspection which their inconclusiveness, when standing alone, requires. The rule on the subject has had nowhere a clearer and more concise expression than that given by Chief Justice Shaw in the *Webster Case*, to which the trial court adverted. *Com.* v. *Webster*, 5 Cush. 295, 52 Am. Dec. 711. The learned Chief Justice said: "To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons; all or any of which tend somewhat to prove consciousness of guilt, and when proved exert an influence against the accused. The consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case, often mentioned in the books and cited here yesterday, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as his niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive afterwards proved conclusively that he was not guilty of the murder."

In *Ryan* v. *People*, 79 N. Y. 593, considering an objection that the court erred in admitting evidence of an attempt to escape from the sheriff, the court said:

"There are so many reasons for such conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon surrounding circumstances. It was not error to admit it." *People* v. *Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People* v. *Forsyth*, 65 Cal. 102; *State* v. *Gee*, 85 Mo. 647; *State* v. *Brooks*, 92 Mo. 542; *Swan v. *People*, 98 [418 Ill. 610; *Anderson* v. *State*, 104 Ind. 467, 472; *Jamison* v. *People*, 145 Ill. 357.

The cases which illustrate the rule in various phases are too numerous to review. They are collected in the text-books, and will be found in Whart. Crim. Ev. (9th ed.) chap. 14, § 750, *note*. The modern English law on the subject is referred to in Wills on Circumstantial Evidence, p. 79, citing the opinion of Mr. Baron Gourney in *Reg.* v. *Belaney*, which is thus recapitulated:

"By the common law, flight was considered so strong a presumption of guilt that in cases of treason and felony it carried the forfeiture of the party's goods, whether he were found guilty or acquitted; and the officer always, until the abolition of the practice by statute, called upon the jury, after verdict of acquittal, to state whether the party had fled on account of the charge. These several acts in all their modifications are indications of fear; but it would be harsh and unreasonable invariably to interpret them as indications of guilty consciousness, and greater weight has sometimes been attached to them than they have fairly warranted. Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principle from which consistency springs; but it does not follow, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, that the converse is always true. Men are differ-

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ently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt, and every man is therefore entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty."

And the same author at p. 80 quotes the observation of Mr. Justice Abbott on a trial for murder, where evidence was given proving flight: "A person however conscious of innocence might not have courage to stand a trial, but might, although innocent, think it necessary to consult his safety by flight. It may be," added the learned judge, "a conscious anticipation of punishment for guilt, as the guilty 419] will always anticipate the *consequences, but at the same time it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this."

So, again, at p. 88, the same writer says: "So also is the concealment of death by the destruction or attempted destruction of human remains (a presumption of guilt), but in this case the presumption of criminality results from the act of concealment rather than from the nature of the means employed, however revolting, which must be regarded only as incidental to the fact of concealment, and not as aggravating the character and tendency of the act itself. Where a prisoner tried for murder admitted that he had cut off the head and legs from the trunk of a female, and concealed the remains in several places, but alleged that her death had taken place by accident while she was in his company, and that in the alarm of the moment, and to prevent suspicion, he had determined to conceal the death, Lord Chief Justice Tindal told the jury that the concealment of death under such circumstances had always been considered to be a point of the greatest suspicion, but that this evidence must be received with a certain degree of modification, and especially in a case where the feelings might be excited by the singular means of concealment adopted by the prisoner; that this point of evidence was therefore for the consideration of the jury, and it was for them to show how far it was proof of the prisoner's guilt; but the mere general fact of concealment, added the learned judge, is to be considered, and not the circumstances under which it took place."

The text-writers generally state the principle in accordance with the foregoing.

"Few things," says Best on Presumption, p. 323, "distinguish an enlightened systems of judicature from a rude and barbarous one more than the way in which they deal with evidence. The former weighs testimony, while the latter, conscious, perhaps, of its inability to do so, or careless of the consequences of error, at times rejects whole portions *en masse*, and at others converts pieces of evidence 420] into rules of *law by investing with conclusive effect some whose probative force has been found to be, in general, considerable. If any proof of this were wanting it would be amply supplied by the history of our law with reference to the species of evidence under consideration. Our ancestors, observing that guilty persons usually fled from justice, adopted the hasty conclusion that it was only the guilty who did so, according to the maxim *Fateiur facinus qui fugit judicium*, so that under the old law a man who fled to avoid being tried for felony forfeited all his goods even though he were acquitted; and the jury were always charged to inquire, not only whether the prisoner were guilty of the offense, but also whether he fled for it, and, if so, what goods and chattels he had. This practice was not formally abolished until the Stat. 7 & 8 Geo. IV. chap. 28, § 5. In modern times more correct views have prevailed, and the evasion of or flight from justice seems now nearly reduced to its true place in the administration of the criminal law, namely, that of a circumstance, a fact which it is always of importance to take into consideration, and combined with others may afford strong evidence of guilt, but which, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility." And this is quoted with approval in Burrill on Circumstantial Evidence, p. 473. See also Roscoe's Criminal Evidence (8th Am. ed.) p. 30. Mr. Wharton, in his Criminal Evidence, after referring in a note to the American authorities, states the rule in accordance with the foregoing, and concludes: "The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All the courts can do when such inference is invoked is to say that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred, but this should be qualified by a general statement of the countervailing conditions, incidental to a comprehensive view of the question."

In a footnote at p. 645 this author collects several marked and peculiar instances where a person had fled who was undoubtedly innocent. One of these instances is this: *"Dr. [421 Thomas Fuller gives the following quaint excuse for running away from London when charged with treason: And if any tax me, as Laban taxed Jacob, 'Wherefore didst thou flee away secretly without taking solemn leave?' I say with Jacob to Laban, 'Because I was afraid.' And that plain-dealing patriarch, who could not be accused for purloining a shoe latchet of other men's goods, confessed himself guilty of that awful felony that he 'stole away' for his own safety, seeing truth may sometimes seek corners, not as fearing her cause, but as suspecting her judge."

Thompson on Trials, tit. 6, chap. 69, § 2543, makes this statement: "It is often inaccurately said that the flight of the accused creates a presumption of his guilt, and this presumption is sometimes inadvertently dealt with as though it were a presumption of law. But it belongs to that class of presumptions which are generally classified as presumptions of fact. If it were a presumption of law, the jury would be bound to draw it in every case of flight, and the court might so instruct them; whereas it is merely a circumstance tending to increase the probability of the defendant being

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the guilty person, which on sound principle is to be weighed by the jury like any other evidentiary circumstance."

Measuring the correctness of the charge by these principles and authorities, it is at once demonstrated to have been plainly erroneous. It magnified and distorted the proving power of the facts on the subject of the concealment; it made the weight of the evidence depend not so much on the concealment itself as on the manner in which it was done. Considering the entire context of the charge, it practically instructed that the facts were, under both divine and human law, conclusive proof of guilt. The statement that no one who was conscious of innocence would resort to concealment was substantially an instruction that all men who did so were necessarily guilty, thus ignoring the fundamental truth, evolved from the experience of mankind, that the innocent do often conceal through fear or other emotion. The legal influence which this language must have exerted on the jury was increased by the [422]subsequent instruction that it was as *old as the first murder for the conduct of an innocent person to be different from that of a guilty one. Putting this language in connection with the epithets applied to the acts of concealment and the vituperation which the charge contains, it is justly to be deduced that its effect was to instruct that the defendant was a murderer, and therefore the only province of the jury was to return a verdict of guilty. It is true that a subsequent portion of the charge refers to the evidence on the subject of concealment as "proper to be taken into consideration, as evidence of guilt," as going to show guilt. But these qualified remarks did not recall the undue weight which the previous language had affixed to the facts to be considered by the jury. The instruction as to the probative weight which the jury should attach to the fact of flight was equally erroneous. It was as follows: "And not only this, but the law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case." This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth. On this subject also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt. In *Starr* v. *United States*, 153 U. S. 626 [38: 845], in considering the power of a Federal court to comment in charging a jury on the evidence, we quoted with approval the language of the supreme court of Pennsylvania (*Burks* v. *Maxwell*, 81 *Pa. 139, 153), saying: [423 "When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one sided." The charge given in this case violates every rule thus announced. It was neither calm nor was it impartial. It put every deduction which could be drawn against the accused from the proof of concealment and flight, and omitted or obscured the converse aspect. In so doing it deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth. Nor can it be considered that the language subsequently used corrected the error. "Now," says the charge, "there may be exceptions to the general rule. General as it is, it may have its exceptions." But none of the exceptions thus referred to were called to the attention of the jury. Indeed, taking the language of the charge which follows the foregoing words, it must have conveyed, by the strongest possible intimation, the impression to the jury that the case before them was controlled by the general rule previously stated to them by the court, although other cases might be an exception to such rule. For these reasons the judgment must be reversed. In this state of the case it would ordinarily be unnecessary to consider the other assignments. As, however, the case is before us for the second time, and must be remanded for a new trial, the ends of justice will best be subserved by passing on the remaining assignment, that is to say, the eleventh assignment. The portion of the charge to which this assignment is addressed is as follows:

"And then, again, there stands before you a witness who was there, a positive witness, who saw this killing. That witness is the defendant. Bear in mind when you are passing upon this case that the other witness to it cannot appear before you, he cannot speak to you, except as he speaks by his body as it was found, having been denied even the right of decent burial, by the dead body of his horse, by the concealed weapons *and the concealed [424 saddle, by the blood stains that were obliterated. He stands before you, although he is in his grave, speaking by the aid of the power and the might of these circumstances in this case. You are to see whether they harmonize with this statement of this transaction as given by the defendant, bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed, that cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody, naked facts before you, speaking for Joseph Wilson and justice, in opposition to and confronting this defendant, who stands before you as an interested party; the party who has in this case the largest interests a man can have in any case upon earth. While you are not to disbelieve his evidence because of that alone, if you are to do justice, if you are,

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in the language of counsel, not to be cruel to the country, and to the people of the country who are entitled to legal protection, you are to weigh these facts and see whether they harmonize with his statement when viewed by the light of your intelligence, and when this case is illuminated by such facts, whether it is in harmony with the statements of this interested witness or in contradiction of them."

It is apparent that this part of the charge is replete with the errors which we have already found to exist in the matter which we have already considered. But the instruction contains an additional error of so grave a nature that we call attention to it in order to prevent its recurrence. The manner of contrasting the testimony of the accused with the circumstances connected with the concealment was clearly illegal. The language in which this was done is: "Bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed, that cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody, naked facts before you, speaking for Joseph Wilson and justice, in opposition to and confronting this defendant, who stands before you as an interested party; the party who has in this case the largest interest a man can have in any case 425] upon earth." This *contrast thus made could have conveyed but one meaning to the jury; that is, a warning that the testimony of the accused was to be considered by them as of little or no weight because he could be bribed, he could be dragged or seduced into perjury. Such denunciation of the testimony of an accused is without legal warrant. *Allison* v. *United States*, [160 U. S. 203, *ante*, 395]. Indeed, this instruction, besides giving rise to this error, was also, if possible, more markedly wrong from the implications which it conveyed to the jury. It substantially said to them: The circumstances as to the killing and concealment cannot be bribed, but the defendant can be; therefore you must consider that these circumstances outweigh his testimony, and it is hence your duty to convict him. In *Starr* v. *United States*, 153 U. S. 626 [38: 845], speaking through Mr. *Chief Justice* Fuller, this court called attention to the fact that there were limitations on the power of a Federal court, in commenting on the facts of a case, when instructing a jury, limitations inherent in and implied from the very nature of the judicial office. In *Reynolds* v. *United States*, 98 U. S. 168 [25: 251], speaking through Mr. *Chief Justice* Waite, this court also said on the same subject: "Every appeal by the court to the passions or prejudices of the jury should be promptly rebuked, and . . . it is the imperative duty of the reviewing court to take care that wrong is not done in this way." Admonished by the duty resting on us in this regard, we feel obliged to say that the charge which we have considered crosses the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prejudices are necessarily called into play.

The judgment is reversed, and the case remanded with directions to grant a new trial.

JABEZ H. GILL, *Appt.*, [426
v.
UNITED STATES.

(See S. C. Reporter's ed. 426-438.)

Use of patent right—estoppel—use by government.

1. An employee who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assents to the use of such improvements by his employer, cannot, on taking out a patent upon such invention, recover a royalty or other compensation for such use.
2. A person looking on and assenting to that which he has power to prevent is precluded ever afterwards from maintaining an action for damages.
3. If the inventions of a patentee be made in the course of his employment by the government, and he knowingly assents to the use of such inventions by it, he cannot claim compensation therefor, especially if his machines have been made at the expense of the government, although the inventions were conceived out of the hours of labor.

[No. 85.]

Argued November 21, 22, 1895. Decided January 6, 1896.

APPEAL from a judgment of the Court of Claims dismissing a suit brought by Jabez H. Gill to recover from the United States a certain sum of money upon an implied contract for the use of certain machines covered by letters patent issued to said Gill. *Affirmed.*

See same case below 25 Ct. Cl. 415.

Statement by *Mr. Justice* **Brown**:

This was a suit by Gill to recover of the United States the sum of $94,693.04 upon an implied contract for the use of certain machines covered by letters patent issued to the claimant.

The petition alleged in substance that from March, 1864, to March, 1881, the claimant was employed as machinist, foreman, and draftsman at the Frankford Arsenal, in the state of Pennsylvania, and since March, 1881, as master armorer at such arsenal, receiving during the term of his employment a *per diem* compensation for his services. His engagement required him to perform manual labor and to exercise his mechanical skill in the service of the government, but did not require the exercise of his inventive genius in such service, or secure to the government the right to use any of his inventions without compensation.

That at sundry times from 1869 to 1882, six patents were granted to him for a cartridge-loading machine, a weighing machine, a gauging machine, a cartridge anvil, a heading machine, and a priming tool for reloading; that at different times he assigned to individuals or corporations all these inventions, but reserved to the government the right to use them.

The petition further alleged that the reasonable value of such use by the government amounted to the sum of *$94,693.04, no [427 part of which had ever been paid; that no action upon the claim had been had in any department of the government beyond repeated ac-

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knowledgments, by the Ordnance Department, of claimant's right to compensation for the use of the inventions.

The government made a general denial of the allegations of the petition, and submitted the case to the court of claims, which made a finding of facts, the material portions of which are printed in the margin,† and entered a judg-
428] ment dismissing *the claim upon the ground that where an employee of the government takes advantage of his connection with it to introduce an unpatented device into the public service, giving no intimation at the time that he regards it as property or that he intends to protect it by letters patent, but allows the government to test the invention at its own exclusive cost and risk, by constructing machinery and bringing it into practical use before he applies for a patent, the law will not imply a contract; and that a contract will not be implied in favor of an employee who has thus placed a patented device in the public service, as to the machines constructed and used after his patent has been obtained.

*From this decree the claimant ap- [429
pealed to this court.

Mr. **Halbert E. Paine** for appellant.

Mr. **J. M. Dickinson,** Assistant Attorney General, for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

This case raises the question, which has been several times presented to this court, whether an employee paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his em-

† (1) During the period of time within which the claimant invented the devices hereafter mentioned he was in the defendants' employment, and received wages or a salary for his services. The terms of his employment required him to exercise his mechanical skill in the service of the defendants, but did not require the exercise of his inventive genius in such service, or secure to the defendants the right to use any inventions of the claimant without compensation therefor.

Letters patent of the United States were granted to the claimant, while in the service of the defendants, as follows: No. 97,904, dated December 14, 1869, for a cartridge-loading machine; No. 185,858, dated January 2, 1877, for a cartridge-weighing machine; No. 208,903, dated October 15, 1878, for a cartridge-gauging machine; No. 220,472, dated October 14, 1879, for a cartridge anvil; No. 241,962, dated May 24, 1881, for a cartridge-heading machine; No. 257,860, dated May 16, 1882, for a priming tool for reloading.

(2) The manner in which the invention above referred to originated and came into the use of the government was as follows:

In 1867 the claimant, being a machinist or skilled mechanic in the Frankford Arsenal, and getting as compensation $4 a day, came to General Benét, the commanding officer, and suggested that an improvement could be made in the method of loading cartridges, and exhibited to the commanding officer, then or subsequently, his device for an improvement which is now embodied in patent No. 97,904.

General Benét, after due examination and consideration, authorized the construction of such a machine. The machine was built at a cost of $500 by the United States according to the design of the claimant. On its completion it proved to be thoroughly satisfactory to the commanding officer, who authorized the construction of a second machine. The construction of both took place under the immediate supervision of the claimant, and such supervision was a part of his ordinary duty and employment. Subsequently successive commanding officers ordered from time to time six other machines to be constructed, which in like manner were built under the immediate supervision of the claimant, and all of these eight machines were completed prior to the claimant filing his application for a patent.

After his patent had been issued a ninth machine was also ordered, and in like manner constructed under the immediate supervision of the claimant. These machines have been used by the government at the Frankford Arsenal in the manufacture of cartridges, and continue in use to the present time.

(3) At no time did the claimant ever bring his invention before a commanding officer or other agent of the government as a subject of purchase and sale; nor did he ever raise an objection to the use of the invention as set forth in the preceding finding; nor did he ever enter into an express agreement, written or oral, whereby a license was granted or intended to be granted to the government to operate and use the machine described in the preceding finding, or whereby the claimant waived or intended to waive his legal or equitable right, if any, to compensation; nor did any commanding officer ever undertake or assume to incur a legal or pecuniary obligation on the part of the government for the use of the invention or the right to manufacture thereunder.

The claimant was not employed to make inventions, or assigned to that duty, and his invention, until it was reduced to paper in the form of an intelligible drawing, was made out of the hours of labor at the arsenal and during the time which was properly his own; and the thought and time which he devoted to it were voluntarily given, as a good and earnest servant of the government, intent on rendering more effective the work and machinery of the arsenal with which he was connected; and the work of so devising a machine was not an obligation imposed upon him by the authorities of the arsenal.

(4) The other inventions of the claimant, set forth in the patents enumerated in finding I., except that of the heading machine, which was fabricated and used by the defendants under the supervision of the claimant, were also brought to the attention of the various commanding officers by suggestions from the claimant for making the means and appliances at the arsenal more efficient than they were; and in like manner the cost of preparing patterns for the iron and steel castings, and preparing working drawings and of constructing working machines was borne exclusively by the government; but the claimant did not use any property of the defendants, or the services of any employee of the defendants, in making or developing or perfecting the inventions themselves. In each case one or more machines or articles of manufacture embodying the invention had been constructed and was in operation or use in the arsenal with the claimant's knowledge and assent before he filed an application for a patent.

(5) In 1867, when the claimant made his first invention described in the patents hereinbefore enumerated, he was a machinist rated as a skilled laborer in the Frankford Arsenal, but acting and doing the duty of a master armorer, on wages of $4 a day. From time to time his wages were advanced until they became, in 1881, $6 a day, and he was in 1881 appointed master armorer, the duties of which are a general supervision of the shops. This increase of pay and advancement of position came through and by authority of the commanding officers of the arsenal, and the consideration or reason therefor was that the claimant was a faithful, intelligent, and capable employee, whose services were of great value to the government.

It was never stipulated by any commanding officer, or understood or agreed to by the claimant, that the advance of wages was to be a consideration for the use of his inventions, though the practical ability of the claimant as an inventor, and the value of his inventions to the government, did operate upon the minds of the officers in estimating the claimant's services and ordering his advancement.

(6) The claimant has sold the right to use his inventions, reserving the right to the government as set forth in finding VII., to various persons for sums amounting in the aggregate to $5,380. But the use of the inventions by private manufacturers is not nearly so large as the use by the government, the inventions being specially adapted to military purposes and appliances.

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ployer to put his invention into practical form, and assenting to the use of such improvements by his employer, may, by taking out a patent 430] *upon such invention, recover a royalty or other compensation for such use. In a series of cases, to which fuller reference will be made hereafter, we have held that this could not be done.

The principle is really an application or outgrowth of the law of estoppel *in pais*, by which a person looking on and assenting to that which he has power to prevent is held to be precluded ever afterwards from maintaining an action for damages. A familiar instance is that of one who stands by while a sale is being made of property in which he has an interest, and makes no claim thereto, in which case he is held to be estopped from setting up such claim. The same principle is applied to an inventor who makes his discovery public, looks on, and permits others to use it without objection or assertion of a claim for a royalty. In such case he is held to abandon his inchoate right to the exclusive use of his invention, to which a patent would have entitled him had it been applied for before such use. As was said by *Mr. Justice* Story in *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1, 16 [7: 327, 332]: "This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure; for, where gifts are once made to the public in this way they become absolute." "It is possible," said the trial court, in charging the jury, "that the inventor may not have intended to give the benefit of his discovery to the public, and may have supposed that, by giving permission to a particular individual to construct for others the thing patented, he could not be presumed to have done so. But it is not a question of intention which is involved in the principle we have laid down, but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say whether the evidence brought this case within the principle which has been stated." This language was quoted with approval in *Grant* v. *Raymond*, 31 U. S. 6 Pet. 218 [8:376]. So also, in *Shaw* v. *Cooper*, 32 U. S. 7 Pet. 292, 323 [8: 689, 700], it was held directly that "whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatsoever, without the immediate assertion of his right, he is not entitled to a patent."

431] *The application of this principle to a single individual whom the patentee has permitted to make use of his invention without claiming compensation therefor first arose in *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 [11: 102]. In this case the patentee, Harley, was employed by the defendants at their foundry upon weekly wages. While so employed, he invented the patented improvements, making experiments in the defendants' foundry, and wholly at their expense. The result proving useful, his wages were increased. He continued in their employment, during all of which time he made rollers for them, spoke about procuring a patent, and finally made an application, which was granted. He assigned the patent to the plaintiffs, after the defendants had declined his proposition that they should take out a patent and purchase his right. He made no demand upon them for compensation for using his improvement, and gave them no notice not to use it, until a misunderstanding had arisen, when he left their employment, and made an agreement with plaintiffs to assign his right to them. The defendants continuing to make the rollers on his plan, the action was brought by the plaintiffs, without any previous notice by them. It was held that the facts above stated justified the presumption of a license to use the invention, and that the charge of the court, that the defendants might continue to use it without liability to the plaintiffs, was correct.

In the case of *Solomons* v. *United States*, 137 U. S. 342 [34: 667], one Clark, who was in the employ of the government as chief of the bureau of engraving and printing, conceived the idea of a self-canceling stamp, and prepared a die or plate therefor, making use of the services of the employees of the bureau and the property of the government. While his application for a patent was pending, he assigned his rights to the appellant, Solomons, in payment of an account between them. On taking out the patent, the appellant notified the Commissioner of Internal Revenue that he was the owner of the patent, and demanded compensation for the use of the stamp on whiskey barrels. It further appeared that Mr. Clark, as chief of the bureau, had been assigned the duty of devising a stamp for this purpose, and it was not understood or intimated that the *stamp which he was to devise [432 should be patented or become his personal property. Indeed, before the final adoption of the stamp, he said that the design was his own, but he should make no charge to the government therefor, as he was employed on a salary by the government, and had used its machinery and other property in the perfection of the stamp. It was held that, having been employed and paid to devise a new stamp, the invention, when accomplished, became the property of the government, and that the patentee had practically sold in advance whatever he might be able to accomplish in that direction.

A similar case was that of *Lane & B. Co.* v. *Locke*, 150 U. S. 193 [37: 1049], in which an engineer and draftsman, at a fixed salary, in the employ of the defendants, and using their tools and patterns, invented a stop valve, which the firm used with his knowledge in certain elevators constructed until its dissolution, and after that a corporation organized by the firm used it in the same way and with the like knowledge. It was held that the patentee, having made no claim for remuneration for the use of the patent, saying that he did not desire to disturb his friendly relations with the firm, might be presumed to have recognized an obligation to permit them to use the invention.

In *McAleer* v. *United States*, 150 U. S. 424 [37: 1130], there was an express license by an employee in the Treasury Department to such department and its bureaus, of a right to make and use machines containing the improvements of the patentee to the end of the patented term, and it was held that this agreement could not be varied by parol evidence

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that it was to terminate upon the discharge of the patentee from the employment of the government.

In *Keyes* v. *Eureka Consol. Min. Co.* 158 U. S. 150 [39: 929], a person in the employ of a smelting company invented a new method of withdrawing molten metal from a furnace, took out a patent for it, and permitted his employer to use it without charge so long as he remained in its employ, which was about ten years. It was held that there was at least an implied license to use the improvement without 433]payment of royalties during *the continuance of his employment, and also a license to use the invention upon the same terms and royalties fixed for other parties, from the time the patentee left the defendant's employment.

An attempt is made to differentiate the case under consideration from those above cited in the fact, stated in the third finding, that the invention in this case, until it was reduced to paper in the form of an intelligible drawing, was made out of the hours of labor at the arsenal, and during the time which properly belonged to the patentee, and that, by finding four, "the claimant did not use any property of the defendants or the services of any of the employees of the defendants in making or developing or perfecting the inventions themselves." This, however, must be taken in connection with the further finding that "the cost of preparing patterns for the iron and steel castings, and of preparing working drawings, and of constructing working machines, was borne exclusively by the government," and that in each case, one or more machines or articles of manufacture embodying the invention had been constructed and was in operation or use in the arsenal with the claimant's knowledge and consent before he filed an application for a patent. The inference to be deduced from the findings is, in substance, that, while the claimant used neither the property of the government nor the services of its employees in conceiving, developing, or perfecting the inventions themselves, the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines themselves that were made in putting the inventions into practical use, was borne by the government, the work being also done under the immediate supervision of the claimant.

There is an assumption by the claimant in this connection that, if he did not make use of the time or property of the government in conceiving and developing his ideas, the fact is an important one as distinguishing this case from those above cited. In view of the finding that he did make use of the property and labor of the government in preparing patterns and working drawings and constructing his working ma-434]chines, *the distinction is a very narrow one,—too narrow, we think, to create a difference in principle, or to prevent the application of the rule announced in those cases. In *Solomons* v. *United States*, 137 U. S. 342 [34 667], the finding was that, while employed as chief of the bureau of engraving and printing, Clark conceived the idea of a self-canceling stamp, and under his direction the employees of that bureau, using government property, prepared a die or plate, and put into being the conception of Mr. Clark.

In every case, the idea conceived is the invention. Sometimes, as in the case of *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 [11: 102], a series of experiments is necessary to develop and perfect the invention. At other times, as in the case under consideration, and apparently in the *Solomons' Case*, the invention may be reduced to paper in the form of an intelligible drawing, when nothing more is necessary than the preparing of patterns and working drawings, and the embodiment of the original idea in a machine constructed accordingly. Now, whether the property of the government and the services of its employees be used in the experiments necessary to develop the invention, or in the preparation of patterns and working drawings and the construction of the completed machines, is of no importance. We do not care, in this connection, to dwell upon the niceties of the several definitions of the word "develop" as applied to an invention. The material fact is that, in both this and the *Solomons' Case*, the patentee made use of the labor and property of the government in putting his invention into the form of an operative machine, and whether such employment was in the preliminary stage of elaborating and experimenting upon the original idea, putting that idea into definite shape by patterns or working drawings, or finally embodying it in a completed machine, is of no consequence. In neither case did the patentee risk anything but the loss of his personal exertions in conceiving the invention. In both cases, there was a question whether machines made after his idea would be successful or not, and if such machines had proved to be impracticable, the loss would have fallen upon the government.

In this connection, too, it should be borne in mind that the *fact upon which so much[435 stress has been laid by both sides, that the patentee made use of the property and labor of the government in putting his conceptions into practical shape, is important only as furnishing an item of evidence tending to show that the patentee consented to and encouraged the government in making use of his devices. The ultimate fact to be proved is the estoppel, arising from the consent given by the patentee to the use of his inventions by the government without demand for compensation. The most conclusive evidence of such consent is an express agreement or license, such as appeared in *McAleer* v. *United States*, 150 U. S. 424 [37: 1130]; but it may also be shown by parol testimony, or by conduct on the part of the patentee proving acquiescence on his part in the use of his invention. The fact that he made use of the time and tools of his employer, put at his service for the purpose, raises either an inference that the work was done for the benefit of such employer, or an implication of bad faith on the patentee's part in claiming the fruits of labor which technically he had no right to enlist in his service.

There is no doubt whatever of the proposition laid down in *Solomons' Case*, that the mere fact that a person is in the employ of the government does not preclude him from making

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improvements in the machines with which he is connected, and obtaining patents therefor as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property than any other proprietor would have. On the other hand, it is equally clear that, if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do. Indeed, the *Solomons Case* might have been decided wholly upon that ground, irrespective of the question of estoppel, since the finding was that Clark had been assigned the duty of devising a stamp, and it was understood by everybody that the scheme would proceed upon the assumption that the best stamp which he could devise would be adopted and made a part of the revised scheme. In these consultations it was understood that he **436**] was acting in *his official capacity as chief of the bureau of engraving and printing, but it was not understood or intimated that the stamp he was to devise would be patented or become his personal property. In fact, he was employed and paid to do the very thing which he did, *viz.*, to devise an improved stamp; and, having been employed for that purpose, the fruits of his inventive skill belonged as much to his employer as would the fruits of his mechanical skill. So, if the inventions of a patentee be made in the course of his employment, and he knowingly assents to the use of such inventions by his employer, he cannot claim compensation therefor,—especially if his experiments have been conducted or his machines have been made at the expense of such employer.

The following remarks of the court in *Solomons* v. *United States*, 137 U. S. 346 [34: 669], are pertinent in this connection: "So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employees to develop and put in practical form his invention, and expressly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment, and the benefits resulting from the use of the property and the assistance of the coemployees of his employer, as to have given to such employer an irrevocable license to use such invention."

The acquiescence of the claimant in this case in the use of his invention by the government is fully shown by the fact that he was in its employ; that the adoption of his inventions by the commanding officer was procured at his suggestion; that the patterns and working drawings were prepared at the cost of the government; that the machines embodying his inventions were also built at the expense of the government; that he never brought his inventions before any agent of the government as the subject of purchase and sale; that he raised no objection to the use of his inventions by the government; and that the commanding officer never undertook to incur a legal or pecuniary obligation on the part of *the gov- [**437** ernment for the use of the inventions or the right to manufacture thereunder. It further appeared that from time to time his wages were advanced from $4 to $6 a day, and while it was never stipulated by the commanding officer or understood by the claimant, that the advance of wages was a consideration for the use of the inventions, the practical ability of the claimant as an inventor, and the value of his inventions to the government, did operate on the minds of the officers in estimating the claimant's services and ordering his advancement.

Clearly, a patentee has no right, either in law or morals, to persuade or encourage officers of the government to adopt his inventions, and look on while they are being made use of year after year without objection or claim for compensation, and then to set up a large demand upon the ground that the government had impliedly promised to pay for their use. A patentee is bound to deal fairly with the government, and if he has a claim against it, to make such claim known openly and frankly, and not endeavor silently to raise up a demand in his favor by entrapping its officers to make use of his inventions. While no criticism is made of the claimant, who was a simple mechanic, and, as found by the court of claims, "a faithful, intelligent, and capable employee, whose services were of great value to the government," and whose conduct was "fair, honest, and irreproachable," and while the government appears to have profited largely by his inventive skill, we are of opinion, for the reasons above stated, that the appeal in his behalf should be addressed to the generosity of the legislative, rather than to the justice of the judicial, department.

It may be added, in this connection, that the inventions which the claimant suggested to the commanding officer to adopt were mere undeveloped conceptions of his own that had never been embodied in a machine; that it was uncertain at this time whether he could or would obtain patents for them. If he did not obtain patents, their use was open to anybody. Under such circumstances, it is impossible to say that an officer of the government, conceiving that he had full authority *to [**438** make use of them, agreed by their adoption to pay for the value of the use of such machines under patents that might be applied for and granted in the future.

We are clearly of opinion that the case is covered by our former decisions, and that the judgment of the court below must be affirmed.

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SOUTHERN PACIFIC COMPANY, *Plf. in Err.*,
v.
MALOLA POOL, Administratrix of JOSEPH S. POOL, Deceased.

(See S. C. Reporter's ed. 433-451.)

Contributory negligence.

Where a car repairer went under a car which was standing on the track with a train in front of it, with the certainty that a caboose was to be attached to the rear, without putting out a flag or other signal warning of his being under the car, in order to protect himself, and as the caboose backed slowly down it was both heard and seen by him in ample time to enable him to get from under the car, he was guilty of negligence which precludes recovery for his death, although reliance was placed by him on the warning which he expected would be given by another car repairer, who remained on the side of the track.

[No. 21.]

Argued January 15, 16, 1895. Decided January 6, 1896.

IN ERROR to the Supreme Court of the Territory of Utah to review a judgment of that court affirming a judgment of the trial court of the state, in favor of the plaintiff, Malola Pool, administratrix of Joseph S. Pool, deceased, against the Southern Pacific Company, defendant, for damages for the death of the plaintiff's intestate caused by the negligence of defendant. *Reversed with directions for a new trial.*

See same case below, 7 Utah, 303.

The facts are stated in the opinion.

Mr. **Maxwell Evarts**, for plaintiff in error:

The plaintiff's intestate on entering the service of the Southern Pacific Company assumed as one of the incidents of his employment the risk of being injured by the negligence of Kilpatrick; that is to say, Pool and Kilpatrick were fellow servants as the term is used in law.

A workman assumes all the obvious risks incident to his employment, among which are the risks which he incurs by reason of the negligence of the men with whom he works. *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 (28: 787); *Quebec S. S. Co.* v. *Merchant*, 133 U. S. 375 (33: 656); *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 384 (37: 772, 780); *Conway* v. *Belfast & N. C. R. Co.* 11 Ir. Rep. C. L. 345, 351; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326, 345; *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 (38: 1009); *Morgan* v. *Vale of Neath R. Co.* L. R. 1 Q. B. 149, 5 Best & S. 736, Aff'g 5 Best & S. 570, 580; *Campbell* v. *Pennsylvania R. Co.* (Pa.) 2 Atl. Rep. 489; *Farwell* v. *Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Waller* v. *South Eastern R. Co.* 2 Hurlst. & C. 102; *Lovell* v. *Howell*, L. R. 1 C. P. Div. 161; *Hall* v. *Johnson*, 3 Hurlst. & C. 589; *Charles* v. *Taylor*, L. R. 3 C. P. Div. 492.

When the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing, as part of the work which he is bound to do, may injure the other while doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other.

Priestly v. *Fowler*, 3 Mees. & W. 1; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 266; *Tunney* v. *Midland R. Co.* L. R. 1 C. P. Div. 291; *Hutchinson* v. *York, N. & B. R. Co.* 5 Exch. 343; *Searle* v. *Lindsay*, 11 C. B. N. S. 429; *Feltham* v. *England*, 7 Best & S. 676; *Allen* v. *New Gas Co.* L. R. 1 Exch. Div. 251; *Loregrove* v. *London, B. & S. C. R. Co.* 16 C. B. N. S. 669; *Howells* v. *Landore Steel Co.* L. R. 10 Q. B. 62; *New York & N. E. R. Co.* v. *Hyde*, 5 U. S. App. 443, 56 Fed. Rep. 188; *Wolcott* v. *Studebaker*, 34 Fed. Rep. 8; *Baltimore & O. R. Co.* v. *Andrews*, 50 Fed. Rep. 728, 27 Ohio L. J. 396; *Van Wickle* v. *Manhattan R. Co.* 32 Fed. Rep. 278; *Easton* v. *Houston & T. C. R. Co.* 32 Fed. Rep. 893; *Howard* v. *Denver & R. G. R. Co.* 26 Fed. Rep. 837.

The following are cases in the state courts in which car repairers have been held to be coservants with engineers, brakemen, and switchmen. Their main facts are, in every instance, similar to the present case.

Besel v. *New York C. & H. R. R. Co.* 70 N. Y. 171; *Unfried* v. *Baltimore & O. R. Co.* 34 W. Va. 260, 269; *Texas & P. R. Co.* v. *Cumpston*, 4 Tex. Civ. App. 25; *Corcoran* v. *Delaware, L. & W. R. Co.* 126 N. Y. 673; *Texas & P. R. Co.* v. *Harrington*, 62 Tex. 597; *Gilman* v. *Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635; *Chicago & A. R. Co.* v. *Murphy*, 53 Ill. 336, 5 Am. Rep. 48; *Peterson* v. *Chicago & N. W. R. Co.* 67 Mich. 162; *Kirk* v. *Atlanta & C. A. L. R. Co.* 94 N. C. 625, 55 Am. Rep. 621; *Ritt* v. *Louisville & N. R. Co.* 31 Am. & Eng. R. R. Cas. 289.

The only inference to be drawn from the evidence is that the accident was caused by the negligence of Rice, another car repairer, and not by the negligence of Kilpatrick. Pool and Rice, being car repairers, were of course fellow servants.

The plaintiff's intestate was guilty of contributory negligence.

O'Rorke v. *Union P. R. Co.* 22 Fed. Rep. 189; *Southern Pac. Co.* v. *Seley*, 152 U. S. 145, 156 (38: 391, 396).

Messrs. **Samuel Shellabarger** and *Jeremiah M. Wilson*, for defendant in error:

The effect of the general verdict in the case is conclusive, under the state of proofs shown by this record, to the effect that the defendant below was guilty of negligence, and that the deceased was not guilty of contributory negligence.

Richmond & D. R. Co. v. *Powers*, 149 U. S. 43-45 (37: 642, 643); *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745); *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554

NOTE.—*As to freedom of plaintiff from contributory negligence, necessary to entitle him to recover*—see notes to Stokes v. Saltonstall, 10: 115.

As to responsibility of master to servant for carefulness and competency of coservants,—see note to Wabash R. Co. v. McDaniels, 27: 605.

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(34: 235); *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469 (35: 214).

The decision of the question of negligence ought not to be withheld from the jury unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively shows contributory negligence that the court would be compelled in the exercise of sound judicial discretion to set aside any verdict rendered or returned in his favor.

Kane v. *Northern C. R. Co.* 128 U. S. 91 (32: 339); *Morton* v. *Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Detroit & M. R. Co.* v. *Steinburg*, 17 Mich. 99.

The question of fellow service is one for the jury.

Cooley v. *O'Connor*, 79 U. S. 12 Wall. 400 (20: 449); *Wiggins* v. *Burkham*, 77 U. S. 10 Wall. 129, 133 (19: 885, 886); *Leather Mfrs. Nat. Bank* v. *Morgan*, 117 U. S. 122 (29: 821); *Kane* v. *Northern C. R. Co.* 128 U. S. 96 (32: 342.)

It is only where there is no dispute about the facts that enter into the question that the court is justified in deciding the question without the finding of the jury.

Toland v. *Sprague*, 37 U. S. 12 Pet. 336 (9: 1107); *Indianapolis & St. L. R. Co.* v. *Morgenstern*, 106 Ill. 216; *Chicago & N. W. R. Co.* v. *Moranda*, 108 Ill. 576; *Chicago & A. R. Co.* v. *Kelly*, 127 Ill. 637-642; *Haas* v. *Philadelphia & S. Mail S. S. Co.* 88 Pa. 269; *Mullan* v. *Philadelphia & S. Mail S. S. Co.* 78 Pa. 25, 21 Am. Rep. 2.

Kilpatrick, the negligent employee of the company, was not a fellow servant with the deceased, Pool.

Hough v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Union P. R. Co.* v. *Snyder* ("*Union P. R. Co.* v. *Daniels*") 152 U. S. 684. 688, 689 (38: 597, 600, 601); *Corcoran* v. *Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642, 649 (29: 757, 759); *Shanny* v. *Androscoggin Mills*, 66 Me. 420; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 388 (28: 792); *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 208 (32: 109); *Van Avery* v. *Union P. R. Co.* 35 Fed. Rep. 41; *Howard* v. *Denver & R. G. R. Co.* 26 Fed. Rep. 840.

Mr. Justice **White** delivered the opinion of the court:

The action was brought below to recover damages from the defendant (plaintiff in error here) upon the ground that he had negligently, on September 12, 1888, caused an injury which resulted in the death of Pool, the plaintiff's intestate. The cause was tried by a jury. At the close of the evidence for the plaintiff, defendant moved for a nonsuit on the grounds, (1) that no negligence had been shown on its part; (2) that the evidence established contributory **439**]negligence on the part *of the deceased. These motions were overruled, and exceptions reserved. The defendant thereupon rested. Exceptions were also taken to the action of the court as to the following: (*a*) to an instruction of the court that if the jury found that Pool, the deceased, was a car repairer and in a different line of service from that of the negligent servant (if any such there was), and Pool's death was caused thereby, then defendant was liable; (*b*) to an instruction that the trainmen or yardmen of the defendant company were not fellow servants of the deceased, who was a car repairer; (*c*) to the action of the court in submitting to the jury for their determination as a fact, whether Pool, the deceased, was a fellow servant with the switchman, Kilpatrick, by whose negligence it was claimed the injury resulted; and (*d*) to an instruction that, in ascertaining the quantum of damages, the jury should consider the number of the family left by the deceased, and the ages of his children.

Before the case went to the jury the defendant renewed its request for a peremptory instruction in its favor, which, being refused, exception was taken. The court, in its general charge to the jury, gave as the law of the case what is usually denominated the "departmental theory" of the law of fellow servant, that is to say, it substantially instructed that the criterion by which they were to determine whether the relation of fellow servant existed, was by ascertaining whether the servants were employed in the same department of service, and if not so employed, they were not fellow servants. Two questions were submitted by the court to the jury to be answered by them. They were: First, "What of the employees of the defendant, if any, were negligent in the discharge of their duty, and by which the deceased was injured?" Second, "Did the deceased use such care and precaution to avoid the injury as a prudent man in the exercise of due diligence should have used?" The jury returned a verdict in favor of the plaintiff, answering the first question, "Kilpatrick," and the second, "Yes." After a denial of a motion for new trial, an appeal was taken to the supreme court of the territory, in which court the judgment was affirmed. The grounds upon *which this affirmance was based were [**440** that there had been no negligence on the part of the deceased, and that the switchman Kilpatrick was not a fellow servant with the car repairer, because they were employed in different departments of service. One of the judges dissented on the ground that the deceasd had been guilty of contributory negligence. 7 Utah, 303. The case was then brought by error here.

The questions which the record presents are: First. Was the accident which caused the death of Pool the result of his own negligence, hence giving rise to no cause of action on behalf of his representatives? Second, And if the accident was occasioned by the negligence of Kilpatrick, the switchman, can the representatives of the deceased recover damages resulting from such fact? or, to put the proposition in another form, Were Pool and Kilpatrick fellow servants? We will primarily consider the first of the foregoing inquiries, because it is manifest if the injury was brought about by the negligence of Pool, the question of fellow servant becomes wholly immaterial.

Was the accident caused by the negligence of Pool?

To answer this question involves an analysis of the evidence (which the record fully sets out), not for the purpose of weighing the tes-

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timony or of ascertaining the preponderating balance thereof, but in order to arrive at the undoubted proof, from which the legal consequence, negligence, results. There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt where the facts are undisputed or clearly preponderant that the question of negligence is one of law. *Union P. R. Co.* v. *McDonald*, 152 U. S. 262 [38: 434]. The rule is thus announced in that case (p. 283 [443]): "Upon the question of negligence . . . the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict 441] returned in opposition to it. **Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 472 [35: 213, 215], and authorities there cited; *Elliott* v. *Chicago, M. & St. P. R. Co.* 150 U. S. 245 [37: 1068]; *Anderson County Comrs.* v. *Beal*, 118 U. S. 227, 241 [28: 966, 971]."

The undisputed facts which the record here shows are as follows: Pool, the deceased, at the time he received the injury, was in the employ of the company as a car repairer, and had been so employed in its shops at Ogden City, Utah, for three or more years prior to his death. His duty was not only to do repair work on cars which were brought into the shop for that purpose, but also on cars outside of the shops and standing on the railway track. On the day the accident occurred, about half an hour before the usual hour for quitting their work, Pool and another car repairer, named Fowers, were ordered by the foreman of the car shops to repair the last car of a train of eighteen or twenty cars due to leave in a short time for the west. The train was standing on one of the six or seven tracks composing a railway yard, and on these various tracks there was a frequent moving to and fro of trains and a constant switching of cars backward and forward.

The work to be done consisted in attaching what was called a carrying strap (made of iron and used to hold up what was known as a Miller hook) underneath the platform, about level with the main front of the car, in advance of and outside the wheels. In addition to this work, which Pool and Fowers were sent to do, Rice, who was also a car repairer working in the shop, but doing a higher grade of work, was sent from the shop to "adjust the air on the train." These three employees found that in order to do the work of repairing the strap, required the moving of the car a short distance from the others in the train, and this was accordingly done by the three, Pool, Fowers, and Rice. The work "on the air," which Rice was to do, could not be executed until the repairs to be made by Pool and Fowers had been completed and the car had been recoupled to the train. The end of the car which required repair faced north towards the train from which it had just been detached, and Pool and Fowers went under the car in order to do the work assigned 442] them, Pool on the west and *Fowers on the east side of the track. Rice waited in the neighborhood of the car on the east side thereof, so that when they had finished their work the car might be recoupled, thus enabling him to do the duty assigned him of "adjusting the air." The two men in going under the car placed no flag or other signal to warn of their presence there, and thereby protect themselves from the peril to which they were necessarily subjected. Their reason for not taking this precaution is stated in the testimony of Fowers:

"Q. Mr. Fowers, couldn't you and Mr. Pool have put up a red flag out there that would have notified,—put up a red flag or some other flag that would have notified the engineer of danger?

"A. Yes, sir.

"Q. Why didn't you put up a flag?

"A. Because it was too big a work.

"Q. Because it was too much work?

"A. Yes, sir.

"Q. You thought it would take only a few minutes before you got through?

"A. Yes, sir. We also knew that we had a man stationed there to watch for us, and considered ourselves safe.

"Q. Who was the man you had stationed there to watch for you?

"A. Mr. Rice.—Mr. George Rice.

"Q. And you considered you were all right with Mr. Rice to watch for you?

"A. Yes, sir.

"Q. Who was Mr. Rice?

"A. He was a car laborer from the shop.

"Q. Was he one of your car repairers?

"A. Yes, sir."

Shortly after the men went under the car a switch engine with a caboose and car moved from a track called the "caboose track" towards a switch connecting with the track on which the car was being repaired, and backed down for the purpose of coupling the caboose to the south end of this car, such end being the opposite one to that which was being repaired.

*The two men under the car could not[443 be seen by the engineer or by those on the backwardly moving caboose. As the engine and caboose came back slowly toward the car, both the men under it heard the noise caused by its movement. However, owing to a curve in the track, Fowers, who was on the east side of the car, could not see the engine and caboose approaching, but, hearing them, spoke to Pool, and said, "I believe they are coming in here." Pool, who was on the west side, leaned back and saw the switch engine and caboose coming down upon them. As he did so, a switchman by the name of Taylor, who was on the west side, was visible to and in hailing distance of Pool. The movement of Pool is thus related by Fowers: "From his position he could lean back this way and could see the cars, see the engine and caboose coming from the south to couple on. He says, 'Yes, they are coming in here.'" Thereupon Pool made a movement to get from under the car, but did not entirely do so. Fowers jumped out on the east side. As he did so he spoke to Rice, who was standing near at hand, and told him to stop the switch engine from backing, and to say that men

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were under the car repairing, and not to strike or couple to it, as it could not go out until repairs were finished. Rice walked to the south end of the car, and as the caboose slowly backed down, called out, when it was about 20 or 30 feet away, to Kilpatrick, a switchman, who was standing on the west side of the caboose, not to make the coupling as men were at work under the car. The caboose continued to slowly back towards the car, and when it arrived within about 6 feet stopped for a brief moment. Kilpatrick, on its so stopping, at once gave the signal to the engineer to back down, which signal was obeyed, the caboose striking the car with considerable force. In the meanwhile, either on the going forward of Rice or on the stoppage of the caboose, Fowers returned quickly to his work, as did also Pool. As the former stepped under the car, being uneasy lest the caboose should couple, he looked out and caught sight of a portion of Kilpatrick's body, and saw his arm wave the signal to back down. He cried out to Pool and threw himself from under the car and was thus saved. 444] Pool was not so alert, and *was caught between the car on which he was working and the one in front thereof, receiving a mortal injury. Whilst it is certain that Rice gave a warning call to Kilpatrick, and told him that the men were under the car, and not to couple the caboose to it, there is no evidence whatever that Kilpatrick heard and understood the purport of what Rice said to him when he called to him; there is no proof that he conveyed any signal to Rice which could have produced upon Rice's mind, or upon the mind of any one, the impression that he understood that the men were under the car. There is no proof that Kilpatrick, after the warning given by Rice, transmitted any signal to the engineer to stop the train, and therefore there is no proof that the stop which the caboose made in its backward movement was the result of any communication, by signal or otherwise, between Kilpatrick and the engineer, nor, indeed, is there any proof that the stop was the result of anything but the caution of the engineer in backing down, under the impression that he had backed far enough to make the coupling which it was his purpose to make.

These being the undisputed facts, there can be no doubt that the fatal injury which Pool received was the result of his own inexcusable negligence. He went under the car which was standing on the track with a train in front of it, and with a certainty that a caboose was to be attached to the rear, without putting out a flag or other signal warning of his being under the car in order to protect himself from the peril which was obvious and of which he must have been aware, having been for a period of three years engaged in doing work of a like nature. This original act of negligence was continued by his subsequent conduct. As the caboose backed slowly down it was both heard and seen by him in ample time to have enabled him to get from under the car. There was also abundant opportunity for him to step out and give warning to the engineer in charge of the switch engine, and to Taylor the switchman, who was on the west side of the moving car, thus insuring absolute safety. He did neither. Nor can these acts of negligence be legally excused by conceding that Pool's conduct, whether of commission or of omission, was caused by *the [445 reliance placed by him on the warning which he expected would be given by Rice, the car repairer, who remained on the side of the track. Either Rice was the agent of Pool or of the corporation. If he was the agent of the former, of course Pool cannot recover for an injury suffered by him in consequence of the negligence of his own agent. If Rice, in giving the warning, was the servant of the corporation, his negligence gave rise to no cause of action on behalf of Pool, since in any and every view of the law of fellow servants, Rice and Pool were such servants. The negligence of Pool, established by the undisputed testimony, was not denied by the court below, but was treated as immaterial, in consequence of what the court considered to be proof of neglect on the part of Kilpatrick, the switchman. Such neglect on his part was treated as having been the proximate, and therefore sole, legal cause of the accident. This conclusion is thus stated in the opinion of the supreme court of the territory:

"Nor can there be any question made but that Kilpatrick heard the signal from Rice to stop the engine, and that he acted upon such signal and did stop the engine about 6 feet from the car in question, under which the deceased was working at the time. The signal was understood by the switchman Kilpatrick, and obeyed by him. The verbal communication to Kilpatrick to stop the engine was a notice and warning as certain, positive, and safe as if there had been a red flag signal used in such case. In any event Kilpatrick received it, understood it, and replied to it, and complied with it at the time, and he would have done no more had there been a red flag signal placed by the car."

We have already said that the record, which contains all the testimony, disclosed no proof whatever either that Kilpatrick understood the call of Rice, that he gave any indication to Rice of his so understanding, or that, in consequence of Rice's warning, he signaled the stoppage of the engine, or that he did any of the things which the court below concluded the undisputed proof established that he did do. The case then, on this question, resolves itself to this, that we find no proof whatever of facts which the court below considered *to be[446 undisputedly established. The only testimony which refers to what took place at the time the warning was given by Rice is that of Rice and Fowers, Kilpatrick not having been examined. The following excerpts from the testimony of Rice contain every word said by him which can in any way throw light on the subject:

"Q. What, if any, conversation did you have with Mr. Kilpatrick?

"A. I had no conversation with Mr. Taylor, if that is his name; I do not know him. There were two switchmen; I didn't know the names. I had no conversation with Mr. Taylor. I had no conversation any further than to tell Mr. Kilpatrick not to come up to touch the cars, there were men working under the car.

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"Q. How far was he from you at that time?

"A. Well, it was 20 or 30 feet at the time I told him this.

"Q. Where was he at that time?

"A. He was on the west of the caboose.

"Q. Now, then, you told him that; what did you see, if anything, him do?

"A. Well, I saw him do nothing more until the engine and caboose stopped within 6 feet of this freight car that they were working on, when it stopped still; the next signal was Mr. Kilpatrick gave a motion.

"Q. What was that?

"For it to come back, and it came back with great force; and at that time I heard Mr. Fowers holler 'Pull up!' I run back to where Mr. Fowers was. He was at the other end of the car where he was at work previous to my going up and notifying him not to come down, and I saw Mr. Pool in between the cars, and we yelled for help. . . .

"Q. How long after you told Mr. Kilpatrick that there were men under the cars was it that you saw Mr. Kilpatrick go and make the signal?

"A. How?

"Q. How long after you told Mr. Kilpatrick that there were men under the car?

447] *"A. How long after that? Oh, it was very short.

"Q. And then what, if anything, did the engineer on the car, on the engine that he was working, do in response to that signal? What did the engineer do with his engine in response to that?

"A. Why, he backed up.

"Q. How did he back up?

"A. He came back with great force to this car."

This testimony, it is apparent, does not even tend to show that the switchman Kilpatrick understood the warning given by Rice, or that he acted upon it by transmitting a signal to the engineer to stop the train, and then signaled to continue. The mere presence of Rice, if, owing to the noise of the moving train or from other reasons, his warning either did not reach or was misunderstood by Kilpatrick, was not sufficient to convey the fact that men were working under the car, and therefore it should not be coupled. Rice was an air adjuster. His work could not be done without the coupling of the car. His mere presence, therefore, if his voice was not heard and his words understood, would have naturally suggested that he desired the coupling to be done in order that his work might be accomplished. Nor can it be considered, without any evidence tending to that end, that Kilpatrick understood the warning, knew the men were under the car, signaled to stop the backward movement of the caboose, and then suddenly, without any change in the situation, gave the signal to back up. Such conduct on his part would have been murder, and is certainly not to be presumed without proof, on bare suspicion. The testimony of Fowers, full excerpts therefrom being in the margin, whilst more contradictory than that of Rice, likewise fails to show that Kilpatrick actually understood Rice or acted on the warning by him given.

448] An examination of this testimony *at once demonstrates that the only matter therein which seemingly tends to show that Kilpatrick understood Rice is the statement of Fowers, that he heard Kilpatrick make some reply, although the witness could not give the nature of the reply.† But the question is, not whether Kilpatrick heard the voice of Rice, but whether he understood his meaning; therefore the mere fact that the witness testifies some

†"Mr. Rice was standing outside of the car, and I says to him, says I, 'You go and stop him, and don't let him hit this car at all,' and told him that it could not get out on the train until it was repaired. Of course, they could not make up the train until that car was repaired, and, says I, 'Don't let them hit the car at all, and we will have it done in five minutes.' Says he, 'All right,' and stepped down to the other end of the car, and I saw him signal for the engineer to stop, making the regular signal with his arms to them coming up.

"Q. What, if anything, did he say at that time?

"A. He didn't say anything at that time—he stood and signaled. I was standing right at the end of the car, still looking down, and saw Mr. Pool leaning back over the rail this way—about in that position—looking back at the engine coming. They come up very slow within about 6 feet of the car that he was working under, and then came to a stop. I heard Mr. Rice tell somebody not to hit the car; that they were working there. As soon as I heard him say that I just went right to work, and jumped right under the car again with Mr. Pool, and he turned his attention right to the work, and we went to work again. I felt a little uneasy myself, thinking they might try to couple the caboose on to the car that we were working under. They can do that very easily sometimes, you know, without moving it. So I leaned over the rail—I was kind of on my knees—and I turned my head, and leaned over the rail to the east, and looked right out, and there I saw one of the yardmen giving a signal to back up. I could see the motion of his arms and part of his body, and says I, 'Look out, Joe, they are right on us!' and threw myself head first out over the rail."

On cross-examination he said:

"Q. Did you advise those switchmen to notify the engineer you were in there?

"A. No, sir; I told Mr. Rice to tell the switchman that we were in there repairing a car.

"Q. And you relied on the switchman to attend to notifying the engineer? You expected him to notify the engineer?

A. "Yes, sir.

"Q. To protect you both—Mr. Pool was in the same condition or position, did he expect that, too?

"A. Sir?

"Q. Mr. Pool and yourself both relied on the switchman to notify the engineer, and you thought the switchman would attend to it?

"A. Yes, sir.

"Q. That he would notify them, could the engineer see you from where he was, out on the engine? Could he see you were in there with the caboose and car between you?

"A. No, sir."

After stating the presence of Rice beside the car, he was asked:

"Q. And you requested him to notify the engineer?

"A. Yes, sir. Understand, of course, that they could not use the air on that train until we had done these repairs, because they could not make the coupling with the rest; they were waiting for these repairs.

"Q. Sir?

"A. They were waiting for these repairs.

"Q. While he was standing there you just requested him to notify the engineer not to back back?

"A. Not the engineer, but the switchman.

"Q. Not the engineer, but the switchman, not to back back the engine?

"A. Yes, sir.

"Q. You don't know whether he notified them or not.

"A. I heard him tell them not to hit the car, and that was satisfactory to me.

"Q. You supposed it would not be struck?

"A. I supposed it would not be struck; yes, sir.

"Q. Did you see the switchman yourself?

"A. I saw one of them—a part of one of them—I could see his arm and part of his body.

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449] reply was made, without giving the *reply, in no way shows that Rice's warning was comprehended. Indeed, the entire context of the testimony shows that Fowers himself was uncertain whether the warning given by Rice was received and understood by Kilpatrick, for when asked, in the first instance, whether Kilpatrick in giving the signal to back did so after he had been warned by Rice, answered, "Well, I suppose"—a mere conjecture; and again, when asked if the engineer had stopped the engine in consequence of a *signal [450 from Kilpatrick, his reply was, "Yes, sir: it must have been,"—a mere opinion. On cross examination, in answering a question asking, "Who then signaled the engineer not to back back?" Fowers answered, "Yes, sir." But the whole context of his testimony shows that the word "not" in the question was misunderstood by the witness, for he was testifying solely as to the signal given to back after he (the witness) was under the car. Indeed, this is the only signal which he, Fowers, testifies he saw given by Kilpatrick. To construe this question and answer as relating to a presumed signal not to back given by Kilpatrick to the engineer in consequence of Rice's warning, would contradict the whole of Fowers' testimony, since it clearly shows that no such signal was seen by him, and that the only signal which he noticed was the one given to make the coupling which led to the death of Pool.

*Finding no proof whatever that the [451 switchman actually understood the warning given by Rice and acted upon it, there is nothing in the record to support the conclusion below that, as the warning was actually given and understood, Pool was thereby relieved from the legal consequence of his negligence in having gone under the car without placing the usual and customary signal, of having remained there in the presence of an impending danger, and, when there was ample opportunity to avoid it, of having failed himself to give a warning as the car moved down, which the proof shows he could have done, thus rendering his position absolutely safe.

The judgment is reversed, and the case remanded with directions to grant a new trial.

"Q. Well, was it the switchman that Mr. Rice spoke to that beckoned the engine to back back?
"A. Yes, sir; I heard Mr. Rice talking to that switchman, and I supposed it was that switchman.
"Q. Well, what switchman was that; who was it?
"A. I think it was Ben. Kilpatrick; I would not be positive which one it was.
"Q. But do you think it was Ben. Kilpatrick who signaled the engineer to back back?
"A. Yes, sir.
"Q. And struck this car?
"A. Yes, sir.
"Q. And he did that after he had been warned by Mr. Rice?
"A Well, I suppose——
"Q. Well, after you heard Mr. Rice tell him?
"A. Yes, sir.
"Q. He done that after he had been told by Mr. Rice not to hit the car?
"A. Yes, sir.
"Q. Who then signaled the engineer not to back back?
"A. Yes, sir.
"Q. It was the switchman?
"A. It was the switchman; yes, sir. . . .
"Q. I think you got back under the car, as I understand you, and commenced to fix this bolt?
"A. Not until they come to a stop.
"Q. Not until they come to a stop?
"A. Yes, sir.
"Q. Well, after they came to a stop did you know that there was any signal, and who was it made the signal to back back farther?
"A. At the time that I saw the signal I was under the car, but leaning out over the rail, and I saw the signal for the back up; that was after they had stopped, and after I had got under the car again, and at that time I leaned over and saw, I think it was Kilpatrick, giving the signal to back up.
"Q. You saw Kilpatrick give a signal to back up, and immediately after that signal they backed up and you sprung out?
"A. Yes, sir.
"Q. And that is the time that Pool was caught?
"A. Yes, sir.
On his redirect examination he said:
"Q. Where were you when you saw Rice communicate, do you know, to Kilpatrick?
"A. I was standing at the north end of this car.
"Q. Standing there?
"A. Yes, sir.
"Q. Where was Kilpatrick; on which side of the train?
"A. He was right in front of the caboose, I think.
"Q. Where was that caboose from where you were?
"A. Well it might have been 20 feet at that time.
"Q. I understand you to say it was about 20 feet to where Kilpatrick was?
"A. Yes, sir; when Mr. Rice spoke to him.
"Q. Did you see Kilpatrick when he spoke to him?
"A. Yes, sir.
"Q. Well, did he hear him? Are you able to say that he heard him?
"A. Well, I heard Mr. Kilpatrick make some reply, but I don't know what it was.
"Q. He replied, did he, when Rice spoke?
"A. Yes, sir.
"Q. This was the time the engine was standing still?
"A. No, sir; she was moving then, and came up within about 6 feet and then stopped. She was stopped at the time——
"Q. I know; but after Rice spoke to Kilpatrick the engineer stopped the engine.
"A. Yes, sir.
"Q. Was that in response to the signal from Kilpatrick?
"A. Yes, sir; it must have been.
"Q. What did Kilpatrick (of course meaning Rice) say when he communicated to Kilpatrick; did he refer to your being under the car?
"A. I would not be right positive as to that. He told him not to hit the car, and I think he said we were working there."

W. B. ELDRIDGE, *Appt.*, [452
v.
PETER J. TREZEVANT ET AL.

(See S. C. Reporter's ed. 452-469.)

When servitude attaches to lands—equal protection of the law—due process of law.

1. Where by the state law lands bordering upon a navigable river are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making levees may be taken without compensation, such servitude attaches to lands whose titles are derived from the United States.
2. The subject-matter of such rights and regulations falls within the control of the states; and the provisions of the 14th Amendment of the United States Constitution are satisfied if, in cases like the present one, the state law, with its

NOTE.—*As to navigable waters; what are in United States; streams and inland waters as highways,*—see note to United States v. The Montello, 22: 391.

As to what is due "process of law," see note to Pearson v. Yewdall, 24: 426.

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benefits and its obligations, is impartially administered.

8. A citizen of another state, who, as respects his property in a state, has received the same measure of right as that awarded to its citizens, has not been deprived of his property without due process of law, or been denied the equal protection of the laws.

[No. 62.]

Submitted October 17, 1895. Decided January 6, 1896.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Louisiana dismissing a suit in equity brought by William B. Eldridge against Henry B. Richardson, chief of the board of engineers of the state of Louisiana, and Peter J. Trezevant, to enjoin them from the construction of a certain public levee through lands belonging to complainant. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

William B. Eldridge, a citizen of the state of Mississippi, filed in the circuit court of the United States for the western district of Louisiana a bill of complaint against Henry B. Richardson, chief of the board of engineers of the state of Louisiana, and Peter J. Trezevant, citizens of Louisiana, whereby he sought to have the defendants enjoined from the construction of a certain public levee through a plantation belonging to the complainant and situated in Carroll township, state of Louisiana.

An answer was filed admitting that the state board of engineers had projected and laid out a public levee through the complainant's plantation, and that a contract to construct said levee had been awarded to Peter J. Trezevant, but claiming that such proceedings were in pursuance of an act of the general assembly of the state of Louisiana, approved February 14, 1879, and were therefore lawful.

The case was heard upon the issues presented by the bill and answer, supplemented **453**] with an admission that none of the *acts complained of in the bill were wanton, malicious, or arbitrary.

On June 20, 1891, a decree was rendered adjudging the sufficiency of the answer and dismissing the bill, from which decree an appeal was taken to this court.

Mr. **Wade R. Young,** for appellant:

By article 156 of the Constitution of Louisiana adopted July 23, 1879, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

Ruch v. *New Orleans*, 43 La. Ann. 275.

This right of appropriation, which is recognized in the provisions of the Code, is and was coexistent with the right of expropriation as provided for in La. Rev. Civ. Code, arts. 2626 *et seq.* and La. Rev. Stat. 1479 *et seq.* All of those provisions pre existed the Constitution, with the 155th and 156th articles of which the right of appropriation is said to conflict. This, of itself, leads to the supposition of their entire compatibility. But the two principles are of well-recognized and ancient origin, —one being an exercise of the police power, any loss sustained thereby entitling the injured party to no recompense, the same being *damnum absque injuria;* the other being the exercise of the right of eminent domain, the damages entailed being compensable.

Bass v. *State*, 34 La. Ann. 494; *Chaffe* v. *Trezevant*, 38 La. Ann. 746.

In determining whether the laws of a state are in conflict with the prohibitions of the Federal Constitution, this court must decide for itself; and if the decision requires a construction of state Constitutions and laws, it is not necessarily governed by previous decisions of the state courts.

Vicksburg, S. & P. R. Co. v. *Dennis*, 116 U. S. 665 (29: 770).

The prohibition of the state Constitution is apparently plain and free from ambiguity, and although articles 213 *et seq.* provide for a levee system in the state, no exception to the prohibition is to be found in the Constitution itself. This exception is to be found in article 665 of the Civil Code: "Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common works. All that relates to this kind of servitudes is determined by laws or particular regulations." This statute is held to control the prohibition of the Constitution because it pre-existed, and to authorize the taking, damages, and destruction of private property for the making and repairing of levees, roads, and other public or common works, without compensation, in the exercise of the police power of the state.

Article 258 of the Constitution provides that all laws in force at the time of the adoption of the Constitution and not inconsistent therewith shall continue as if the said Constitution had not been adopted.

The prohibition against the taking of private property for public use is to be found in the Federal Constitution, and in the Constitutions of most, if not all, of the states, and has received a uniform interpretation, which has become a part of the jurisprudence of the country.

Pumpelly v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557).

The state court seems to have appreciated this difficulty, and to have disposed of it by justifying the taking as an exercise of the police power, entirely compatible with the right of expropriation and provided for by the statute for the making and repairing of levees, roads, and other public or common works.

It becomes necessary, then, or interesting, to inquire into the origin and history of the servitude. The article was taken from articles 649 and 650 of the Code Napoleon: "Servitudes established by law have for object the public or communal utility, or the utility of private persons. Those established for the public or communal utility have for object the towpaths along the navigable or floatable rivers, the construction or repairing of roads, and other public or communal works."

The laws which formerly regulated this servitude have been long repealed, as the necessity therefor ceased to exist, and nothing re-

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mains of the legislation except the principle embodied in the article of the Code.

The Acts of 1829, § 5 (La. Rev. Stat. 1856, p. 481), provided: "Throughout all that portion of the state watered by the Mississippi and the bayous running to and from the same, which are settled, where levees are necessary to confine the waters and to protect the inhabitants against inundation, the said levees shall be made by the riparian proprietors in the proportions and at the time hereinafter prescribed."

This had been the law and public policy of the territory before its purchase, and up to that time, and was the condition of the ancient grants.

Cash v. *Whitworth*, 13 La. Ann. 402, 71 Am. Dec. 515.

The Constitution of 1812 imposed no restriction on the right of the legislature to take private property for public use without compensation, and in that respect its will was sovereign.

As the state progressed in population, wealth, and intelligence, the system was found to be unequal and oppressive, or inadequate to the needs of the public, and it was enacted as early as 1829 (La. Rev. Stat. 1856, p. 501) that "the police juries of the parishes of Concordia and Ouachita (then embracing all that part of the state between the Ouachita and Mississippi rivers) shall have plenary and unlimited power to make such enactments with regard to roads and levees within their respective limits as may be deemed necessary and proper by those bodies, including the power to authorize the assessment and collection of taxes which they may deem necessary on the private land claims within any levee district established by them, to cover the expenses of leveeing any public land included in such district, or other necessary work or expenses authorized by any ordinance of said juries respectively.

"Sec. 219. If, in the exercise of the powers granted by the foregoing section, the police juries of the parishes of Concordia or Ouachita find it necessary to stop the natural drain of one or more tracts of land, in order to protect several other tracts or a considerable district of country, they shall have power to do so. If any individual, the natural drainage of whose land shall have been so authorized to be stopped, should deem himself damaged thereby, he may, at the same or at the next regular meeting of the said police jury, claim indemnity therefor."

The principle of indemnity for damages so inflicted was thus early recognized by the legislature.

In the Constitution of 1845, art. 109, the people first adopted in their organic law the provision that "vested rights should not be devested unless for purposes of public utility and for adequate compensation previously made." In 1848 the legislature enacted (La. Rev. Stat. 1856, p. 496): "Whenever it shall be necessary to make a new levee in the parish of Tensas, and the persons on whose lands the same may be laid off shall feel themselves aggrieved or injured thereby, the police jury shall appoint a jury of five disinterested freeholders of a different levee ward, who shall examine on oath and report to the police jury the amount of damage that may be done the complainants, and the benefit also that may arise from the construction of the levee, and if it appear that the amount of damage is greater than the benefit accruing, the difference shall be paid out of the levee fund within a reasonable time after the report of the jury; and any person refusing to act as one of the jurymen in this section shall be fined $50." *Inge* v. *Tensas Police Jury*, 14 La. Ann. 117.

This enactment was a legislative recognition of the right to compensation to the full extent, and an abandonment of the principle of servitude.

The Constitution of 1852, art. 105, contained the same provision that "vested rights should not be devested unless for purposes of public utility, and for adequate compensation previously made."

In *Zenor* v. *Concordia*, 7 La. Ann. 150, and *Dubose* v. *Levee Comrs.* 11 La. Ann. 165, the court adhered to the doctrine of servitude, and in the latter case held that, although the property was considerably impaired in value, the law concerning the expropriation of private property for public use did not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes. In neither case was any allusion made to the constitutional provision against the devestiture of vested rights without compensation. In the case of *Mithoff* v. *Carrollton*, 12 La. Ann. 185, the court seems for the first time to have recognized the constitutional provision, and, by a divided court with a strong dissenting opinion, without abandoning the doctrine of servitude, distinguished, and held that the soil alone owed the servitude, and that when it became necessary to construct a levee on ground on which buildings had been erected, and the buildings had been demolished for that purpose, the owners were entitled to be compensated for their value. *Cash* v. *Whitworth*, 13 La. Ann. 401, 71 Am. Dec. 515; *Inge* v. *Tensas Police Jury*, 14 La. Ann. 117.

The former laws were all repealed after the late war, and a new and different system adopted, by which the state undertook the duty of making and repairing levees. *Jefferson Police Jury* v. *Tardos*, 22 La. Ann. 58; *Surgi* v. *Matthews*, 24 La. Ann. 613. The Constitution of 1868, art. 110, contained the same provision that "vested rights should not be devested, unless for purposes of public utility and for adequate compensation made."

The case of *Bass* v. *State*, 34 La. Ann. 494, arose and was decided under that Constitution, and the court held that private property could be taken for public use, in the exercise of the general police powers of the state, without making compensation therefor. In 1879 the people adopted a new Constitution, and in that appears for the first time the provision in the words of the 5th Amendment to the Constitution of the United States and of so many of the states, that "private property shall not be taken (nor damaged) for public purposes (use) without just (and adequate) compensation (first paid)."

This provision had at that time been construed by this court and by the courts of many of the states, and it had come to be understood that the exercise of the police power, as dis-

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tinguished from the right of eminent domain, was a matter of public law, rather than a matter of legislative or judicial discretion. The Constitution of Mississippi contained the provision that private property shall not be taken for public use without just compensation being first made. In the case of *Penrice* v. *Wallis*, 37 Miss. 172, the same argument was used, that the levee commissioners could take private property for the purpose of making public levees, without compensation. The court said: "In cases of public emergencies, such as the calamities of fire, flood, war, pestilence, and famine, private property may be taken and applied to public use without just compensation being made therefor, upon the principle of imperative necessity for the public protection; but in order to justify such appropriation, the necessity must be apparently present, and the apprehended danger must be so imminent and impending as not to admit of the delay incident to legal proceedings for the condemnation of the property."

It would naturally appear that the framers of the Louisiana Constitution of 1879, in adopting the provision in words which had received a settled construction, adopted the existing interpretation, rather than one founded on a principle of the Spanish and French laws, which had been in part abandoned for the parish of Concordia as early as 1829, and altogether abandoned for the parish of Tensas in 1848, and which is in conflict with the spirit of our institutions.

The court can take judicial notice of the fact that the public levees of the state, on the shores of the Mississippi river, are now a part of a system of public works undertaken by the United States for the improvement of the navigation of the river, and incidentally, in co-operation with the state, for the protection of the country from overflow, by confining the waters of the river, and that such levees, whether made by the United States or by the state, are parts of one and the same system, and are planned and executed for both purposes.

In *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557), it was alleged that the title came to the plaintiff burdened with an easement in favor of improving the navigation of the Fox river, which authorized the injuries complained of, and of which, therefore, he could not complain. This court said: "We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the state within which it lies. The plaintiff owns the lands in fee through titles derived by patent from the United States without reservations. Whatever may have been the conditions of the ancient grants, no such condition attaches to his ownership; and the lands, although bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other private property."

The doctrine was stated by this court in the case of *Parker* v. *Bird*, 137 U. S. 661 (34: 819): "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee."

In the case of *Bass* v. *State*, 34 La. Ann. 494, the state supreme court boldly stated that private property may be taken for public use, in the exercise of the general police powers, without making compensation therefor, and that the article of the Code rested upon that foundation.

The judges of the United States circuit court, in *Hollingsworth* v. *Tensas*, 4 Woods, 280, considered that the exercise of the police powers of the state and the right of eminent domain were questions of general jurisprudence, and not of local law, and held that, according to the principles of general jurisprudence, private property could not be taken or damaged for public use without compensation, either by authority of the police power of the state or under the right of eminent domain.

If any doubt could ever have existed that the distinction between the police power and the right of eminent domain is a question of general jurisprudence, and not of local law, such doubt has been solved by the prohibition of the 14th Amendment, that no state shall deprive any person of property without due process of law. As said by this court in *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557), the just principles of the common law on this subject have been placed beyond the power of the states to change or control them. What is due process of law is not a question of local or state law, but a question of Federal law, and the customs of the French and Spanish colonists, and the law and policy of the territory and state before the adoption of the amendment, are not pertinent to the discussion.

Perhaps no definition is more often quoted than that given by Webster in *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 (4: 629): "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." The meaning is that every citizen shall hold his life, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.

Cooley, Const. Lim. 353.

The words "due process of law," as used in the Federal Constitution, do not mean the law and jurisprudence of the state by which the wrong is worked.

In *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235 (4: 559), this court said: "As to the words from *Magna Charta*, incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

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When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws.

In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession.

Due process of law in each particular case means such an exertion of power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Cooley, Const. Lim. 356.

It was in recognition of this principle that, in *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9 (28: 889), this court said: "And by providing for an assessment of full compensation to the owners of lands flowed it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557)."

It has never been doubted that the taking of private property from one person for the private use and benefit of another person would be a taking without due process of law.

Cooley, Const. Lim. 357.

And it has never been doubted that the taking of private property for public use without compensation, except in the exercise of police power, would be a deprivation of property without due process of law.

Kaukauna Water Power Co. v. *Green Bay & M. Canal Co.* 142 U. S. 254 (35: 1004).

To determine under what circumstances property can be taken in the exercise of the police power, as distinguished from the right of eminent domain, this court does not look to the jurisprudence of the state, but to the settled maxims of law.

The maxim *Sic utere tuo ut alienum non lædas* is that which lies at the foundation of the power, and it is distinct from the right of eminent domain.

These police powers rest upon the maxim *Salus populi est suprema lex.* This power to restrain a private injurious use of property is very different from the right of eminent domain.

Dill. Mun. Corp. ¶93.

There are cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property and even to destroy it. A strong instance of this description is where it becomes necessary to take, use, or destroy the private property of individuals to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or other great public calamity.

Cooley, Const. Lim. 594.

The cases in which private property can be taken, used, or destroyed in the exercise of the police power are well defined, and the authorities are all agreed that there must be an imperative necessity.

Penrice v. *Wallis*, 37 Miss. 172.

This court cannot so interpret the prohibition of the 14th Amendment of the Constitution of the United States that what would be confiscation in the state of Mississippi can become, under the same condition of things, due process of law in the state of Louisiana.

Nor can it be said that it is competent for the state, by its legislature or by its courts to decide that such imperative necessity exists as to justify the taking, damage, and destruction of private property for public use without compensation, in the exercise of the police power.

If such be the law of Louisiana, that the lands of plaintiff, being adjacent to the Mississippi river, are subject to a servitude or easement in the exercise of which the state can take, damage, and destroy his property for the purpose of making and repairing levees, roads, and other public or common works, without compensation, such a law is repugnant to and in conflict with the prohibitions of the 14th Amendment of the Constitution of the United States, unless it be plead and shown that there exists such imperative necessity as to justify the exercise of the police power of the state.

If, on the other hand, the general provision, embodied in article 156 of the state Constitution, and in article 497 of the Civil Code, provides a suitable remedy by trial in the regular course of justice, to recover compensation for the injury to plaintiff's property, the compensation should have been first paid, and the defendants were proceeding to take, damage, and destroy the property of the plaintiff in violation of the Constitution and laws of the state.

In either case the plaintiff had a plain right to the equitable remedy by injunction, and the more so because he would have had no remedy at all against the state for the torts of its officers and agents.

Messrs. **M. J. Cunningham,** Attorney General of Louisiana, and **T. M. Miller,** for appellees:

The state of Louisiana claims the right to build levees across riparian lands without compensating the owners for the lands so taken.

To the attempt to exercise this right the plaintiff in the present case objected on the ground that it involved the taking of his property without compensation, and was therefore in conflict with the cited provisions, both of the Federal and of the state Constitutions, relative to the taking of private property for public purposes.

In answer to this contention the state, in substance, asserts that two fallacies underlie plaintiff's position, *viz.:* First, in his assumption that the 14th Amendment to the Federal Constitution, forbidding the states to take private property without due process of law, is the same in purpose and effect as the constitutional provision in the 5th Amendment, which forbids the taking of private property for public purposes without compensation to the owner. Second, in his assumption that the building by the state of levees over riparian lands involves any taking of property at the time of the building.

It is not denied by appellant's counsel that before the state of Louisiana was admitted into the Union the law and public policy there subjected riparian lands to a public servitude for the making and repairing of levees, nor is it

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denied that the principle of servitude continued to exist up to the date of the adoption of the Louisiana Constitution of 1879.

How and when this servitude disappeared is not made plain, but it is argued that because in one local act provision was made for compensation (in presumably exceptional circumstances) the entire principle was abandoned. And the argument is also advanced, in the face of the decisions in *Zenor* v. *Concordia*, 7 La. Ann. 150, and *Dubose* v. *Levee Comrs.* 11 La. Ann. 165, that because article 109 of the Constitution of 1845 and article 105 of the Constitution of 1852 declared that vested rights should not be devested unless for purposes of public utility and for adequate compensation, the law of servitude became extinguished for repugnancy, as if the exercise of an undisputed and unqualified sovereign right, reserved always, could devest a vested right.

The decisions in *Mithoff* v. *Carrollton*, 12 La. Ann. 185; *Cash* v. *Whitworth*, 13 La. Ann. 401, 71 Am. Dec. 515; and *Inge* v. *Tensas Police Jury*, 14 La. Ann. 117,—affirm and reaffirm the existence of this servitude for levees as the condition upon which lands bordering streams and subject to inundation are held in Louisiana, and as an incident of such ownership.

The case of *Dubose* v. *Levee Comrs. supra*, which settled that the law concerning the expropriation of private property for public use did not apply to such lands upon the banks of navigable rivers as might be found necessary for levee purposes, and that there was no arbitrary limit fixed by law as the maximum distance at which a levee might be placed back of a caving bank, was expressly approved in *Mithoff* v. *Carrollton*, *supra*.

In *Cash* v. *Whitworth*, *supra*, the court merely decided that it would be a perversion of the principle of riparian servitude to require the owner of land on a bayou to surrender his land to a levee not intended to prevent inundation, but for the reclamation of swamp land at a distance.

Inge v. *Tensas Police Jury*, 14 La. Ann. 117, involved the construction of a local statute, and is not in point here.

Counsel next insists that the principle of servitude was abandoned by the repeal of the *ante bellum* laws regulating it, and cites *Jefferson Police Jury* v. *Tardos*, 22 La. Ann. 58, and *Surgi* v. *Matthews*, 24 La. Ann. 613.

Both cases were actions against riparian proprietors to recover the cost of constructing levees ordered by the parochial authorities. The question of servitude was not raised in either.

Bass v. *State*, 34 La. Ann. 494, maintains that rights of property, like all other social and conventional rights, are subject to such reasonable limitations as the legislature, under the governing and controlling power of the Constitution, may think necessary and expedient; places levee building along the Mississippi river in the alluvial regions of Louisiana within the police powers of the state, where a controlling public necessity demands interference or destruction, as within the principle which justifies the taking or destroying of private property to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity. *Necessitas publica major est quam privata.*

The opinion then declares that "the laws passed for such purposes, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no compensation is made."

It is shown that in the early days of the state the levees were made and kept in repair at the joint expense of the front proprietors. The law and clauses in the original grant burdened those who were contiguous on the river with the construction and repair of the roads, ditches, bridges, and the levee, reference being made to Martin's History; Dumont; Gayarré's History, vol. ii, p. 2; Ordinance of O'Reilly (Spanish Governor), Feb. 18, 1770, and other authorities.

So far as the question of infringement of the state Constitution is concerned, the decision of the state supreme court is binding.

It may be said, further, that where given legislation is assailed, as here, upon the ground that no just compensation is provided for a taking, by the state, the 14th Amendment has no sort of application, for in stretching the 5th Amendment so as to touch acts of state legislatures, the clause in relation to compensation was omitted.

Davidson v. *New Orleans*, 96 U.S. 97 (24:616).

The servitude for the making and repairing of levees rests upon all lands adjacent to the Mississippi river, in Louisiana, and its exercise by the state is referable to the police power, and not the right of eminent domain, and any injury done the owner is *damnum absque injuria*.

Ruch v. *New Orleans*, 43 La. Ann. 275.

Domat says: "The banks of rivers, highways, etc., are things public, the use of which is common to all particular persons. But it is the sovereign that regulates them."

The text of the French Code is: "A servitude established for the public benefit or that of the commune has for its object footways by the side of the navigable rivers, . . . the construction or repairs of roads and other public works, or those relating to the commune," Code Napoleon, arts. 650, 556.

And Justinian is referred to as saying: "The banks belonged to the proprietor of the adjacent soil; but the use of them, for the purposes of navigation and otherwise, was open to all. The proprietors, therefore, could alone reap the profits of the soil; but if they attempted to exercise their rights so as to hinder the public use of the bank, they would be restrained by the interdict of the pretor." Lib. II., tit. I., p. 159. To Cicero is ascribed the expression that "the public use of the banks of a river is part of the law of nations."

The Revised Civil Code of Louisiana provides that "servitudes imposed for the public or common utility relate to the space which is left for the public use by the adjacent proprietors on the shores of navigable rivers, and for making and repairing levees, roads, and other public or common works." La. Rev. Civ. Code 665. This has confessedly been the law in Louisiana from the earliest times, and that provision, in substance, is found in all her codifications of the civil law.

Peart v. *Meeker*, 45 La. Ann. 421.

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However broad and emphatic may be the same provision in our existing Constitution, it had not either the intention or effect to repeal article 665 of the Civil Code, or to bring within its grasp the lawful appropriation of property for levee purposes. On the contrary, the Constitution itself charges the general assembly with the "duty of maintaining a levee system."

The 14th Amendment simply forbids the states to "deprive any person of property without due process of law." It does not undertake to prescribe in what due process of law shall consist. It merely requires some process which shall be equal and impartial to all, and shall operate in the same general manner upon the rights of all. Any process that complies with these requirements satisfies the 14th Amendment. Provided the process which governs the transfer or devestiture of property is regular, uniform, and impartial in its operation, the other conditions, as to compensation, etc., are left to the states to determine.

The requirement of due process of law is a different matter from the regulation of the taking of private property for public purposes, under the police power inherent in every government. But the 14th Amendment deals solely with the question of due process of law.

The proper location of the levees is necessarily committed to the discretion of the engineers. And as they are very often called upon to act in great haste, it was necessary that they should act both in a judicial capacity and as their own executive. The system is on the whole fair and impartial and has worked satisfactorily for nearly a century. The contention that the plaintiff's rights under the 14th Amendment have been violated is then, we submit, ill founded.

Considering the necessity of every alluvial land owner to protect his land and home against the floods, is it not perfectly certain that if the state did not undertake the protection he would protect himself as best he might or abandon the country? Is it not certain that, if able and allowed to build his own levees, he would go far enough back from the caving banks to assure permanency? And would he not employ engineers, expert in business, just as the state does? Why, then does counsel talk about confiscation of private property?

It is denied that this court has ever given an utterance that would sanction the idea that such an exercise of a state's reserved police power, as here shown, is forbidden by the 14th Amendment to the Federal Constitution.

Davidson v. *New Orleans*, 96 U. S. 97 (24: 616); *Barbier* v. *Connolly*, 113 U. S. 27 (28. 923).

The entry upon the land and surveying the route is "such proceeding in regard to the property as is appropriate to the nature of the case," and it is immaterial that the statute fails to provide a remedy against the wanton, unjust, and arbitrary exercise of the power, since the principles of the civil law, prevailing in the state of Louisiana, are themselves to be taken as if incorporated into the statute, and they open the courts against such abuses.

Tiedeman, Lim. Police Powers, § 124.

The constitutionality of legislation providing for the compulsory drainage of swamp lands has generally been sustained as a reasonable exercise of the police power of the state, even on the general ground that the state may impose upon the owner the duty of draining his low lands, in consideration of the consequent increase in the value of his lands.

Tiedeman, Lim. Police Powers, § 124.

If the state in the exercise of her police powers in the interest of public safety may impose a duty on a landed proprietor, it is hard to conceive why she may not assume the duty herself, subject to his right to prevent a wanton and unnecessary invasion of his property rights.

The levee laws in Louisiana, without which no part of complainant's property would have value or be habitable, are not an unrighteous exercise of police power from the standpoint of a most jealous scrutiny, so there is no call for an "overstrict construction."

People v. *Jackson & M. Pl. Road Co.* 9 Mich. 285; *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557); Tiedeman, Lim. Police Powers, § 3; Cooley, Const. Lim. 6th ed. 732.

It is in the power of the state to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts and of levees to prevent inundations.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28: 569).

In Louisiana these riparian rights have always been held subject to the incidents and rights reserved by the state to prevent inundation.

Eminent domain is said to be "an incident of sovereignty, and requires no constitutional recognition."

Mills, Eminent Domain, § 1; Prentice, Police Powers, 54; *Philadelphia* v. *Scott*, 81 Pa. 80, 22 Am. Rep. 738; *Bancroft* v. *Cambridge*, 126 Mass. 438.

So far as the circumstances of complainant's title having come from the general government is concerned, that cannot exempt him from the burden common to those in his situation. He has the use and enjoyment of his property just as all others similarly placed have theirs, and which is just as complete as the nature of the case will permit.

Whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states.

Packer v. *Bird*, 137 U. S. 661 (24: 819); *Hart* v. *Orleans Levee Comrs.* 54 Fed. Rep. 559.

Land within a state belonging to the United States, and not devoted to public purposes, is treated as the land of a private proprietor, and may be taken for public use by the state in the same way as other lands.

United States v. *Railroad Bridge Co.* 6 McLean, 517; Randolph, Eminent Domain, 35, and cases cited.

Mr. Justice **Shiras** delivered the opinion of the court:

By an act of the general assembly of the state of Louisiana, approved February 14, 1879, there was created a board of state engineers,

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whose duty it was to make a survey of the watercourses, public works, and levees of the state. They were to report to the governor of the state the improvements which they should deem necessary and the construction of such levees as were of prime importance to the state at large and were beyond the means of the parochial authorities. They were also, in said report, to furnish estimates and specifications of work necessary to be done. It was thereupon made the duty of the governor to advertise for proposals to make such improvements and construct such levees as were recommended, and to award the contracts to the lowest responsible bidder, under proper and sufficient bonds for the faithful performance of their contracts; and upon completion of said works it was made the duty of the board of engineers to examine and measure the work and to certify to its correctness; and, upon approval by the governor, the auditor of public accounts of the state was to draw his warrant therefor, payable out of the general engineer fund or such fund as should be provided by law.

In the exercise of the powers thus conferred, the board of engineers reported to the governor that it was necessary to construct a levee across complainant's plantation; that such levee was of prime importance to the state at large; would have to be of large size; that the river front was a dangerous and constantly caving bank, and that necessarily the levee had to be located some distance from the river; 462 and they *furnished estimates and specifications of the work necessary to be done. Subsequently, after advertising for proposals, the governor awarded the contract for constructing the levee proposed to the defendant, Peter J. Trezevant, as the lowest responsible bidder, who was, at the time of filing the bill, proceeding with the work.

The plaintiff expressly admits in his bill that, although the Constitution of the state of Louisiana contains a provision that private property shall not be taken or damaged without adequate and just compensation being first paid, the laws of the state, as interpreted by the supreme court of the state, provide no remedy for cases of proceedings under the levee laws, and that the supreme court of the state has decided that such taking, damage, and destruction of property for the purpose of building a public levee is an exercise of the police power of the state, and *damnum absque injuria* because the state has a right of servitude or easement over the lands on the shores of navigable rivers for the making and repairing of levees, roads, and other public works. But he contends that, as he cannot sue the state for compensation, and as an action at law, if such would lie, would not furnish that just and adequate compensation first paid contemplated by the provision of the state Constitution, he has a right, as a citizen of another state, to invoke, in the circuit court of the United States, the protection of the 14th Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

The concession distinctly made by the complainant, in his bill, that the state courts refuse to recognize that owners of lands abutting on the Mississippi river and the bayous running to and from the same, where levees are necessary to confine the waters and protect the inhabitants against inundation, are entitled, when a public levee is located upon such lands, to invoke the application of that provision of the state Constitution which provides that "private property shall not be taken nor damaged for public use without just and adequate *compensation first paid," and repeated [463 in the brief filed on his behalf in this court, relieves us from an extended examination of the origin and history of the state enactments, constitutional and legislative, and of the decisions of the state courts on this subject.

It is important, however, to observe the ground upon which the state legislature and judicial authorities base their action. That ground is found in the doctrine existing in the territory of Louisiana before its purchase by the United States and continuing to this time, that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensation. This doctrine is said to have been derived from the Code Napoleon, whose 649th and 650th articles were as follows:

"Servitudes established by law have for object the public or commercial utility, or the utility of private persons. Those established for the public or commercial utility have for object the towpaths along the navigable or floatable rivers, the construction or repairing of roads and other public or commercial works. All that concerns this kind of servitude is determined by laws or particular regulations."

But whether the servitude in question was derived from French or Spanish sources, or from local and natural causes, we need not inquire, because it is explicitly asserted in La. Civ. Code, art. 661, in the following terms:

"Servitudes imposed for the public or common utility relate to the space which is to be left for public use by the adjacent proprietors, on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common *works. All [464 that relates to this kind of servitude is determined by laws of particular regulations."

In the case of *Zenor* v. *Concordia*, 7 La. Ann. 150, where the legislature had enacted that the police jury of a parish exposed to inundation should have plenary power to locate and construct levees, and where such police jury, in pursuance of these powers, had placed and built a levee on the lands of the complainant, greatly to his detriment, it was held that the enactment was valid, and that no liability for damages was caused by a bona fide proceeding under it. The court said:

"In this state, so much exposed to ruinous inundations, the public have the undoubted right, on the shores of the Mississippi river, to the use of the space of ground necessary for the making and repairing of the public levees and roads. La. Civ. Code, art. 661. It was the condition of the ancient grants of land on the

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Mississippi river, and sufficient depth was always given to each tract, to prevent the exercise of the public rights from proving ruinous to the individual. Speculations and other motives have, in later times, caused the division and sale of some tracts, and entries of others, with large fronts and little depth, in opposition to the general policy of the country. Thus in the present case, the plaintiff has scarcely any depth, with a large front, in a deep bend, with a curving bank. The policy of the country and the laws of the land, made for the general safety, cannot yield to cases of individual hardship. Those who purchase and own the front on the Mississippi river gain all that is made by alluvion, and lose all that is carried away by abrasion. And those who choose to purchase tracts with little depth, in caving bends, expose themselves, knowingly, to total loss, and must suffer the consequences when they occur. They suffer *damnum absque injuria*.

In *Dubose* v. *Levee Comrs.* 11 La. Ann. 165, the plaintiff sued for damages occasioned to his land by the acts of the commissioners in changing the line of the public levee, but the court, citing the provisions of La. Civ. Code, art. 661, held that "the law concerning the expropriation of private property for public use does not apply to such lands upon the banks 465] *of navigable rivers as may be found necessary for levee purposes. The quantity of land to be taken for such purposes presents a question of policy or administration to be decided by the local authorities, whose decision should not be revised by this tribunal, except for the most cogent reasons, and where there has been manifest oppression or injustice."

In the case of *Bass* v. *State*, 34 La. Ann. 494, the supreme court again held that an owner of land abutting on the Mississippi river could not recover for damages inflicted upon his property by the state board of engineers and contractors in locating and constructing a public levee, but put the immunity of the state mainly upon the proposition that such public works are done in the exercise of the police power, and did not advert to the doctrine of servitude, upon which the previous decision had placed such immunity.

But we do not understand that the supreme court of the state intended thereby to repudiate the doctrine of a servitude, explictly declared in the Code, and recognized through a long period by many decisions. If, to approve the judgment in that case, it were necessary to hold that the state and its agents can take private property wherever situated, and apply it to any public purpose, and escape from the duty of compensation by terming such action an exercise of the police power, it is difficult to see how such a conclusion could be reached by the courts of a state in whose Constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made. But, as we have said, it is not necessary to so read the decision in question, nor to consider whether, even in such a case, a remedy could be found in any provision of the Federal Constitution.

This, we think, clearly appears by the later case of *Ruch* v. *New Orleans*, 43 La. Ann. 275, where the supreme court reviewed the law and the cases, and again put the immunity of the city from liability for damages occasioned to the front of plaintiff's property by a public work upon the long established doctrine of servitude, and declared that "the riparian owner enjoys his property *sub modo, i. e.*, subject to *the right of the public to reserve space[466 enough for levees, public roads, and the like. Over this space the front proprietor never acquires complete dominion. It never passes free of this reservation by a deed to a purchaser."

With the admission that, under the state Constitution and laws as construed by the highest court of the state, the plaintiff below was not entitled to the remedies he sought, we are requested to hold that he can obtain relief by invoking in a circuit court of the United States, the protection of the 14th Amendment of the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The first contention of the plaintiff in error is that, as it is admitted that he owns the land in fee through title derived by patent from the United States, without reservation, whatever may have been the conditions of the ancient grants, no such condition attaches to his ownership, and the lands, although bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other property. In other words, the claim is that the servitude under which are held lands whose titles are derived by grant from Spain or France, or from the state, does not attach to lands whose titles are derived from the United States.

Previous decisions of this court furnish a ready answer to this contention.

In *Barney* v. *Keokuk*, 94 U. S. 324 [24: 224], where the dispute was as to the nature of the title as to the river front, and as to new ground formed by filling in upon the bed of the river, and where some conflict was shown to exist between the common law rules as to such ownership and those asserted by the state of Iowa in her legislation and the decisions of her courts, *Mr. Justice* Bradley, speaking for the court, said:

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual *floods, *is a question*[467 *which each state decides for itself*. . . . The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence, it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy.

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Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, *is for the several states themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in the sovereign capacity, it is not for others to raise objections."

In *Pucker* v. *Bird*, 137 U. S. 662 [34: 819], where a similar question arose, and where it was claimed that the fact that the title was derived by a grant from the United States afforded a reason for decision, *Mr. Justice* Field stated the question as follows:

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream."

The language of *Barney* v. *Keokuk*, *supra*, was cited with approval, and the conclusion reached was that the law of the state, as construed by its supreme court, was decisive of the controversy.

468] *The question was again presented in *Hardin* v. *Jordan*, 140 U. S. 372 [35: 430], and, after a review of the cases, *Mr. Justice* Bradley stated the conclusion as follows:

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie."

In *Shively* v. *Bowlby*, 152 U. S. 1 [38: 331], this court had to deal with a conflict as to the title in certain lands below high-water mark in the Columbia river, in the state of Oregon, between parties claiming respectively under the United States and under the state of Oregon. The entire subject was thoroughly examined, involving a review of all the cases, both state and Federal, and one of the conclusions reached was thus stated by *Mr. Justice* Gray

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

These decisions not only dispose of the proposition that lands situated within a state, but whose title is derived from the United States, are entitled to be exempted from local regulations admitted to be applicable to lands held by grant from the state, but also of the other proposition, that the provisions of the 14th Amendment extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a state to be valid under the Constitution and laws of such state.

The subject-matter of such rights and regulations falls within the control of the states, and the provisions of the 14th Amendment of the Constitution of the United States are satisfied if, in cases like the present one, the state law, with its benefits and its obligations, is impartially administered. *Walker* v *Sauvinet*, 92 U. S. 90 [23: 678]; *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616]; *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 [25: 989]; *Hallinger* v. *Davis*, 146 U. S. 314 [36: 986]. **[469**

The plaintiff in error is, indeed, not a citizen of Louisiana, but he concedes that, as respects his property in that state, he has received the same measure of right as that awarded to its citizens, and we are unable to see, in the light of the Federal Constitution, that he has been deprived of his property without due process of law, or been denied the equal protection of the laws.

The decree of the court below is affirmed.

Mr. Justice **Brewer** dissented.

DENNIS DAVIS, *Plff. in Errr.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 469-493.)

Defense of insanity—reasonable doubt—burden of proof.

1. On a trial for murder, where the defense is insanity, it is not the duty of the jury to convict if the evidence on that subject is equally balanced; but if on all the evidence there is reasonable doubt of his sanity, the accused is entitled to an acquittal.
2. The legal presumption of sanity does not absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond a reasonable doubt.
3. Where evidence is given on a trial for murder of the insanity of the accused, the burden of proving his sanity beyond a reasonable doubt is on the prosecution.
4. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal.

[No. 593.]

Submitted October 30, 1895. Decided December 16, 1895.

NOTE.—*As to evidence of insanity; opinions as to sanity,*—see note to Dexter v. Hall, 21: 73.

As to insanity in avoidance of deeds, see note to Harding v. Handy, 6: 429.

As to power of attorney, revoked by insanity of principal, see note to Hunt v. Rousmanier, 5: 569.

As to insanity; evidence; committee; delusions; dealings with insane; imbecility; when equity will interfere; inquisition; contracts of lunatics; conveyances from parent to child, or between relatives, when set aside,—see note to Hoffman v. Overbey, 34: 754

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IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting Dennis Davis of the crime of murder. *Reversed with directions for a new trial.*

The facts are stated in the opinion.

No counsel appeared for plaintiff in error.

Mr. **J. M. Dickinson,** Assistant Attorney General, for defendant in error:

There is much conflict of authority on the proposition as to whether the judge should charge the jury that they must acquit if the whole evidence raises a reasonable doubt in their minds as to whether the defendant is sane or not.

The doctrine in England is well settled that the burden is on the defendant to establish his insanity to the reasonable satisfaction of the jury.

Russell, Crimes, 9th ed. 525; Roscoe, Crim. Ev. 7th ed. 975; Foster, Crown Law, 225.

In *McNaughten's Case*, 10 Clark & F. 200, the question of insanity as a defense in criminal cases having been made the subject of debate in the House of Lords, the opinion of the judges on the law governing such cases was taken, and on the point here involved the answer was that "the jurors ought to be told that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction."

The law so declared has been acquiesced in in England. In this country there are two lines of authorities. The following hold the doctrine that the burden of proof is on the defendant to establish insanity to the reasonable satisfaction of the jury, some of the cases using the language that it must be established by a preponderance of the evidence. These authorities will all be cited together as adverse to the contention that only a reasonable doubt must be raised.

Rice, Crim. Ev. vol. 3, §§ 398, 399; Whart. Homicide, § 669; Whart. Crim. Ev. § 340; Whart. Crim. Law, 7th ed. § 54; Greenleaf, Ev. vol. 2, § 373, vol. 3, § 5; *Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193; *Gunter* v. *State*, 83 Ala. 96; *Maxwell* v. *State*, 89 Ala. 150; *Coates* v. *State*, 50 Ark. 330; *Bolling* v. *State*, 54 Ark. 588; *People* v. *McDonnell*, 47 Cal. 134; *People* v. *Bawden*, 90 Cal. 195; *People* v. *Travers*, 88 Cal. 238; *People* v. *Bemmerly*, 98 Cal. 299; *Fogarty* v. *State*, 80 Ga. 450, 455; *State* v. *Bruce*, 48 Iowa, 533, 30 Am. Rep. 403; *State* v. *Trout*, 74 Iowa, 545; *Kriel* v. *Com.* 5 Bush, 362; *Moore* v. *Com.* 13 Ky. L. Rep. 738; *State* v. *Coleman*, 27 La. Ann. 691; *State* v. *Burns*, 25 La. Ann. 302; *State* v. *De Rancé*, 34 La. Ann. 186, 44 Am. Rep. 426; *State* v. *Lawrence*, 57 Me. 574; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Com.* v. *Eddy*, 7 Gray, 583; *State* v. *Hanley*, 34 Minn. 430; *State* v. *McCoy*, 34 Mo. 534, 86 Am. Dec. 121; *State* v. *Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *State* v. *Pagels*, 92 Mo. 300; *State* v. *Schaefer*, 116 Mo. 96; *State* v. *Lewis*, 20 Nev. 333; *State* v. *Spencer*, 21 N. J. L. 196; *State* v. *Starling*, 6 Jones L. 366; *State* v. *Vahn*, 82 N. C. 631; *State* v. *Davis*, 109 N. C. 780; *Loeffner* v. *State*, 10 Ohio St. 598; *Bond* v. *State*, 23 Ohio St. 349; *Com.* v. *Mosler*, 4 Pa. 266; *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420; *Pannell* v. *Com.* 86 Pa. 260; *Com.* v. *Gerade*, 145 Pa. 289; *State* v. *Bundy*, 24 S. C. 439, 58 Am. Rep. 263; *State* v. *Alexander*, 30 S. C. 74; *Webb* v. *State*, 9 Tex. App. 490; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638; *People* v. *Dillon*, 8 Utah, 92; *Baccigalupo* v. *Com.* 33 Gratt. 807, 36 Am. Rep. 795; *State* v. *Strauder*, 11 W. Va. 747, 27 Am. Rep. 606.

The following hold that if the evidence raises a reasonable doubt of sanity the jury must acquit:

Thompson, Trials, § 2524; 2 Bishop, Crim. Proc. §§ 669, 673; *Guiteau's Case*, 10 Fed. Rep. 161; *United States* v. *Ridgeway*, 31 Fed. Rep. 149; *United States* v. *Faulkner*, 35 Fed. Rep. 730; *United States* v. *McClure*, 7 Law Rep. 439; *United States* v. *Lancaster*, 7 Biss. 440; *State* v. *Johnson*, 40 Conn. 136; *Hodge* v. *State*, 26 Fla. 11; *Hopps* v. *People*, 31 Ill. 385, 83 Am. Dec. 231; *Chase* v. *People*, 40 Ill. 353; *Dunn* v. *People*, 109 Ill. 635; *Langdon* v. *People*, 133 Ill. 382; *Bradley* v. *State*, 31 Ind. 492; *Guetig* v. *State*, 66 Ind. 94; *Grubb* v. *State*, 117 Ind. 277; *Pirke* v. *State*, 121 Ind. 433; *State* v. *Jones*, 64 Iowa, 349; *State* v. *Crawford*, 11 Kan. 32; *State* v. *Mahn*, 25 Kan. 186; *State* v. *Nixon*, 32 Kan. 205; *Smith* v. *Com.* 1 Duv. 224; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Underwood* v. *People*, 32 Mich. 1, 20 Am. Rep. 633; *Cunningham* v. *State*, 56 Miss. 269, 21 Am. Rep. 360; *Wright* v. *People*, 4 Neb. 407; *State* v. *Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Faulkner* v. *Territory* (N. M.) 30 Pac. 905; *Brotherton* v. *People*, 75 N. Y. 162; *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379; *Walker* v. *People*, 88 N. Y. 81; *Dove* v. *State*, 3 Heisk. 348; *Revoir* v. *State*, 82 Wis. 295; *State* v. *Reidell* (Del.) 14 Atl. 550.

Thus it appears that the preponderance of authority is against the contention that it is only necessary to raise a reasonable doubt.

It is urged by those authorities holding the contrary doctrine that every element necessary for conviction must be established beyond a reasonable doubt; that while there is a presumption of sanity, this only goes to the extent of relieving the state of the burden of proving sanity, and without any proof on the subject the presumption is conclusive, but that when proof is introduced, inasmuch as malice and will could not exist in the mind of a person insane, evidence establishing a reasonable doubt as to the sanity of the defendant in effect establishes a reasonable doubt as to whether there were malice and the operation of the will.

Nowhere has this doctrine been stated with more force than by Chief Justice Nicholson in *Dove* v. *State*, 3 Heisk. 366-374.

The reasoning upon which the opposite conclusion is based is that sanity is the normal condition and that there is a presumption that every person is sane, and this presumption stands until it is overthrown, and that evidence which merely raises a reasonable doubt of sanity does not overthrow this presumption.

There is a difference, growing out of the well-established rules of law based on public policy, between the doubt of guilt and the doubt of insanity. Malice is presumed from certain facts, and persons are held responsible

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for the consequences of their acts upon the principle of presumption. These presumptions are fixed rules established by public policy and not by the reasoning upon each particular case. The rule, which has been enforced, that drunkenness is not an excuse for crime, grows out of public policy. Fixed rules of law, established by public policy like this, are not to be subjected to the refinements of reasoning growing out of the facts of particular cases.

It has been said that statistics show that the majority of the persons acquitted on the ground of insanity were not insane, and this even in England, where the strongest rule against the defendant prevails. The probability of a jury finding an insane man guilty, under the rule that insanity must be established to their reasonable satisfaction, is very slight as compared with the evil that results to society from the application of the doctrine that a reasonable doubt as to whether the defendant is sane or insane must be followed by acquittal.

It is urged with great force of logic, which overlooks public policy and applies to the question of insanity the same reasoning which has been accepted in establishing the doctrine of reasonable doubt in respect of the affirmative facts necessary to be proven by the state to establish crime, that sanity when put in issue by any evidence must be established beyond a reasonable doubt. It is submitted that a substantial ground for differentiation exists. This has been presented by Attorney General Heiskell in *Dove* v. *State*, 3 Heisk. 348, as follows:

That doubt of insanity and doubt of guilt do not stand on the same footing. Rules of law are not matters of simple logical consistency. Policy influences them. Every man is presumed to know the law, to contemplate the consequences of his acts; malice is presumed from the use of a deadly weapon or from the fact of killing; not because courts suppose these things are universally true in fact, but that policy demands their adoption. Policy, not logic, is the foundation of the rule as to drunkenness, that it shall not excuse crime. The legal reason for it is logically nonsense; practically, wise. The same policy demands that we shall adhere to the English rule as to proof of insanity, not make a new one, as the courts of other states have done.

The defendant cannot be sent to an insane asylum on a doubt as to his insanity. He must therefore, in all doubtful cases, be turned loose upon the country.

The question is one that has not been passed upon by this court. The *nisi prius* Federal courts have held to the doctrine of reasonable doubt.

Mr. Justice **Harlan** delivered the opinion of the court:

Dennis Davis was indicted for the crime of having on the 18th day of September, 1894, at the Creek Nation, in the Indian territory, within the western district of Arkansas, feloniously, wilfully, and of his malice aforethought, killed and murdered one Sol Blackwell.

He was found guilty of the charge in the indictment. A motion for a new trial having been overruled and the court having adjudged that the accused was guilty of the crime of *murder, as charged, he was sentenced [475 to suffer the penalty of death by hanging.

At the trial below the government introduced evidence which, if alone considered, made it the duty of the jury to return a verdict of guilty of the crime charged.

But there was evidence tending to show that at the time of the killing the accused, by reason of unsoundness or weakness of mind, was not criminally responsible for his acts. In addition to the evidence of a practising physician of many years standing, and who, for the time, was physician at the jail in which the accused was confined previous to his trial, "other witnesses," the bill of exceptions states, "testified that they had been intimately acquainted with the defendant for a number of years, lived near him, and had been frequently with him, knew his mental condition, and that he was weak-minded, and regarded by his neighbors and people as being what they called half crazy. Other witnesses who had known the defendant from ten to twenty years, witnesses who had worked with him and had been thrown in constant contact with him, said he had always been called half-crazy, weak-minded, and in the opinion of the witnesses defendant was not of sound mind."

The issue, therefore, was as to the responsibility of the accused for the killing alleged and clearly proved.

In its elaborate charge the court instructed the jury as to the rules by which they were to be guided in determining whether the accused took the life of the deceased feloniously, wilfully, and with malice aforethought. "Where," the court said, "a man has been shot to death, where the facts, as claimed by the government here, show a lying in wait, show previous preparation, show the selection of a deadly weapon, and show concealment to get an opportunity to do the act,—where that state of case exists, if there is a mental condition of the kind that renders a man accountable, why, there is crime, and that crime is murder."

Referring to the evidence adduced to show that the accused was incompetent in law to commit crime, the court observed: "Now, when a man premeditates a wicked design that *produces death, and executes that design, [476 *if* he is a sane being,—*if* he is what the law calls a sane man, not that he may be partially insane, not that he may be eccentric, and not that he may be unable to control his will power if he is in a passion or rage because of some real or imaginary grievance he may have received,—I say, if you find him in that condition and you find these other things attending the act, you would necessarily find the existence of the attributes of the crime of murder known as 'wilfulness' and malice aforethought." But, the court said, the law "presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it. The responsibility of overturning that presumption, that the law recognizes as one that is universal, is with the party who sets it up as a defense. The government is not required to show it. The law presumes that we are all sane; therefore the government does not have to furnish any evidence to show that this defendant is sane. It comes in here with the

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fact established in legal contemplation until it is overthrown. The government takes and keeps that attitude until the evidence brought in the case overthrows this presumption of sanity. Now, let us see what the nature of this defense is. The defendant interposes the plea of insanity, and he says by this plea that he did the killing, but the act is not one for which he can be held responsible; in other words, that the act was and is excusable in the law because he was insane at the time of its commission. Now, I say to you in this connection, and it is a fact admitted in argument by the counsel, that under the evidence there is nothing that justifies the act of the killing; nor was it such an act that the law upholds it or mitigates it, or reduces it to a grade lower than murder. If it was committed by the defendant while he was actually insane it is excusable."

Again: "Now, I will undertake or endeavor to tell you, and I bespeak your most earnest attention especially upon this proposition of 'insanity.' The term 'insanity,' as used in this defense, means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the 477]* time of the nature of the act he is committing; or where, though conscious of the nature of the act and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control. Such insanity, if proved to your reasonable satisfaction to have existed at the time of the commission of the act,—that is the test, at the time of its commission,—is in the law an excuse for it, however brutal or atrocious it may have been. For a person to be excused from criminal responsibility it is not necessary that he be a raving maniac, but ordinarily it requires something more than mere eccentricity of a natural character. Such insanity does not excuse."

Later in the charge the court recurred to the defense of insanity and said: "Now, as I have already told you, the law presumes every person who has reached the years of discretion to be of sane mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is interposed as a defense, the fact of the existence of such insanity at the time of the commission of the offense charged must be established by the evidence to the reasonable satisfaction of a jury, and the burden of proof of the insanity rests with the defendant. Although you may believe and find from the evidence that the defendant did commit the act charged against him, yet, if you further find that at the time he did so he was in such an insane condition of mind that he did not and could not understand and comprehend the nature of the act; or that, thus knowing and understanding it, he was so far deprived of his will, not by his own passion conceived for the purpose of spurring him on to commit the violence, not by his own passion of mind engendered by some real or fancied grievance, but that he was so far deprived of his will by disease or other cause over which he had no control, as to render him unable to control his actions,—then such killing was not a malicious killing, and you will acquit him of the crime charged against him."

In concluding its charge the court thus summarized the *principles by which the [478 jury were to be guided in their deliberations:

"Now, gentlemen, the propositions are few in this case. First, inquire whether there was a killing; then whether the act of killing was done by the defendant, and what was his condition of mind under the law at that time, as I have given it to you. See what his mental condition was at that time under the law as I have given it to you, and if he is to be held responsible for his actions. If so, you are then to take a step further and see whether these attributes of the crime of murder existed as I have defined them to you; that is, that the killing was done wilfully and with malice aforethought.

"Gentlemen, I have given you the law in the case, and you are to take it as the law and by this law and the testimony you are to make up your verdict. You are to be satisfied beyond a reasonable doubt of the guilt of this defendant before you convict. When you start into a trial of a case, as I have already told you, you start in with the presumption of sanity. Then comes in the responsibility resting upon the defendant to show his condition; to show his irresponsibility under the law. He is required to show that to your reasonable satisfaction,—I say, to your reasonable satisfaction,—that it is a state of case where he is excusable for the act."

These extracts from the charge of the court present this important question: If it appears that the deceased was killed by the accused under circumstances which—nothing else appearing—made a case of murder, can the jury properly return a verdict of guilty of the offense charged if upon the whole evidence, from whatever side it comes, they have a reasonable doubt whether, at the time of killing, the accused was mentally competent to distinguish between right and wrong or to understand the nature of the act he was committing? If this question be answered in the negative the judgment must be reversed; for the court below instructed the jury that the defense of insanity could not avail the accused unless it appeared affirmatively, to the reasonable satisfaction of the jury, that he was not criminally responsible for his acts. The fact of killing being clearly proved, the legal presumption, *based upon the common experience of [479 mankind, that every man is sane, was sufficient, the court, in effect, said, to authorize a verdict of guilty, although the jury might entertain a reasonable doubt, upon the evidence, whether the accused, by reason of his mental condition, was criminally responsible for the killing in question. In other words, if the evidence was *in equilibrio* as to the accused being sane, that is, capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defense of insanity or if there were an entire absence of proof that he was insane.

This exposition of criminal law is not without support by adjudications in England and in this country. In *Reg.* v. *Stokes*, 3 Car. & K.

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185, 188, a case of murder, Baron Rolfe said: "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offense charged. The onus rests on him, and the jury must be satisfied that he actually was insane. If the matter is left in doubt, it will be their duty to convict him; for every man must be presumed to be responsible for his acts until the contrary is clearly shown." The same judge, in *Reg.* v. *Layton*, 4 Cox, C. C. 149, 155, which was also a case of murder and the defense insanity, after observing that in cases of that description it was a cardinal rule "that the burden of proving innocence rested on the party accused," said that the question for the jury was, "not whether the person was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind."

But the most deliberate and careful statement of the doctrine in the English courts is to be found in *McNaughton's Case*, 10 Clark & F. 199, 203, 210, decided in 1843. The accused having been found not guilty, on the ground of insanity, his trial became the subject of discussion in the House of Lords, and much was said about insane delusions and partial insanity as giving or not giving immunity for acts which, being committed by sane persons, were punishable criminally. The judges were summoned to give their opinion [480] on that question, *although there was no case pending before the House. Hansard, Parl. Deb. vol. 67, 3d series, 713-743. Among the questions propounded to the judges were these: "What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense? In what terms ought the question to be left to the jury, as to the person's state of mind at the time when the act was committed?" Mr. Justice Maule delivered a separate opinion in which he expressed great difficulty in answering the questions put to the judges, because they did not appear to arise out of, and were not propounded with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of these terms, and also, because he had heard no argument, at the bar or elsewhere, on the subject referred to in the questions. He expressed fear that any answers made would embarrass the administration of justice in criminal cases. He, nevertheless, said that "to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong;" and that the judge, in the particular case on trial, should employ such terms in his instructions as, in his discretion, would be proper to assist the jury in coming to a right conclusion as to the guilt of the accused. Lord Chief Justice Tindal, speaking for himself and the other judges, said, in response to the questions propounded, that the jurors ought to be told in all cases where insanity is set up as a defense that "every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

*In *Com.* v. *Rogers* (1844) 7 Met. 500, 504, [481] 506, 41 Am. Dec. 458, it was said by Chief Justice Shaw, in his charge to the jury, that "the ordinary presumption is that a person is of sound mind, until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury. Such proof may arise, either out of the evidence offered by the prosecutor to establish the case against the accused, or from distinct evidence offered on his part. In either case it must be sufficient to establish the fact of insanity; otherwise the presumption will stand." The jury, after being in consultation for several hours, came into court and asked whether they must be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal. The court responded that if the preponderance of the evidence was in favor of the insanity of the prisoner the jury would be authorized to find him insane. A verdict was returned of not guilty, by reason of insanity. In *Com.* v. *York* (1845) 9 Met. 93, 116, 43 Am. Dec. 373, the charge was murder, and the defense provocation or mutual combat, making the offense, at most, only manslaughter. The court held that the guilt of malicious homicide was established beyond reasonable doubt, by proof, beyond reasonable doubt, of the fact of voluntary killing, without excuse or justification apparent upon the evidence introduced in behalf of the prosecution; that, in such case, the proof must preponderate in favor of the fact of sudden and mutual combat, in order to justify a finding in favor of the prisoner in respect to the fact, it not being sufficient to raise a doubt, even though it be a reasonable doubt, of the fact of extenuation. In that case Mr. Justice Wilde dissented in an able opinion, holding that "the burden of proof, in every criminal case, is on the commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him." p. 134. In *Com.* v. *Eddy* (1856) 7 Gray, 584, in which the crime charged was murder and the defense insanity, Mr. Justice Metcalf, speaking for himself and Justices Bigelow *and Merrick, [482] said: "The burden is on the commonwealth to prove all that is necessary to constitute the crime of murder. And as that crime can be committed only by a reasonable being,—a person of sane mind,—the burden is on the commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption sustains the burden of proof, unless it is

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rebutted and overcome by satisfactory evidence to the contrary. In order to overcome this presumption of law and shield the defendant from legal responsibility, the burden is on him to prove, to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that, at the time of committing the homicide, he was not of sane mind.'

It would seem that later cases in Massachusetts do not go to the extent indicated by the above cases. In *Com.* v. *Heath*, 11 Gray, 304, which was tried before Justices Dewey, Metcalf, and Thomas, the charge was murder, and one question was whether the defendants were of sufficient intelligence to be responsible for a homicide. Upon this point, and as to the burden of proof, the court said: "The law presumes men and women of the age of the prisoners to be sane, to be responsible agents. Where, therefore, a homicide is proved to have been committed in such way and under such circumstances as, when done by a person of sane mind, would constitute murder, the presumption of law, as of common sense and general experience, supplies that link. It presumes men to be sane till the contrary be shown. The presumption of law stands till it is met and overcome by the evidence in the case. This evidence may come, of course, as well from the witnesses for the government as the witnesses for the defense; and when the evidence is all in, the jury must be satisfied, in order to convict the prisoner, not only of the doing of the acts which constitute murder, but that they proceeded from a responsible agent, one capable of committing the offense. This is the rule to be applied to a case where the defense is idiocy, an original defect and want of capacity. Whether the rule is modified where the defense relied upon is insanity, 483]disease *of the mind, or delusion, it is not necessary now to inquire." In respect to that case we observe that, upon principle, the rule as to the burden of proof in criminal cases cannot be materially different, where the defense is insanity, disease of the mind or delusion, from the rule obtaining when the defense is an original defect and want of capacity. In *Com.* v. *Pomeroy*, 117 Mass. 148 (reported in Whart. Hom. (2d ed.) Appendix), which was tried in 1874 before Mr. Justice Gray (then chief justice of the supreme judicial court of Massachusetts) and Mr. Justice Morton (afterwards chief justice of the same court), it was contended by the prosecution that the question of sanity, raised by the defendant, was to be determined by the preponderance of proof; that the commonwealth was not bound to prove the sanity of the accused beyond a reasonable doubt. But the court said: "The burden is upon the government to prove everything essential beyond reasonable doubt; and that burden, so far as the matter of sanity is concerned, is ordinarily satisfactorily sustained by the presumption that every person of sufficient age is of sound mind and understands the nature of his acts. But when the circumstances are all in, on the one side and on the other; on the one side going to show a want of adequate capacity, on the other side going to show usual intelligence,—when the whole is in, the burden rests where it was in the beginning, upon the government to prove the case beyond a reasonable doubt."

In *State* v. *Spencer* (1846) 21 N. J. L. 196, 202, 212, which was a case of murder tried before Chief Justice Hornblower, it was said that "when the evidence of sanity on the one side and of insanity on the other leaves the scale in equal balance or so nearly poised that the jury have a reasonable doubt of his sanity, then a man is to be considered sane and responsible for what he does;" and that the "proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty." Again, in the same case: "If, in your opinion, it is clearly proved that the prisoner at the bar, at the time of the homcide, was unconscious that what he did was wrong,*and that he[484 ought not to do it, you must acquit him on the ground of insanity; but if in your opinion this is not clearly established beyond a reasonable doubt, then you must find him guilty of the act, and proceed to investigate the nature of the homicide." There are other cases to the same general effect, some of them holding that the presumption of sanity will prevail, and that the jury may properly convict, unless the defense of insanity is established beyond a reasonable doubt; others, that it is the duty of the jury to convict unless it appears by a preponderance of evidence that the accused was insane when the killing occurred.

We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime.

No one, we assume, would wish either the courts or juries when trying a case of murder to disregard the humane principle, existing at common law and recognized in all the cases tending to support the charge of the court below, that "to make a complete crime cognizable by human laws, there must be both a will and an act;" and "as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will." 4 Bl. Com. 21. All this is implied in the accepted definition of murder; for it is of the very essence of that heinous crime that it be committed by a person of "sound memory and discretion," and with "malice aforethought," either express or implied. 4 Bl. Com. 195; 3 Co. Inst. 47; 2 Chitty, Crim. Law, 476. Such was the view of the court below which took care in its charge to say that the crime of murder could only be committed by a sane being, *although it instructed the jury that a [485 reasonable doubt as to the sanity of the accused would not alone protect him against a verdict of guilty.

One who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have

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"a wicked, depraved, and malignant heart," or a heart "regardless of social duty and fatally bent on mischief," unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act. Although the killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears, yet, "in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent and is not punishable for criminal acts." *Com.* v. *Rogers*, 7 Met. 501, 41 Am. Dec. 458. Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions. All admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts.

Upon whom, then, must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea [486] the accused *may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.

This view is not at all inconsistent with the presumption which the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favor of sanity. If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But that is not a conclusive presumption, which the law upon grounds of public policy forbids to be overthrown or impaired by opposing proof. It is a disputable or, as it is often designated, a rebuttable presumption resulting from the connection ordinarily existing between certain facts—such connection not being "so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence." 1 Greenl. Ev. § 38. It is therefore a presumption that is liable to be overcome or to be so far impaired in a particular case that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life. In a certain sense it may be true that where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption *in favor of sanity. But [487 to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.

In considering the distinction between the presumption of innocence and reasonable doubt, the court, in *Coffin* v. *United States*, upon full consideration, said: "The presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn." Reasonable doubt, it was also said, was "the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusions upon the proof actually before them." *Coffin* v. *United States*, 156 U. S. 432, 459, 460 [39: 481, 493].

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the *benefit in the way of proof of the [488

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presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not include beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?

The views we have expressed are supported by many adjudications that are entitled to high respect. If such were not the fact, we might have felt obliged to accept the general doctrine announced in some of the above cases; for it is desirable that there be uniformity of rule in the administration of the criminal law in governments whose Constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty.

In *People* v. *McCann*, 16 N. Y. 58, 69 Am. Dec. 642, a case of murder, the jury were instructed that if any reasonable doubt existed as to the proof of the deed itself the prisoner should be acquitted, "but as sanity is the natural state, there is no presumption of insanity, and the defense must be proved beyond a reas-[489]onable*doubt." This instruction was held to be erroneous by the unanimous judgment of the court of appeals of New York, of which, at the time, Judges Denio, Johnson, Comstock, and Selden were members. The judges who delivered opinions concurred in the view that, while there was no presumption of insanity, and while the law presumes a sufficient understanding and will to do the act, the fact of the killing by the accused being established by proof, the burden was upon the prosecution to show from all the evidence the existence of the requisites or elements constituting the crime, one of which was the sanity of the prisoner. In that case Mr. Justice Brown said: "If there be a doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of. it; and if there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both *the* act and the will are necessary to make out the crime?" And, "if he is entitled to the benefit of the doubt in regard to the malicious intent, shall he not be entitled to the same benefit upon the question of his sanity, his understanding? For, if he was without reason and understanding at the time, the act was not his, and he is no more responsible for it than he would be for the act of another man." pp. 67, 68. So in *Brotherton* v. *People*, 75 N. Y. 159, 162, Chief Justice Church, speaking for the court, after observing that crimes can only be committed by human beings in a condition to be responsible for their acts, and that the burden of overthrowing the presumption of sanity and of showing insanity is upon the person who alleges it, says: "If evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt and to an acquittal." To the same effect are *O'Connell* v. *People*, 87 N. Y. 377, 380, 41 Am. Rep. 379, and *Walker* v. *People*, 88 N. Y. 81, 88.

*In *Chase* v. *People*, 40 Ill. 352, 358, reaf-[490 firming the rule announced in the previous case of *Hopps* v. *People*, 31 Ill. 385, 392, 83 Am. Dec. 231, the court, speaking by Chief Justice Breese, said: "Sanity is an ingredient in crime as essential as the overt act, and if sanity is wanting there can be no crime, and if the jury entertain a reasonable doubt on the question of insanity, the prisoner is entitled to the benefit of the doubt. We wish to be understood as saying, as in that case, that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, whatever the defense may be. If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demands that the accused shall have the benefit of the doubt."

The same principle is recognized in New Hampshire. Bellows, J., speaking for the court, after observing that a plea of not guilty, in a criminal cause, puts in issue all the allegations of the indictment, said: "A system of rules, therefore, by which the burden is shifted upon the accused of showing any of the substantial allegations in the indictment to be untrue, or, in other words, to prove a negative, is purely artificial and formal, and utterly at war with the humane principle which *in favorem vitæ*, requires the guilt of the prisoner to be established beyond reasonable doubt." Again, in the same case, after saying that to justify a conviction all the elements of the crime charged must be shown to exist and to a moral certainty, including the facts of a sound memory, an unlawful killing, and malice, he proceeded: "As to the first, the natural presumption of sanity is prima facie proof of a sound memory, and that must stand unless there is other evidence tending to prove the contrary; and then, whether it come from the one side or the other, in weighing it the de-

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fendant is entitled to the benefit of all reasonable doubt, just the same as upon the point of an unlawful killing or malice. Indeed, the want of sound memory repels the proof of malice in the same way as proof that the killing was accidental, in self-defense or in heat of blood; and there can be no solid distinction [491] founded upon the *fact that the law presumes the existence of a sound memory. So the law infers malice from the killing when that is shown, and nothing else; but in both cases the inference is one of fact, and it is for the jury to say whether, on all the evidence before them, the malice or the sanity is proved or not. Indeed, we regard these inferences of fact as not designed to interfere in any way with the obligation of the prosecutor to remove all reasonable doubt of guilt; but are applied as the suggestions of experience, and with a view to the convenience and expedition of trials, leaving the evidence, when adduced, to be weighed without regard to the fact whether it come from the one side or the other . . . The criminal intent must be proved as much as the overt act, and without a sound mind such intent could not exist; and the burden of proof must always remain with the prosecutor to prove both the act and criminal intent." *State* v. *Bartlett*, 43 N. H. 224, 231, 80 Am. Dec. 154.

So, in *People* v. *Garbutt*, 17 Mich. 9, 22, 97 Am. Dec. 162, the court, speaking by Chief Justice Cooley, after observing that the prosecution may rest upon the presumption of sanity until that presumption is overthrown by the defendant's evidence, said: "Nevertheless, it is a part of the case for the government; the fact which it supports must necessarily be established before any conviction can be had; and when the jury come to consider the whole case upon the evidence delivered to them, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty."

In *Cunningham* v *State*, 56 Miss. 269, 21 Am. Rep. 360, the question was carefully examined and the rule was stated by Chalmers, J., to be that whenever the condition of the prisoner's mind is put in issue by such facts proved on either side as create a reasonable doubt of his sanity, it devolves upon the state to remove it and to establish the sanity of the prisoner to the satisfaction of the jury beyond all reasonable doubt arising out of all the evidence in the case.

In *Dove* v. *State*, 3 Heisk. 348, 371, Chief Justice Nicholson, delivering the unanimous opinion of the supreme court of Tennessee, thus stated its view of the question: "When the proof [492] *of insanity makes an equipoise, the presumption of sanity is neutralized—it is overturned, it ceases to weigh, and the jury are in reasonable doubt. How, then, can a presumption, which has been neutralized by countervailing proof, be resorted to to turn the scale? The absurdity to which this doctrine leads will be more obvious by supposing that the jury should return a special verdict. It would be as follows. 'We find the defendant guilty of the killing charged, but the proof leaves our mind in doubt whether he was of such soundness of memory and discretion as to have done the killing wilfully, deliberately, maliciously, and premeditatedly.' Upon such a verdict no judge could pronounce the judgment of death upon the defendant." So, in *Plake* v. *State*, 121 Ind. 433, 435, Judge Elliott, speaking for the supreme court of Indiana, said: "If the evidence is of such a character as to create a reasonable doubt whether the accused was of unsound mind at the time the crime was committed, he is entitled to a verdict of acquittal. *Polk* v. *State*, 19 Ind. 170, 81 Am. Dec. 382; *Bradley* v. *State*, 31 Ind. 492; *McDougal* v. *State*, 88 Ind. 24." To the same effect are many other American cases cited in the argument. The principle is accurately stated by Mr. Justice Cox of the supreme court of the District of Columbia as follows: "The crime, then, involves three elements, *viz.*, the killing, malice, and a responsible mind in the murderer. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned, —*i. e.*, that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears, —and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground (either as to the killing or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal." *Guiteau's Case*, 10 Fed. Rep. 161, 163.

It seems to us that undue stress is placed in some of the cases upon the fact that in prosecutions for murder the defense of insanity is frequently resorted to and is sustained by the *evidence of ingenious experts whose theories are difficult to be met and overcome. [493] Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

For the reasons stated, and without alluding to other matters in respect to which error is assigned, the judgment is reversed and the cause remanded with directions to grant a new trial, and for further proceedings consistent with this opinion.

Reversed.

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UNITED STATES, *Plff. in Err.*,
v.
WILLIAM P. SAYWARD and GEORGE A. MEIGS.

(See S. C. Reporter's ed. 493-496.)

Jurisdiction of circuit court.

Where the United States are plaintiffs in an action, the circuit court has jurisdiction without regard to the value of the matter in dispute.

[No. 75.]

Submitted November 19, 1895. Decided December 23, 1895.

IN ERROR to the Circuit Court of the United States for the District of Washington to review the judgment of that court dismissing, for want of jurisdiction, an action brought by the United States against Wm. P. Sayward *et al.* to recover damages for the unlawful conversion of timber taken from the public lands *Reversed and cause remanded for further proceedings.*

The facts are stated in the opinion.

Mr. **Holmes Conrad,** Solicitor General, for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

494]*This action was brought by the United States against the defendants in error in the circuit court of the United States for the district of Washington, northern division, to recover the sum of $1,470 as damages alleged to have been sustained by the government in consequence of the unlawful conversion by the defendants of timber made from fir trees on certain unoccupied lands of the United States.

One of the defendants demurred upon the ground that, as the matter in dispute did not exceed the sum or value of $2,000, the court was without jurisdiction.

The demurrer was sustained and the cause was dismissed, the circuit court holding, upon the authority of *United States* v. *Huffmaster*, 35 Fed. Rep. 81, 83, that the acts of Congress defining the jurisdiction of the circuit courts of the United States deprived those courts of jurisdiction in civil suits where the amount involved was less than $2,000, exclusive of interest and costs, even in cases in which the United States were plaintiffs or petitioners.

In accordance with the 5th section of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), the court below certified the above question of jurisdiction as the only question to be determined upon the present writ of error.

By the judiciary act of 1789 it was provided that "the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the state where the suit is brought and a citizen of another state." 1 Stat. at L. 78, chap. 20, § 11.

The Revised Statutes, which went into effect in 1873, specified the suits and proceedings of which the circuit courts of the United States should have original jurisdiction, and among them were many in which the government would ordinarily be the plaintiff,—namely: suits in equity where the matter in dispute, exclusive of costs, exceeded the sum or value of $500, and the United States were petitioners; suits at common law *where the[495 United States or any officer thereof, suing under the authority of an act of Congress, were plaintiffs; suits at law or in equity arising under an act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; suits arising under a law providing internal revenue, and of all causes arising under the postal laws; suits and proceedings for the enforcement of penalties provided by laws regulating the carriage of passengers in merchant vessels; proceedings for the condemnation of property taken as a prize, in pursuance of § 5308, tit. *Insurrection;* suits arising under the laws relating to the slave trade; and suits by the assignee of a debenture for drawback of duties, issued under a law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture. § 629.

In reference to the jurisdiction of the district courts of the United States, as defined by the Revised Statutes, it is only necessary to say that as to actions or suits in which ordinarily the United States would be petitioners or plaintiffs, such jurisdiction was not made to depend upon the amount in dispute. § 563.

The 1st section of the act of March 3, 1875, determining the jurisdiction of the circuit courts of the United States, and regulating the removal of causes from state courts, provided that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state *and foreign [496 states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,*—see note to Schunk v. Moline, M. & S. Co. 37: 256.

As to jurisdiction of United States courts over common-law offenses, see note to United States v. Coolidge, 4: 124.

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courts of the crimes and offenses cognizable therein." 18 Stat. at L. 470, chap. 137, § 1.

The 1st section of the judiciary act of 1887 (24 Stat. at L. 552, chap. 373), corrected by the act of 1888 (25 Stat. at L. 433, chap. 866), amends the 1st section of the act of 1875, and provides that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States or treaties made or which shall be made under their authority; or in which controversy the United States are plaintiffs or petitioners; or in which there shall be a controversy between citizens of different states, in which the matter of dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; or a controversy between citizens of the same state claiming lands under grants of different states; or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them."

It cannot be doubted that the judiciary act of 1789 made the value of the matter in dispute jurisdictional, even in suits of a civil nature brought by the United States in the circuit courts of the United States. But under the Revised Statutes the amount in dispute was not made jurisdictional in civil actions or proceedings instituted by the United States, except that in suits in equity the matter in dispute, exclusive of costs, must have exceeded the sum of $500; and no restriction as 497]* to amount was imposed in respect of suits at common law where the United States were plaintiffs.

Then came the act of 1875, which prescribed the limit of $500, exclusive of costs, for all civil suits, at common law or in equity, of the several classes therein specified, including suits in which the United States were plaintiffs or petitioners. It is to be observed that the section of that act which defines the original jurisdiction of the circuit courts places the jurisdictional amount in advance of the enumeration, in the same section, of the different cases of which those courts could take cognizance, and there is no repetition, in that section, of such amount. In each of those cases the amount named was jurisdictional, under the act of 1875.

In the particulars last mentioned, the act of 1887 as corrected in 1888 is unlike any previous statute. The jurisdictional amount, prescribed by the 1st section of that act, is fixed at $2,000, and that amount is afterwards, in the same section, twice referred to by the words "the sum or value aforesaid." If Congress intended that the circuit court should not have original cognizance of any case mentioned in the 1st section of the act of 1887, unless the value of the matter in dispute exceeded $2,000, it would not have taken pains to refer to the value of the matter in dispute in immediate connection with particular cases, and made no such distinct reference in connection with other cases placed within the original cognizance of the circuit court. It is clear that a circuit court cannot, under that statute, take original cognizance of a case arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or of a controversy between citizens of different states, or of a controversy between citizens of a state and foreign states, citizens, or subjects, unless the sum in dispute, exclusive of interest and costs, exceeds $2,000, because in immediate connection with the enumeration of each of such cases will be found expressed a limitation of that character in respect of the sum or value necessary to give jurisdiction. But that cannot be said of the reference in the statute to a controversy in which the United States are plaintiffs or *petitioners, or to [498 one between citizens of the same state claiming lands under grants of different states. The clause referring to cases or controversies of the two kinds last mentioned was placed between clauses that specifically refer to the value of the matter in dispute; so that it may be reasonably inferred that Congress intended that a circuit court should take cognizance of a controversy in which the United States are plaintiffs or petitioners, or of a controversy between citizens of the same state claiming lands under grants of different states, without regard to the amount involved.

This interpretation of the statute is made quite clear if the 1st section is subdivided as was the section of the Revised Statutes defining the original jurisdiction of the circuit court. With a slight transposition or change of words, having due regard to substance, the 1st section of the act of 1888, if subdivided, would read as follows:

The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity,—First, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and the suit is one arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority; second, of any controversy in which the United States are plaintiffs or petitioners; third, of any controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; fourth, of any controversy between citizens of the same state claiming lands under grants of different states; fifth, of any controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid.

The United States being plaintiffs in this action, the circuit court had jurisdiction without regard to the value of the matter in dispute.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion. *Reversed.*

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499] THOMAS C. CHAPPELL, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 499-514.)

Certiorari for diminution of record—when denied—certificate of jurisdiction—power to dispose of entire case—act of 1888 constitutional—condemnation of land—amendment of proceedings—action at law—second jury.

1. A motion for a writ of certiorari for diminution of the record will not be granted if not made at the first term, as required by rule 14, and no satisfactory cause is shown for the delay.
2. Such a motion to supply an omission in the record to state that on a certain day a petition for the allowance of a writ of error from the circuit court was filed in the district court will be denied, where the papers on the motion do not show that a writ of error was then allowed or sued out, and plaintiff in error afterwards obtained the allowance of a writ of error from the circuit court, which he abandoned, and instead thereof applied for and obtained the present writ of error from this court.
3. An order overruling a demurrer to a petition and directing a jury to be impaneled is not a final judgment upon which a writ of error will lie.
4. Where there is no formal certificate to this court of the question of the jurisdiction of the district court, and the allowance of the writ of error is general, the petition for the writ, asking for a review of all the rulings, judgments, and orders of the court upon that question raised in the exceptions, pleas, and demurrers and other papers on file, without indicating any specific question of jurisdiction, is not such a sufficient statement of the question as will supply the want of a formal certificate under the judiciary act of 1891, chap. 517, § 5, cl. 1.
5. Where this court has acquired jurisdiction on the ground that the constitutionality of a law of the United States is drawn in question, it has the power to dispose of the entire case, including all questions, either of jurisdiction or of merits.
6. The act of Congress of August 1, 1888, authorizing the condemnation of land for the purpose of a lighthouse, is constitutional.
7. Where a proceeding for the condemnation of land for the use of the United States for lighthouse purposes under the act of Congress was commenced in the name of the Secretary of the Treasury, it may be amended so as to make the United States the formal as well as the real petitioner.
8. Such proceeding instituted and concluded in a court of the United States is, in substance and effect, an action at law.
9. Where the owner of land has had the benefit of a trial by an ordinary jury, on the question of damages on the condemnation of lands, in the United States district court, he is not entitled to a second trial by jury except at the discretion of that court, or upon a reversal of its judgment for error in law.

[No. 91.]

Submitted December 3, 1895. Decided January 6, 1896.

IN ERROR to the District Court of the United States for the District of Maryland to review a judgment of that court confirming an inquisition and award of damages on the condemnation of land for public uses, owned by Thomas C. Chappell. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was a petition, filed March 21, 1890, in the district court of the United States for the district of Maryland, for the condemnation, under the act of Congress of August 1, 1888, chap. 728,† of a perpetual easement in a strip of fast land *on Hawkins' Point in Anne [500 Arundel county in the state of Maryland,—described by metes and bounds and courses and distances, and as owned by Thomas C. Chappell,—for the purpose of transmitting rays of light, without obstruction, both by day and by night, between two beacon lights, known as Hawkins' Point Light and Leading Point Light, theretofore constructed and put in operation by the United States as range lights of the Brewerton Channel of the Patapsco river in the state of Maryland.

The petition was in the name of "William Windom, Secretary of the Treasury of the

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NOTE.—*As to certiorari in the United States courts.*—see note to Clark v. Hackett, 17: 69.

As to eminent domain; damages to easements, noise, smoke, etc., owners of lots abutting on streets; damages to access, light, and air; vibration; depreciation in value; use of street; telegraph poles; what constitutes taking; consequential injury,—see note to Osborne v. Missouri P. R. Co. 37: 156.

As to payment for private property taken for public use; 5th Amendment to Constitution applies only to Federal government, and not to states,—see note to Withers v. Buckley, 15: 816.

As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution, see notes to Martin v. Hunter, 4:97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

†An Act to Authorize Condemnation of Land for Sites of Public Buildings and for Other Purposes.

Sec. 1. In every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building, or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so; and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation; and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

Sec. 2. The practice, pleadings, forms, and modes of proceeding, in causes arising under the provisions of this act, shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding. 25 Stat. at L. 357.

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United States and *ex officio* president of the lighthouse board of the United States;" and alleged that under the provisions of U. S. Rev. Stat. § 4658, the lighthouse board is required to perform all administrative duties relating to the construction, illumination, inspection, and superintendence of lighthouses, light-vessels, beacons, buoys, and seamarks and their appendages; that Congress appropriates annually a sum of money for repairs and incidental expenses of lighthouses, which is available to pay for the easement aforesaid; and that in the opinion of the petitioner it was necessary and advantageous to the United States to acquire this easement by condemnation under judicial proceedings. The petition was signed by the United States District At-[501]torney, "who *appears for the Secretary of the Treasury, the petitioner, by direction of the Attorney General of the United States."

Upon the filing of the petition, the court made an order that a copy be served on Chappell on or before March 24, 1890, and that he show cause on or before April 10, 1890, why the prayer of the petition should not be granted.

On April 9, 1890, Chappell, "saving and reserving all advantages and exceptions whatsoever, prays leave to except to the order" aforesaid; and demurred to the petition, and for cause of demurrer assigned "that there is no authority of law for this proceeding; and also that it is not shown that the Congress of the United States has appropriated or will appriate more than $5,000 to pay for said easement, and that said easement is of a value greatly exceeding $5,000, and whether Congress annually or has ever appropriated a sum of money for repairs and incidental expenses of the lighthouse, sufficient to pay for said easement, which is applicable therefor; and also that there is no party plaintiff made in said declaration and petition; and also that the laws of the state of Maryland require said proceeding, if the right to any such has accrued, to be conducted in the circuit court for the county where said land is situated, and by the laws of the United States the said laws of the state form the rule of decision in the courts of the United States in this matter; and also that the United States of America has passed no general law or special law authorizing the petitioner or the Attorney General of the said United States, nor any other person whatsoever, to institute this proceeding, and said proceeding is instituted *ultra vires*, and the said United States cannot be made a party to said suit except by the direction and with the consent of the lawmaking power, and said power has neither directed the same nor consented thereto."

On May 12, 1890, after argument on the demurrer, the court, by an order reciting that it appeared that the Secretary of the Treasury, and *ex officio* president of the lighthouse board of the United States, had been authorized to acquire this easement for the use of the board, [502]and was of opinion that *it was necessary and advantageous to the United States to acquire this easement by condemnation under judicial proceedings, and had made application to the Attorney General to cause such proceedings to be commenced, overruled the demurrer; and, being of opinion that condemnation of this easement ought to be had by the United States, and that the question of the damages which Chappell would sustain thereby ought to be submitted to a jury, ordered "that, upon a day to be fixed by this court, upon notice to said parties, a jury of this court be impaneled, who shall be duly sworn to justly and impartially value and assess the damages which the said Chappell, as the owner of said land, will sustain by the acquisition by the United States of the easement aforesaid, and that the said jury be impaneled from twenty jurors regularly drawn to serve in this court, from whom each party may strike four jurors, or, if either party refuse to so strike, the court shall strike for him, and the remaining twelve jurors shall be the said jury of inquest to assess said damages. And the said proceeding shall be in such form as that the United States of America and the said Thomas C. Chappell shall be the parties thereto."

On October 28, 1890, in accordance with this order, a jury was duly impaneled in the cause, and was sworn "to truly and impartially value and assess the damages for the condemnation of the said easement over the land at Hawkins' Point, in said petition mentioned, and a true inquisition make according to the evidence;" and upon a trial before the court, and after hearing evidence on behalf of the United States, and on behalf of Chappell, and the charge of the court, returned, on November 3, 1890, an "inquisition and award," signed and sealed by the twelve jurors, assessing to Chappell damages in the sum of $3,500 for the enjoyment by the United States in perpetuity of the easement aforesaid.

On November 10, 1890, Chappell filed a plea "that the court here ought not to take cognizance of or sustain the action aforesaid, because he says that the cause of action aforesaid, if any accrued to the said plaintiff, accrued to him at Annapolis, within the jurisdiction of the circuit court for *Anne [503] Arundel county, state of Maryland, and not within the jurisdiction of this court."

On November 17, 1890, Chappell filed the following exceptions to the inquisition:

"1st. That the statute under which this proceeding is sought to be maintained is unconstitutional, and this court has no jurisdiction of the subject matter of this suit.

"2d. That the lawmaking power of the United States has not authorized any officer to make said United States a party to this suit or proceeding, and this court has no jurisdiction of the subject-matter of this suit, there being a want of power to condemn this property described in this inquisition.

"3d. That the laws of the United States have not been complied with.

"4th. That the damages allowed are inadequate."

On December 18, 1890, the district court overruled these exceptions and confirmed the inquisition and award.

On December 27, 1890, Chappell prayed for, and on February 24, 1891, was allowed, under U. S. Rev. Stat. § 633, a writ of error from the circuit court of the United States for the district of Maryland; but never gave bond to prosecute that writ of error.

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On December 15, 1891, Chappell presented to the district judge a petition for a writ of error, under the act of March 3, 1891, chap. 517, § 5, in which he mentions all the previous proceedings in the case (above stated) and, "in order that said rulings, judgments, and orders may be reviewed and re-examined by the Supreme Court of the United States upon the question of jurisdiction raised in said exceptions, pleas, and demurrers, and the other papers on file in this cause, and either reversed or affirmed, now prays for the allowance of a writ of error to the Supreme Court of the United States and such other process as may cause said rulings, orders, and judgments to be corrected, instead of to the circuit court of the United States for the district of Maryland."

A writ of error was thereupon "allowed," in the usual and general form, by the district judge, and was entered in this court February 27, 1892.

504]*On December 2, 1895, the day before the case was called for argument in this court, the plaintiff in error moved for a writ of certiorari suggesting a diminution of the record in omitting to state that on July 15, 1890, he filed in the district court a petition for the allowance of a writ of error from the circuit court of the United States.

Mr. **Thomas C. Chappell,** for plaintiff in error in person:

This court will review all the questions in the case. "In cases taken direct to the supreme court, where a constitutional question is raised, the supreme court reviews all the questions in the cases, not merely the constitutional question."

2 Foster, Fed. Pr. § 472; *Ekiu* v. *United States*, 142 U. S. 651 (35: 1146); *Horner* v. *United States*, 148 U. S. 570 (36: 266); *Kohl* v. *United States*, 91 U. S. 367 (23: 449); *Pollard* v. *Hagan*, 44 U. S. 3 How. 223 (11: 571).

On appeal from the action of commissioners or special jury, the party is entitled to a trial *de novo* by a common-law jury before the appellate tribunal.

Steuart v. *Baltimore*, 7 Md. 500; *Cruger* v. *Hudson River R. Co.* 12 N. Y. 197.

The plaintiff in error, being entitled to a trial by a common-law jury under article 7 of the Constitution of the United States, has not been afforded that right because he was not brought into the lower court according to the course of the common law.

2 Abbott, U. S. Pr. § 191, p. 29; 2 Md. Code Pub. Gen. Laws, art. 25, § 129.

Where there are several assignments of error, some of which involve the jurisdiction of the court below, and others do not, the circuit court of appeals may take jurisdiction by writ of error or appeal of the whole case.

McLish v. *Roff*, 141 U. S. 661 (35: 893).

Mr. **J. M. Dickinson,** Assistant Attorney General, for defendant in error:

The United States may acquire, through its right of eminent domain, property for public purposes, such as arsenals and lighthouses, without choosing to exclude the jurisdiction of the state within the territory.

Pollard v. *Hagan*, 44 U. S. 3 How. 223 (11: 571).

The United States have the right to condemn private lands lying within a state for the purpose of carrying out any express right conferred by the Constitution, with or without the consent of the state.

Luxton v. *North River Bridge Co.* 153 U. S. 525 (38: 808).

There is no certificate from the judge of any character certifying any question of jurisdiction to this court. This is fatal to the maintenance of the writ of error.

Maynard v. *Hecht*, 151 U. S. 324, 328 (38: 180, 181).

The writ of error should be dismissed because the record shows there is no controversy now existing.

Cheong Ah Moy v. *United States*. 113 U. S. 216 (28: 983); *San Mateo County* v. *Southern P. R. Co.* 116 U. S. 138 (29: 590); *Little* v. *Bowers*, 134 U. S. 547, 558 (33: 1016, 1020); *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696 (35: 906); *California* v. *San Pablo & T. R. Co.* 149 U. S. 308 (37: 747).

Appearance by a defendant, and answering or participating in the suit in a state in which he does not reside, and in which he had not been served with process, waive nonservice of process.

Fitzgerald & M. Constr. Co. v. *Fitzgerald*, 137 U. S. 98 (34: 608); *Henderson* v. *Carbondale Coal & C. Co.* 140 U. S. 25 (35: 332); *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127 (35: 660).

The United States may acquire and hold real property in any state whenever such property is needed for the use of the government; and when the property cannot be acquired by voluntary agreement with the owners it may be taken against their will by the United States in the exercise of the power of eminent domain, upon making just compensation, with or without a concurrent act of the state in which the land is situated.

Van Brocklin v. *Anderson*, 117 U. S. 151, 154 (29: 845, 846); *Luxton* v. *North River Bridge Co.* 153 U. S. 525, 529 (38: 808, 810).

Mr. Justice **Gray** delivered the opinion of the court:

The motion for a writ of certiorari for diminution of the record, in not stating that on July 15, 1890, the plaintiff in error filed a petition for the allowance of a writ of error from the circuit court of the United States to the district court in which the proceedings were pending, must be denied, for several reasons: First, the motion was not made at the first term, as required by rule 14 of this court, and no satisfactory cause is shown for the delay; second, the copy of docket entries, submitted with the motion, while it shows that a petition for a writ of error was filed on that day, does not show that a writ of error was then allowed or sued out; and the plaintiff in error afterwards obtained the allowance of a writ of error from the circuit court to the district court, which he abandoned, and, *instead thereof, applied for[507 and obtained the present writ of error from this court; third, the order overruling the demurrer to the petition, and directing a jury to be impaneled, was not a final judgment, upon which a writ of error would lie. *Luxton* v. *North River Bridge Co.* 147 U. S. 337 [37: 194].

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The writ of error now before us was sued out from this court to the district court of the United States for the district of Maryland, under the judiciary act of March 3, 1891, chap. 517, § 5, which provides that "appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following [among other] cases:"

First. "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Fifth. "In any case in which the constitutionality of any law of the United States . . . is drawn in question." 26 Stat. at L. 827, 828.

In order to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court. If both a question of jurisdiction and other questions were before the court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, this court cannot take jurisdiction under this clause of the statute. *Maynard* v. *Hecht*, 151 U. S. 324 [38: 179]; *Moran* v. *Hagerman*, 151 U. S. 329 [38: 181]; *Colvin* v. *Jacksonville*, 157 U. S. 368 [39: 736]; *Davis & R. Bldg. & Mfg. Co.* v. *Barber*, 157 U. S. 673 [39: 853]; *The Bayonne*, 159 U. S. 687 [40: 306]; *Van Wagenen* v. *Sewall*, 160 U. S. 369 [40: 460].

If, indeed, the writ of error is allowed upon the petition of the original plaintiff, asking for a review of a judgment dismissing the action for want of jurisdiction, and the only question tried and decided in the court below was a question of jurisdiction, that question is sufficiently certified to this court. *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322 [39: 438]; *Interior Const. & I. Co.* v. *Gibney*, 160 U. S. 217 [40: 508] 401]. And if an appeal from a *decree of the circuit court appointing a receiver is allowed by that court "solely upon the question of jurisdiction," and on a petition praying an appeal from the decree as "taking and exercising jurisdiction," the question of jurisdiction is sufficiently certified. *Shields* v. *Coleman*, 157 U. S. 168 [39: 660].

But in the case just cited of *Shields* v. *Coleman*, the essential requisite of the appellate jurisdiction of this court in this class of cases was defined as follows: "It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of, the record, to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction." 157 U. S. 176, 177 [39: 662, 663].

The record in the present case falls far short of satisfying any such test. The defendant, among many other defenses, and in various forms, objected to the jurisdiction of the district court, because the act of Congress under which the proceedings were instituted was unconstitutional, because the proceedings were not according to the laws of the United States, and because they should have been had in a court of the state of Maryland; and the court, overruling or disregarding all the objections, whether to its jurisdiction over the case, or to the merits or the form of the proceedings, entered final judgment for the petitioners. There is no formal certificate of any question of jurisdiction; the allowance of the writ of error is general, and not expressly limited to such a question; and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the "rulings, judgments, and orders" of the court "upon the question of jurisdiction raised in said exceptions, pleas, and demurrers, and the other papers on file in this cause," without defining or indicating any specific *question of jurisdiction. [509 Here, certainly, is no such clear, full, and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under the first clause of the statute.

But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits. *Ekiu* v. *United States*, 142 U. S. 651 [35: 1146]; *Horner* v. *United States* (No. 2) 143 U. S. 570, 577 [36: 266, 269]; *United States* v. *John*, 155 U. S. 109, 112, 113 [39: 87, 89].

In support of the position that the act of Congress was unconstitutional, reliance was placed on U. S. Const. art. 1, § 8, cl. 17, which provides that Congress shall have exclusive power of legislation "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," and on the statute of Maryland, by which a method is provided for the condemnation, for the use and benefit of the United States, of lands wanted for the erection of lighthouses and other public buildings; and jurisdiction is ceded to the United States over such lands "as soon as the same shall be condemned" under this statute. Md. Stat. 1874, chap. 395, §§ 1-13; 2 Md. Pub. Gen. Laws 1888, art. 96, §§ 5-17. It was argued that the act of Congress was unconstitutional, because it undertook to confer exclusive jurisdiction on the courts of the United States before purchase or condemnation of the lands in question.

But in the case at bar the question is not of jurisdiction for purposes of legislation, but of acquiring title by judicial proceedings. It

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is now well settled that whenever, in the execution of the powers granted to the United 510]States by the *Constitution, lands in any state are needed by the United States for a fort, magazine, dockyard, lighthouse, customhouse, court-house, postoffice, or any other public purpose, and cannot be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the state with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the state, as Congress may direct or permit. *Harris* v. *Elliott*, 35 U. S. 10 Pet. 25 [9: 333]; *Kohl* v. *United States*, 91 U. S. 367 [23: 449]; *United States* v. *Jones*, 109 U. S. 513 [27: 1015]; *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 531, 532 [29: 264, 266]; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 656 [34: 295, 301]; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312 [37: 463]; *Luxton* v. *North River Bridge Co.* 147 U. S. 337 [37: 194], and 153 U. S. 525 [38: 808]; *Burt* v. *Merchants' Ins. Co.* 106 Mass. 356, 8 Am. Rep. 339; *Re United States*, 96 N. Y. 227.

Nor is it necessary that Congress should itself select the particular land to be taken. In *Kohl* v. *United States*, above cited, it was decided that an act of Congress, authorizing the Secretary of the Treasury to acquire by purchase at private sale or by condemnation a site in the city of Cincinnati, "for the accommodation of the United States courts, customhouse, United States depository, postoffice, internal revenue and pension offices," was constitutional; and authorized the proceedings for condemnation to be had in the name of the United States in the circuit court of the United States under its general jurisdiction of actions at law in which the United States, or any officer thereof suing under the authority of an act of Congress, were plaintiffs.

By the Revised Statutes of the United States, the lighthouse board, under the direction of the Secretary of the Treasury, is entrusted with the discharge of all administrative duties relating to the construction, illumination, inspection, and superintendence of lighthouses, light vessels, beacons, buoys, seamarks and their appendages; and is authorized to purchase for the purpose, within appropriations made by 511] Congress, *land which does not belong to the United States. U. S. Rev. Stat. §§ 4658, 4660. And the act of August 1, 1888, chap. 728, under which this proceeding was instituted, authorizes the Secretary of the Treasury, whenever in his opinion it is necessary or advantageous to the United States, to acquire land for the purpose of a lighthouse by condemnation under judicial process in a court of the United States in the district in which the land is situated. 25 Stat. at L. 357. This act is a constitutional exercise of the power of Congress, according to the decisions of this court, above cited.

The statute of Maryland, above cited, provides that whenever the United States are desirous of procuring the title to any land within the state, "for the purpose of erecting thereon any lighthouse, beaconlight, range-light, lightkeeper's dwelling, forts magazines, arsenals, dockyards, buoys, public piers, or necessary public buildings, or improvements connected therewith," and cannot obtain the same by purchase, the United States, by any agent authorized under the hand and seal of any member of the President's Cabinet, may, by petition to the circuit court for the county where the land lies, have the land condemned for the use and benefit of the United States. That statute further provides that the petition shall state the bounds and quantity of the land, the purpose for which the United States desire to obtain title, and the names of the owners, and shall be verified by an affidavit of the agent of the United States; that, after notice to the owner, the court shall hear and determine upon the petition and any objections filed to the proposed condemnation, and, if it shall declare that the condemnation ought to be had, shall issue a warrant to the sheriff to summon twenty jurors, "and from them each party or his agent, or, if either be not present in person or by his agent, the sheriff for said party, may strike four jurors, and the remaining jurors shall act as the jury of inquest of damages;" that the sheriff, before the jury proceed to act, shall "administer to each of them an oath that he will justly and impartially value the damages which the owner will sustain by the use or permanent occupation of the land required by the United States;" that "the jury shall summon such *witnesses[512 as the parties may require," and examine them on oath in relation to the value of the land, and reduce the testimony to writing, and ascertain and determine the compensation which ought to be made by the United States to the party owning or being interested in the land to be condemned; and that the jury shall reduce their inquisition to writing, and sign and seal it, and it shall then be returned by the sheriff, together with the testimony, to the clerk of the circuit court for the county; that the inquisition shall be confirmed by the court, if no sufficient cause be shown by the fourth day of the ensuing term, and, when confirmed, shall be recorded; that, if the inquisition be set aside, the court may direct another inquisition in the manner before prescribed; that the inquisition shall describe the land condemned, and state the valuation thereof; and that such valuation, when paid or tendered to the owner, shall entitle the United States to the land, for the use and purposes set forth in the petition.

The only position, other than the denial of the constitutionality of the act of Congress, argued by the plaintiff in error in this court, was that by the statutes and decisions of Maryland the jury which returned the inquisition was but a body of assessors of damages, in the nature of a special jury of inquest, or board of commissioners, and that he was entitled to have the whole case tried anew by an ordinary jury. In support of this position were cited the following cases, decided under different statutes of Maryland: *Tide Water Canal Co.* v. *Archer*, 9 Gill & J. 479; *Steuart* v. *Baltimore*, 7 Md. 500; *State* v. *Graves*, 19 Md. 351. But, however that may be under the statutes of the state, it is not so under the act of Congress.

The direction, in the act of Congress, that

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the practice, pleadings, forms, and modes of proceeding, in cases arising under it, "shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state," must, as was said by this court in an analogous case, following the decisions under the corresponding provision of U. S. Rev. 513]Stat. § 914,* "give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress." *Luxton* v. *North River Bridge Co.* 147 U. S. 337, 338 [37: 194].

This proceeding for the condemnation of an interest in land for the use and benefit of the United States for lighthouse purposes was instituted in the district court of the United States by the Secretary of the Treasury, acting through the Attorney General of the United States, as authorized by the act of Congress. Having been commenced in the name of the Secretary of the Treasury, it was rightly ordered to be amended so as to make the United States the formal, as they were the real, petitioners. *Kohl* v. *United States*, 91 U. S. 367 [23: 449]; *United States* v. *Jahn*, 155 U. S. 109, 111 [39: 87, 89]; *United States* v. *Hopewell*, 5 U. S. App. 137. The proceeding was conducted in substantial accordance with the provisions of the statute of Maryland upon the same subject, except so far as controlled by the act of Congress under which it was instituted, or by other laws of the United States.

The provision of the Maryland statute that a petition in the county court shall be verified by affidavit of the agent of the United States is inapplicable to a petition presented to a court of the United States by the officer designated in the act of Congress. And the provision requiring a sheriff's jury to reduce to writing, and to return to the clerk of the court, the testimony taken before them, has no application to a trial had and evidence taken before the court itself.

The proceeding instituted and concluded in a court of the United States was, in substance and effect, an action at law. *Kohl* v. *United States*, 91 U. S. 367, 376 [23: 449, 452]; *Upshur County* v. *Rich*, 135 U. S. 467, 476 [34: 196, 199]. The general rule, as expressed in the Revised Statutes of the United States, is that the trial of issues of fact in actions at law, both in the district court and in the circuit court, "shall be by jury," by which is evidently meant a trial by an ordinary jury at the bar of the court. U. S. Rev. Stat. §§ 566, 648. Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of lands for public uses. The di-514]rection in the act *of 1888, chap. 728, § 2, that such proceedings shall conform, "as near as may be," to those "in the courts of record of the state," is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record, and as requiring, by way either of preliminary, or of substitute, a trial by a different jury, not in a court of record, nor in the presence of any judge. Such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States. *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 301 [23: 898, 901]; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 209 [36: 942, 945]; *Mexican C. R. Co.* v. *Pinkney*, 149 U. S. 194, 206, 207 [37: 699, 703, 704]. This plaintiff in error had the benefit of a trial by an ordinary jury at the bar of the district court on the question of the damages sustained by him; and he was not entitled to a second trial by jury, except at the discretion of that court, or upon a reversal of its judgment for error in law.

To prevent any possible misconception, it is fit to observe that this case concerns only the taking by the United States, on making compensation to the owner, of an interest in fast land above high-water mark, and does not touch the question, argued but not decided in two recent cases, of the right of the United States to take, without compensation, for the purpose of a lighthouse, land under tide waters. *Hill* v. *United States*, 149 U. S. 593 [37: 862]; *Chappell* v. *Waterworth*, 155 U. S. 102 [39: 85].

Judgment affirmed.

JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY, *Plff. in Err.*,

v.

MARY J. HOOPER ET AL.

(See S. C. Reporter's ed. 514-530.)

Corporate seal—scroll, when sufficient seal—state law—question for court—authority of president of a company—statements by him—when company is bound by lease—power of railroad to lease a hotel—covenant to insure—impossibility of performance—damages on covenants to insure—consideration—instructions.

1. An averment that the parties, one of which was a railroad company, had set their hands and

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NOTE.—*As to parol contracts of officers and agents of corporations*,—see notes to Mechanics' Bank v. Bank of Columbia, 5: 100; and Bank of Metropolis v. Guttschlick, 10: 335.

When promissory notes executed by an officer bind the corporation; when the officer,—see note to Hitchcock v. Buchanan, 26: 1078.

As to power of corporations to mortgage, see note to Memphis & L. R. R. Co. v. Berry, 28: 337.

As to power to mortgage franchises, see note to Chesapeake & O. R. Co. v. Miller, 29: 121.

As to ultra vires; what contracts and acts are; in violation of statute or public policy; estoppel; ratification,—see note to Central Transp. Co. v. Pullman's Palace Car Co. 35: 55.

As to officers of corporations; fiduciary relations; dealings by them with the corporation or with its property,—see note to McGourkey v. Toledo & O. C. R. Co. 36: 1079.

As to contracts; performance; when excused by nonperformance of other party or his prevention of performance,—see note to United States v. Peck, 26: 46.

Impossibility or prevention of performance of contract, when an excuse or reason for nonperformance; impossibility or prevention from act of God, act of party, or from other causes; contract impossible of performance; rights of parties.

Actual impossibility to perform, which arises from extraneous circumstances of inability merely

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seals to a lease the attesting clause of which alleged that the company had signed, sealed, and delivered, in the presence of two witnesses, who signed their names thereto, is, on demurrer, a sufficient averment that a seal attached on behalf of the company was its corporate seal.

2. In the absence of evidence to the contrary, a scroll or rectangle containing the word "seal," opposite the signature of a corporation by its president, will be deemed to be the proper and common seal of the company.

3. That a public officer of a state does not use wax as a seal to an instrument, but simply a scroll on the paper, is sufficient to raise the presumption that such is the law or custom in the state, till the contrary is proved.

4. Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper.

5. The authority of the president of a railroad company to execute a lease on behalf of the company is shown by his signing, sealing, and delivering it in the name of the company, and by its exercising control over the premises, renting a portion of them, and receiving rent and giving a receipt therefor under the seal of the company, opening an account thereof on its books, and making efforts to get the property insured in pursuance of the lease.

6. Statements by the president of a railroad company, if relevant to the controversy, are competent evidence to affect the company, although he be dead at the time of the trial. Error, if any, in receiving such statements, is rendered immaterial by the company's giving affirmative evidence in its own behalf to the same effect.

7. A company is bound by a lease signed for it by its president, although there is no proof that he was authorized to do so by a resolution of the board, where the company took possession of the premises, rented a portion thereof, and received and receipted for the rent.

8. To lease and maintain a hotel at the end of a railroad, on a barren beach, is not so plainly outside of the statutory powers of a railroad company to lease land not necessary for its use, and to erect and maintain buildings for the accommodation of its passengers, as to sustain the defense of *ultra vires* as against the other party to the lease.

9. The covenant to procure insurance, in such lease, is not so far outside of the company's powers as not to be enforceable.

10. Impossibility of performance arising subsequently to the making of a contract, even though it arises without any fault on the part of the covenantor, does not discharge him from his liability under the contract.

11. Damages for breach of a covenant in a lease to keep the premises insured in a certain sum are, if the property is worth that sum and is wholly destroyed by fire, the sum for which the property was agreed to be kept insured, and not merely the amount of the premiums which it would cost to procure the insurance.

12. The obligation of the lessors to rebuild and repair in case of fire, with the suspension of the rent so long as the premises remain uninhabitable, is sufficient consideration for the lessee's agreement to insure.

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in the particular instance, does not amount to physical or moral impossibility,—as, the want of money to make a stipulated payment, etc., cannot excuse one from the legal obligation to perform the condition, or from liability in damages for nonperformance. James v. Morgan, 1 Lev. 111; Thornborow v. Whitacre, 2 Ld. Raym. 1164; Gilpins v. Cousequa, 1 Pet. C. C. 91; Kearon v. Pearson, 7 Hurlst. & N. 386.

But legal impossiblity occasioned by the passage of a statute rendering the act illegal will, by the courts of this country, in furtherance of the local public policy, be deemed a sufficient excuse for nonperformance. Bailey v. De Crespigny, L. R. 4 Q. B. 180; 2 Schouler, Personal Property, § 287; Bennett's Benjamin, Sales, § 571; Campbell, Sales, 315; Newby v. Sharpe, L. R. 8 Ch. Div. 39, 25 Eng. Rep. 99.

Performance physically impossible by the act of God. Barker v. Hodgson, 3 Maule & S. 267; Ford v. Cotesworth, L. R. 7 Q. B. 127; Taylor v. Caldwell, 3 Best & S. 826.

The seller is held to be relieved from his promise to deliver by the death of the horse sold, or the spoliation of specific growing crop from natural causes before the time of gathering it. Shep. Touch. 173; Howell v. Coupland, L. R. 9 Q. B. 462, L. R. 1 Q. B. 258, 16 Eng. Rep. 319.

Impossibility occasioned by human agency. Mill Dam Foundry v. Hovey, 21 Pick. 441; Harmony v. Bingham, 12 N. Y. 106, 62 Am. Dec. 142.

Destruction by fire of an unfinished chattel which is being made to order does not exempt the buyer from obligation to deliver. Jones v. St. Johns College, Oxford, L. R. 6 Q. B. 115; School Dist. No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371.

Defendants contracted to deliver to plaintiff at B certain logs then at specified places on the bank of the river S, plaintiff to pay $16 per 1,000 feet, when account of measurement was handed in. The logs were measured and paid for as agreed. Before the logs were rafted a portion were swept away by a sudden freshet in the river and were lost. In an action to recover the price paid for the logs thus lost,—Held, that the contract to deliver was absolute, and defendants were liable, although the loss occurred without negligence upon their part. Bigler v. Hall, 54 N. Y. 167.

While a destruction of the subject-matter of the contract without fault of plaintiffs relieves them from an action for damages for nonperformance, it cannot enable them to enforce a part performance. Kein v. Tupper, 52 N. Y. 550.

An accident is not an excuse for a failure to perform a contract, even if it prevent performance. If protection is sought from such a contingency, it must be specified in the contract. Booth v. Spuyten Duyvil Roll. Mill Co. 60 N. Y. 487.

Contracts for personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular person named, are not in their nature of absolute obligation under all circumstances, but are subject to the implied condition that the person named shall be able to perform at the time specified, and if he dies, or without fault on the part of the covenantor becomes unable to perform, the obligation to perform is extinguished. Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7.

To excuse nonperformance of an express condition in a contract, it must appear that performance could not, by any means, have been accomplished. Wheeler v. Connecticut Mut. L. Ins. Co. 82 N. Y. 543, 37 Am. Rep. 594.

Although a party to an absolute executory contract is not excused by inability to execute it, caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself by stipulations in the contract, there may be in the nature of the contract an implied condition by which he will be relieved from such unqualified obligation; and when in such case without his fault, performance is rendered impos-

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13. Where the testimony is conflicting in relation to the value of the property, an instruction that, in coming to a conclusion, the jury should consider the testimony in the light of their own experience and knowledge, is not objectionable.

[No. 80.]

Submitted November 21, 1895. Decided January 13, 1896.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida to review a judgment for the plaintiffs, Mary J. Hooper *et al.*, in an action against the Jacksonville, Mayport, Pablo Railway & Navigation Company, on the covenant in a lease to keep the buildings insured, which were destroyed by fire. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

In the circuit court of the United States for the northern district of Florida, on the 4th day of December, 1889, Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, for the use of said Mary J. Hooper, citizens of the state of Ohio, brought an action against the Jacksonville, Mayport, Pablo Railway & Navigation Company, a corporation of the state of Florida. The plaintiffs' amended declaration set up causes of action arising out of the covenants contained in a certain indenture of lease between the parties. This lease, dated July 10, 1888, purported to grant, for a term of two years, certain lots of land situated at a place called "Burnside," in Duval county, Florida, whereon was erected a hotel known as the "San Diego Hotel." In consideration of this grant the railroad company agreed to pay in monthly instalments a yearly rent of $800, and to keep the premises insured in the sum of $6,000.

*It was alleged that on November 28, [516 1889, during said term, and while the railway company was in possession, the hotel and other buildings were wholly destroyed by fire; that the defendant had failed and neglected to have the same insured, and that there was an arrearage of rent due amounting to the sum of $106.67. For the amount of the loss occasioned by the absence of insurance and for the back rent the action was brought.

The defendant denied that the railway company had duly executed the instrument sued on; denied that Alexander Wallace, the president of the company, and who had executed the lease as such president, had any authority from the company so to do. The defendant also alleged that such a lease, even if formally executed, was *ultra vires;* also that the covenant to insure was an impossible covenant, as shown by ineffectual efforts to secure such insurance.

The case was tried in April, 1891, and resulted in a verdict and judgment against the defendant in the sum of $6,798.70. On errors assigned to certain rulings of the court and in the charge to the jury the case was brought to this court.

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sible, it may be excused. Stewart v. Stone, 127 N. Y. 500, 14 L. R. A. 215.

Where performance of the agreement by the vendor is rendered impossible by a fire, defendants are not bound. Goldman v. Rosenberg, 116 N. Y. 79.

Where the performance of a contract depends upon the continued existence of a person or thing which is assumed as the basis of the agreement, the death of the person or the destruction of the thing terminates the obligation. Lorillard v. Clyde, 142 N. Y. 456.

Where a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for the nondelivery. Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415.

A contract to do a thing which both the promisor and promisee know to be physically impossible of performance imposes no obligation upon either party. Clifford v. Watts, L. R. 5 C. P. 588.

A contract to do a thing which is legally impossible is void. Harvy v. Gibbons, 2 Lev. 161; Faulkner v. Lowe, 2 Exch. 595; Stevens v. Coon, 1 Pinney, 356.

When a contract is made upon the supposition that a certain thing is in existence, and it turns out that the thing never was in existence, or had been destroyed at the time when the contract was made, the agreement is void as having been made under a mistake. Gibson v. Pelkie, 37 Mich. 380; Franklin v. Long, 7 Gill & J. 407; Strickland v. Turner, 7 Exch. 208.

Where a cargo of corn was sold while on its way by sea to London, and it turned out that prior to the sale the cargo had been destroyed, it was held that the contract of sale was invalid. Couturier v. Hastie, 5 H. L. Cas. 673.

So a covenantee was discharged from the performance of his covenant to dig a certain amount of potter's clay yearly, upon the discovery that at the time of making the covenant there was not so much as that amount of clay under the land. Clifford v. Watts, L. R. 5 C. P. 577; Scioto Fire Brick Co. v. Pond, 38 Ohio St. 65; Cook v. Andrews, 38 Ohio St. 178.

In an action by one railroad company against another for breach of contract to co-operate in securing such legislation as would result in an appropriation of public lands for the roads, it appearing that all available lands were exhausted, so that the effort would necessarily have been futile,—Held, that the plaintiff could not recover. Dubuque S. W. R. Co. v. Cedar Rapids & M. R. R. Co. 66 Iowa, 366.

One who agrees with a mortgagee to pay a mortgage on its assignment to him is released from his promise by a foreclosure and sale by the mortgagee. Union Sav. Inst. v. Hill, 139 Mass. 47.

If a married man promises to marry a single woman who does not know that he is already married, he is liable for a breach of his promise. Wild v. Harris, 7 C. B. 999; Millward v. Littlewood, 5 Exch. 775.

When the impossibility of performance is known to the promisor, but not known to the promisee, the former is liable in damages for a failure to perform.

If the possibility is known to the promisee, but not to the promisor, the former cannot sue the latter for a failure to perform. Leake, Contracts, 692.

If performance of a contract becomes wholly or in part impossible by reason of a change in the law, the contract is to that extent discharged. Atkinson v. Ritchie, 10 East, 534; Berwick v. Oswald, 3 El. & Bl. 665; Brown v. London, 9 C. B. N. S. 728, 13 C. B. N. S. 828; Jones v. Judd, 4 N. Y. 412; Brick Presbyterian Church v. New York, 5 Cow. 538; Exposito v. Bowden, 7 El. & Bl. 763, 783.

The outbreak of war dissolves a partnership previously existing between subjects of two hostile

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Mr. **J. C. Cooper,** for plaintiff in error:

When the corporate seal is attached to an instrument, it is usual that the secretary or custodian of the seal says, in appropriate language, that he is the custodian of the seal and attests the execution of the paper, and attaches the corporate seal. None of this appears on this paper, but only the ordinary bracket or scrawl, which was, in fact and in law, nothing more than the private seal of Alexander Wallace, who signed the paper.

The demurrer to the declaration on this ground should have been sustained, and the case was tried in an erroneous form of action.

Bank of Metropolis v. *Guttschlick*, 39 U. S. 14 Pet. 21, 29 (10: 336, 340); *Mitchell* v. *St. Andrew's Bay Land Co.* 4 Fla. 200, 203; *Randall* v. *Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *White* v. *Skinner*, 13 Johns. 307, 7 Am. Dec. 381; *Taft* v. *Brewster*, 9 Johns. 334, 6 Am. Dec. 280.

The court below erred in admitting in evidence the alleged certified copy of the lease.

The instruments were not binding upon the defendant company, on the face of them.

1 Morawetz, Priv. Corp. § 340, p. 324; 2 Morawetz, Priv. Corp. § 617, p. 584; *Koehler* v. *Black River Falls Iron Co.* 67 U. S. 2 Black, 715, 718 (17: 340, 341).

The bill of exceptions nowhere shows a single word of proof that the directors or stockholders, acting at stockholders' meeting, or in any other corporate capacity, had ever authorized or recognized this paper.

Conro v. *Port Henry Iron Co.* 12 Barb. 27, 63; *Titus* v. *Cairo & F. R. Co.* 37 N. J. L. 98, 102.

This contract was *ultra vires.*

Pearce v. *Madison & I. R. Co.* 62 U. S. 21 How. 441 (16: 184); *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 82 (25: 950, 952).

The court erred in charging that the defendant was bound in any event to obtain insurance at any cost, or be liable for all damages plaintiff might sustain by loss of property by fire.

Every contract must be construed according to what the court finds was in the minds of the parties at the time they made the contract to carry out their obvious intent.

Chicago, M. & St. P. R. Co. v. *Hoyt*, 149 U. S. 1 (37: 625); *Bliven* v. *New England Screw Co.* 64 U. S. 23 How. 420 (16: 510); *Renner* v. *Bank of Columbia*, 22 U. S. 9 Wheat. 588 (6: 167); 2 Parsons, Contracts, 656.

No company doing business in Florida would insure the property. Companies doing business in the United States and foreign companies had refused to even rate it for insurance, and it was in the prohibited list.

The defendant did make every reasonable effort to get insurance, and it was not possible

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countries. Griswold v. Waddington, 15 Johns. 57, 16 Johns. 438; Matthews v. McStea, 91 U. S. 7, 9 (23: 188, 189); The William Bagaley v. United States, 72 U. S. 5 Wall. 377, 407 (18: 583, 589); Taylor v. Hutchison, 25 Gratt. 596, 18 Am. Rep. 699; Hubbard v. Matthews, 54 N. Y. 43, 48, 49, 13 Am. Rep. 562.

To discharge the contract the law must make performance impossible, not merely more expensive or burdensome. Baker v. Johnson, 42 N. Y. 126.

When the impossibility created by the law is only temporary the contract will be suspended, but will revive again when the impediment is removed. Hadley v. Clarke, 8 T. R. 259; Baylies v. Fettyplace, 7 Mass. 325; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. C. C. 312; McBride v. Marine Ins. Co. 5 Johns. 299.

Where the condition is possible at the date of the instrument, and subsequently becomes impossible by the act of God, or of the law, or of the obligee, the obligation and the condition both become void. Coke, Litt. 206a; Taylor v. Tainter, 83 U. S. 16 Wall. 366, 369 (21: 287, 290); Brown v. Dillahunty, 4 Smedes & M. 718, 43 Am. Dec. 499; People v. Bartlett, 3 Hill, 570; Badlam v. Tucker, 1 Pick. 284; People v. Manning, 8 Cow. 297, 18 Am. Dec. 451; Blake v. Niles, 13 N. H. 459, 38 Am. Dec. 506; Scully v. Kirkpatrick, 79 Pa. 324, 331, 21 Am. Rep. 62; Marshall v. Craig, 1 Bibb (Ky.) 386, 390, 4 Am. Dec. 647; Hopkins v. Com. 18 Cent. L. J. 77; People v. Tubbs, 37 N. Y. 586; Belding v. State, 25 Ark. 315, 4 Am. Rep. 26, 99 Am. Dec. 214.

When a party has undertaken absolutely to do a thing, he is not excused from liability by the occurrence of events which render the performance of his promise impossible. Ford v. Cotesworth, L. R. 4 Q. B. 134; Eugster v. West, 35 La. Ann. 119, 48 Am. Rep. 232; Hills v. Sughrue, 15 Mees. & W. 253; Thiis v. Byers, L. R. 1 Q. B. Div. 244; Thorn v. London, L. R. 9 Exch. 163.

Where one contracts to build a house on the land of another, and performance becomes impracticable either by reason of a latent defect in the soil, or the contract being to finish and deliver the house by a day named, by reason of the accidental destruction of the building shortly before that day, he is not excused from performance; and, performance not being excused, he cannot retain instalments paid on account. Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349; School Dist. No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Stees v. Leonard, 20 Minn. 494; Trenton School Trustees v. Bennett, 27 N. J. L. 513; Ingle v. Jones, 69 U. S. 2 Wall. 1 (17: 762).

Still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse. Jones v. United States, 96 U. S. 24, 29 (24: 645, 647); The Harriman v. United States ("The Harriman") 76 U. S. 9 Wall. 161 (19: 629); Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Booth v. Spuyten Duyvil Roll. Mill Co. 60 N. Y. 487; Youqua v. Nixon, 1 Pet. C. C. 221; Dodge v. Van Lear, 5 Cranch C. C. 278; Eddy v. Clement, 38 Vt. 486; Bacon v. Cobb, 45 Ill. 47; Hand v. Baynes, 4 Whart. 204, 33 Am. Dec. 54; Wareham Bank v. Burt, 5 Allen, 113; Harrison v. Missouri P. R. Co. 74 Mo. 364; Adams v. Nichols, 19 Pick. 275, 31 Am. Dec. 137.

Contracts whose performance depends upon the continued existence of a specified thing are discharged by the destruction of the thing from no fault of either party. Price v. Pepper, 13 Bush, 42; School Dist. No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Wells v. Calman, 107 Mass. 514, 9 Am. Rep. 65; Thomas v. Knowles, 128 Mass. 22; Lovering v. Buck Mountain Coal Co. 54 Pa. 291; Walker v. Tucker, 70 Ill. 527; Ellis v. Atlantic Mut. Ins. Co. ("The Tornado") 108 U. S. 342 (27: 747); Brumby v. Smith, 3 Ala. 123. *Contra*, Niblo v. Binsse, 3 Abb. App. Dec. 375; Whelan v. Ansonia Clock Co. 97 N. Y. 293; Cook v. McCabe, 53 Wis. 250, 40 Am. Rep. 765; Hollis v. Chapman, 26 Tex. 1; Lord v. Wheeler, 1 Gray, 282; Rawson v. Clark, 70 Ill. 656; Taylor v. Caldwell, 3 Best & S. 826.

The accidental destruction of a leasehold building, or the tenant's occupation being otherwise interrupted by inevitable accident, does not determine or suspend the obligation to pay rent. Leeds v. Cheetham, 1 Sim. 146; Lofft v. Dennis, 1 El. & Bl. 474; Gates v. Green, 4 Paige, 355, 27 Am. Dec. 68; Linn v. Ross, 10 Ohio, 412 36 Am. Dec. 95; Hallett v.

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at the usual places in the city of Jacksonville, where every person would apply for such insurance, to obtain the same.

The plaintiff, Hooper, and his attorney, Challen, knew that this property was not insurable.

2 Parsons, Contracts, 656.

The impossibility of performance which will excuse a contracting party usually occurs in cases where at the time the contract was made there was no way of carrying it out. Such cases are divided into two classes: Impossibility on the face of the agreement, or known to both parties at the time, which avoids the contract because there is no real consideration; and, second, impossibility at the time of the contract not known to either party, which may avoid the contract on account of mistake. Still another cause of impossibility of performance, is where the impossibility is known to one party only; and where it is known only to the promisee it cannot be accepted with the expectation that it will be carried out, and therefore the promise is not binding.

Lawson, Contracts, §§ 214, 419; Leake, Contracts, § 692.

A promise is not enforceable where it is to do a thing so impossible that it can form no real consideration.

Jones v. *United States*, 96 U. S. 29 (24: 647); *Clifford* v. *Watts*, L. R. 5 C. P. 588; *Scioto Fire Brick Company* v. *Pond*, 38 Ohio St. 65; *Cook* v. *Andrews*, 36 Ohio St. 178; *Dubuque S. W. R. Co.* v. *Cedar Rapids & M. R. R. Co* 66 Iowa, 366.

Defendant was not responsible, in any event, for the amount of the insurance, not having contracted as an insurer.

The charge of the court as to the damages therefore was erroneous.

Lancaster Mills v. *Merchants' Cotton Press Co.* 89 Tenn. 1.

The court authorized the jury to find the value of the property from their own experience, which was error.

Proffatt, Jury Trials, §§ 369, 371, 372; *Benjamin* v. *Hillard*, 64 U. S. 23 How. 149 (16: 518).

Mr. **James R. Challen,** for defendants in error:

Where the transaction is complete and nothing remains to be done by the party seeking relief, the plea of *ultra vires* is not available by the corporation in an action brought against it for not performing its side of the contract.

Union Gold Min. Co. v. *Rocky Mountain Nat. Bank*, 96 U. S. 64 (24: 649); *Union Nat. Bank* v. *Matthews*, 98 U. S. 621 (25: 188); *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 (20: 199); *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 358 (20: 430); *York & M. L. R. Co.* v. *Winans*, 58 U. S. 17 How. 30 (15: 27).

Wylie, 3 Johns. 44, 3 Am. Dec. 457; Peterson v. Edmondson, 5 Harr. (Del.) 378; Niedelet v. Wales, 16 Mo. 214; Fowler v. Bott, 6 Mass. 63; Robinson v. L'Engle, 13 Fla. 482.

A contract whose performance depends upon the personal capacity of the parties is discharged by their death or incapacitating illness. Hall v. Wright, El. Bl. & El. 793; Robinson v. Davison, L. R. 6 Eq. 269.

Where a contract creates between the parties merely a personal relation, the death of either dissolves it—as, for instance, a contract whereby a party agrees to receive and sell machines for the manufacturer. Howe Sewing Mach. Co. v. Rosenstell, 24 Fed. Rep. 583.

One who prevents the performance of a condition of a contract, or makes it impossible by his own act, cannot take advantage of the nonperformance. Grand Lodge A. O. U. W. v. King, 10 Ind. App. 639.

One who is prevented from performing a contract with a city by the acts of its officers and agents in the line of their duty may abandon the contract and sue for damages. Mahon v. New York, 10 Misc. 664.

A breach of contract which will justify the party not in default in abandoning performance and suing for damages on account of a breach by the other need not be of such a character as to render the further execution of the contract by him impossible, but if the other party refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is in legal effect a prevention of performance by the other party. Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33.

Recovery cannot be had for breach of a contract for the charter of a steamer for a specified day at a designated price, half to be paid three days before the steamer sails, and the remainder on the day of sailing, unless the first payment is made or tendered at the specified time. Goff v. Pacific Coast S. S. Co. 9 Wash. 386.

A contractor to drill a well may stop work and sue for breach of the contract, where the other party notifies him to stop as he does not want and will not pay for the completed work. Gabriel v. Akinsville Pressed Brick Co. 57 Mo. App. 520.

A contractor to drill an artesian well may recover for the work done, where by arrangement between the parties, upon his deeming it impossible to drive a pipe of a certain size deeper, the owner assumed the responsibility of driving such pipe, and its collapse renders further performance of the contract impossible. Charleston Ice Mfg. Co. v. Joyce, 25 U. S. App. 89, 63 Fed. Rep. 916.

One engaged as leader of an orchestra to consist of sixteen persons including the leader's brother cannot recover a sum deducted from the contract price on account of the brother's absence, where the latter voluntarily leaves his employ and the leader is prevented by the other party to the contract from securing another person in his place. Lajos v. Eden Musee Am. Co. 10 Misc. 148.

An employee who releases his employer from liability for injuries in consideration of permanent employment cannot recover for breach of such contract, where an appointment is given him to a position within the contract, and he refuses to accept it, although notice of such appointment is delayed one day. Chicago, B. & Q. R. Co. v. Cochran, 42 Neb. 531.

No tender need be made and kept good under a contract for the conveyance of land providing for delivery of a deed upon the payment of money, where it appears from the declaration of the other party to the contract that it would be a vain and idle ceremony to make the tender and demand the deed. Watson v. White, 152 Ill. 364.

A contractor may recover as upon a performance, where the other party has forbidden performance or interfered therewith to an extent amounting to refusal of performance. Halpin v. Manny, 57 Mo. App. 59.

A recovery upon a building contract is not prevented by failure to complete the building within the time specified, where the delay is caused by the owner. Murphy v. Strickley Simonds Co. 82 Hun, 158.

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A corporation may do any legitimate act which secures, promotes, or insures its existence or its legitimate profits. If it has been executed, the corporation will not be heard to plead want of power.

Taylor v. *Chichester & M. R. Co.* L. R. 2 Exch. 356; *Robins* v. *Embry*, 1 Smedes & M. Ch. 268.

Corporate powers are derived from the legislature either by express grant in words or by necessary and reasonable implication.

State v. *Florida C. R. Co.* 15 Fla. 690; *Parish* v. *Wheeler*, 22 N. Y. 494; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 (25: 950).

In all the cases holding *ultra vires* in a corporation where one side has enjoyed the usufruct of a contract admittedly *ultra vires*, the other side is not forbidden to recover its consideration or to be restored to its rights.

When the act is committed the corporation shall not be shielded from the consequences of it.

Bissell v. *Michigan S. and N. I. R. Cos.* 22 N. Y. 358; Field, Ultra Vires, 117, 129, 132, 133, 136; *Silver Lake Bank* v. *North*, 4 Johns. Ch. 370; *Southern L. Ins. & T. Co.* v. *Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Toledo, W. & W. R. Co.* v. *Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484; *Brown* v. *Winnisimmet Co.* 11 Allen, 326.

A corporation may enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary in the care and management of its property.

Straus v. *Eagle Ins. Co.* 5 Ohio. St. 59; *Buffett* v. *Troy & B. R. Co.* 40 N. Y. 168; *Arnot* v. *Erie R. Co.* 5 Hun, 608; *Downing* v. *Mount Washington Road Co.* 40 N. H. 230; *City Fire Ins. Co. of Hartford* v. *Carrugi*, 41 Ga. 660.

General words used in a corporate contract, which admit a double construction, must be construed consistently with the charter.

Morris & E. R. Co. v. *Sussex R. Co.* 20 N. J. Eq. 542; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62, 20 Am. Rep. 504.

Impossibility of performance is an impossible plea. As it is not against the nature of things that a hotel may be insured, there is nothing apparent of record to justify the plea.

Benj. Sales, Am. notes to §§ 530 to 609, p. 653.

The plea to be good must be a real impossibility, and not merely a very great inconvenience, hardship, or impracticability.

Oakley v. *Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *United States* v. *Smoot* ("*Smoot's Case*") 82 U. S. 15 Wall. 36 (21: 107); *Jones* v. *United States*, 96 U. S. 24 (24: 645).

An instrument purporting throughout the body thereof to be a mortgage of personal property by a corporation is the deed of the corporation although signed by the president only, with his own name and title, and sealed with his individual seal.

Sherman v. *Fitch*, 98 Mass. 59; *Lay* v. *Austin*, 25 Fla. 933; *South Baptist Soc.* v. *Clapp*, 18 Barb. 36; *Bank of Columbia* v. *Patterson*, 11 U. S. 7 Cranch, 306 (3: 353).

Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie.

Bank of England v. *Moffat*, 3 Bro. Ch. 262; *Rex* v. *Bank of England*, 2 Dougl. 524, and note; *Gray* v. *Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Worcester Turnp. Corp.* v. *Willard*, 5 Mass. 80, 4 Am. Dec. 39; *Gilmore* v. *Pope*, 5 Mass. 491; *Andover & M. Turnp. Corp.* v. *Gould*, 6 Mass. 40, 4 Am. Dec. 80; *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 67 (6: 553); *Harper* v. *Charlesworth*, 4 Barn. & C. 575; 1 Parsons, Contracts, 139.

In this country, the old rule as to seals has almost if not entirely disappeared.

Danforth v. *Schoharie & D. Turnp. Co.* 12 Johns. 227; *Commercial Bank* v. *Kortright*, 22 Wend. 348; *American Ins. Co.* v. *Oakley*, 9 Paige, 496, 38 Am. Dec. 561; *Fourth School Dist.* v. *Wood*, 13 Mass. 199; *Proprietors of Canal Bridge* v. *Gordon*, 1 Pick. 297, 11 Am. Dec. 170; *Chestnut Hill Turnp. Co.* v. *Rutter*, 4 Serg. & R. 16, 8 Am. Dec. 675; *Union Bank* v. *Ridgely*, 1 Harr. & G. 324; *Legrand* v. *Hampden Sidney College*, 5 Munf. 324; *Elysville Mfg. Co.* v. *Okisko Co.* 5 Md. 153; *Episcopal Charitable Soc.* v. *Episcopal Church*, 1 Pick. 372; *Hayward* v. *Pilgrim Soc.* 21 Pick. 270; *Randall* v. *Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *Foster* v. *Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168.

If the body of the lease affirms it is sealed, that is proof of sealing.

2 Greenl. Ev. § 296.

When the lease contains a covenant on the part of the lessee to insure the demised premises, with a stipulation that he shall have the right to use the proceeds in rebuilding in the event of loss, the assignee of the reversion is entitled to its benefit, and the assignee of the term subject to its burden, although assigns are not named.

Masury v. *Southworth*, 9 Ohio St. 340; Platt, Covenants, 3 Law Lib. 81; *Thomas* v. *Von Kapff*, 6 Gill & J. 372; *Vernon* v. *Smith*, 5 Barn. & Ald. 1; *Norman* v. *Wells*, 17 Wend. 136; *Kellogg* v. *Robinson*, 6 Vt. 276, 27 Am. Dec. 550; Taylor, Landlord & Tenant, 167.

The covenant to insure may run with the land if the money realized is to be expended in rebuilding or repair.

Masury v. *Southworth*, 9 Ohio St. 341.

The opinions of experts, however intelligent and trustworthy, do not bind the conscience of the court.

The Iberia, 40 Fed. Rep. 893; *Van Wyckler* v. *Brooklyn*, 118 N. Y. 424; *Shelley* v. *Austin*, 74 Tex. 608; *Schmieder* v. *Barney*, 113 U. S. 645 (28: 1120).

A corporate seal is only necessary to convey lands. This may be altered at pleasure.

McClellan, Dig. 228, § 3.

Mr. Justice **Shiras** delivered the opinion of the court:

The nineteen assignments of error may be classified as follows: Those which raise questions as to the sufficiency of the proof of the due execution by the defendant of the contract sued on; those which deny the competency of the railroad company to enter into such a contract; those which deal with the question whether the defendant was relieved from lia-

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bility on its covenant to insure by reason of alleged impossibility to comply therewith; finally, those alleging error in the admission of evidence, and in certain portions of the charge,—particularly in respect to the measure 517] of damages. *We shall discuss these alleged errors in the order thus mentioned.

The declaration was in covenant, and contained, as an attached exhibit, what was alleged to be a certified copy of the contract sued on, the final clause whereof was as follows:

"In witness whereof the parties hereto have hereunto set their hands and seals this day and year above written.

"Jacksonville, Mayport, Pablo Railway & Navigation Company, [Seal.]
"By Alex. Wallace, President.
"Wm. F. Porter, [Seal.]
"By H. H. Hooper, Jr., Att'y in fact.
"H. H. Hooper, [Seal.]
"Mary J. Hooper, [Seal.]"

The attesting clause was as follows:

"Signed, sealed, and delivered in the presence of us.

"H. H. Burkman,
"H. H. Bowne.
As to R. R. Co., H. H. Cooper, and W. F. Porter.
"John Mulholland,
"Sam'l E. Duffy,
As to Mary J. Hooper."

The defendant demurred on several grounds, one of which was as follows:

"That attached to the said declaration is a paper purporting to be the contract which is the basis of this suit, which paper is alleged to be a lease between the defendant company and the plaintiffs, and which paper is referred to in each and every count of said declaration, and asked and prayed and made a part of said declaration; that each and every count of said declares in covenant, and yet the same contains on the face thereof and the face of the paper made part thereof that the said cause of 518]action will not lie because the said *paper is not under seal; that there is no seal of the defendant company to said paper."

The theory of this demurrer appears to be that there should have been an averment on the face of the instrument that the seal attached, on behalf of the company, was its common or corporate seal. However, there was an averment that the parties had set their hands and seals to the paper, and the attesting clause alleged that the railroad company had signed, sealed, and delivered in the presence of two witnesses, who signed their names thereto. On demurrer this was plainly sufficient.

But it is urged in the third and fourth assignments that it was error to permit to be put in evidence the certified copy of the lease, as likewise the duplicate lease, because they were not shown to be under the seal of the company, but appeared to be under the private seal of Alexander Wallace, the president of the company. But, in the absence of evidence to the contrary, the scroll or rectangle containing the word "seal" will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure.

In *Pillow* v. *Roberts*, 54 U. S. 13 How. 472 [14: 228], this court, through *Mr. Justice* Grier, when discussing an objection that an instrument read was improperly admitted in evidence because the seal of the circuit court authenticating the acknowledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance," said: "It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff." *Pierce* v. *Indseth*, 106 U. S. 546 [27: 254], is to the same effect.

*Whether an instrument is under seal[519 or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper. *Hacker's App.* 121 Pa. 192, 1 L. R. A. 861; *Pillow* v. *Roberts*, *supra*.

The defendant did not produce the original in order that it might be compared in the particular objected to with the copy and duplicate offered. The defendant's attorney, Mr. Buckman, was called, and testified that he was one of the attesting witnesses to the instrument offered, and that he, as a notary public, took the acknowledgment thereto of Alexander Wallace, that he executed the same for and in behalf of the company, and that the said lease was the act and deed of the defendant company for the uses and purposes therein expressed.

Whether, therefore, the instrument put in evidence was merely a copy, in which event it would not be expected that a wax or stamped seal of the company would appear upon it, but merely a scroll, representing the original seal, or whether the so-called copy was really the original paper, as certified by one of defendant's witnesses, would not, in our opinion, be material. The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question.

As respects those portions of the objections that raised the question as to the authority of the president to execute the contract in question, there was, besides the presumption that would arise out of the signing, sealing, and delivering of the instrument, evidence that the company exercised acts of ownership and control over the demised premises, took charge of them by their superintendent, took an inventory of the property, rented the hotel portion to a third party, received money rent therefor, gave a receipt therefor under the seal of the company, opened a hotel account on their cash book, which showed receipts for rent from the tenant and expenditures for moving the hotel and for making improvements therein, and *there was evidence adduced by[520

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the defendant itself of efforts to get the property insured in pursuance of their contract.

An exception was taken by the defendant to the action of the court in permitting Mrs. Roberts, the company's tenant, to testify to statements made to her by Alexander Wallace, the president of the company, the ground of objection being that Wallace was dead at the time of the trial. Statements made by the president, if relevant to the controversy, would be competent to affect the company, even if he were dead at the time of the trial. In the present case, it was relevant to show that the witness, when about to rent the hotel, was told by the president to go to Mr. Warriner, the secretary of the company, to whom she paid one month's rent, and who gave her a receipt therefor, with the corporate seal attached. The witness was not a party to nor interested in the suit, nor was the president or his executor or administrator. The admissions made by the president, subsequently, in a casual conversation, as to his ineffectual efforts to get the hotel insured, could scarcely be regarded as relevant and competent to affect the company. But the error, if such it were, in permitting such statements to be received, was rendered immaterial by the action of the company, in adducing affirmative evidence, in its own behalf, to the very same effect, namely, the efforts made by the company and its officers to procure insurance.

Complaint is made of the action of the court in rejecting the offer of the defendant's by-laws for the purpose of showing want of authority to make the lease sued on without the consent of the stockholders or board of directors, and the accompanying offer of the minutes, which did not disclose that any such authority had been granted.

In considering what weight should be given to the error assigned to the rejection of the by-laws, we have a right to advert to the copy of them contained in the bill of exceptions. There we learn that the powers conferred upon the president were in the following terms:

"The president shall preside at all meetings of the board of directors and of the company (of which he shall be president), and shall have the general management and supervision of the 521] *operation of the lines of road of said company and the general business thereof; subject, however, at all times to the control of the board of directors. He shall, when so directed and empowered by the board of directors, execute and sign for and on behalf of said company all documents and writings authorized to be made and executed for and on its behalf. He shall draw and issue all warrants for the payment of moneys on the treasurer of said company when so ordered by the board, and sign the same. He shall make an annual report to said company of the condition thereof, with such suggestions and recommendations as he may deem proper, and to said board of directors whenever required by them; and shall do and perform such other duties as are consistent with said office, and others of a like nature pertaining thereto."

This by-law appears to describe the powers and duties usually possessed by presidents of railroad companies, and we are therefore relieved from considering what would have been the effect of an unusual restriction on the powers of such an officer, and whether those dealing with a railroad company would be obliged to take notice of such unusual restriction.

The question, therefore, we have to consider is whether the admission in evidence of the by-law would have affected the result reached by the court and jury in the case.

Assuming, for the present purpose of the discussion, that the subject-matter of the contract in question was within the legitimate scope of the company's powers, we think the facts and circumstances shown by the evidence disclose a case in which the company would be bound, notwithstanding there was no proof that the president was expressly authorized to make the contract by a previous resolution of the board. The evidence was undisputed that after the execution of the lease the company took possession of the demised premises, rented to a third party the hotel portion thereof, and received and receipted for rent of the hotel.

The case, in this particular, resembles and falls within the principle of *Eureka Clothes Wringing Mach. Co.* v. *Bailey Washing & W. Mach. Co.* 78 U. S. 11 Wall. 488 [20: 209], where the binding force of a contract was denied for alleged want of *authority of an[522 agent to make the same, and this court, through *Mr. Justice* Miller, held:

"We are satisfied that the agreements set up in the bill are the valid contracts of the defendant. Though the plaintiff was unable to produce any resolution or order in writing by the trustees or board of directors of the defendant corporation, and though the seal used was the private seal of one of it officers, instead of the corporate seal, neither of these is essential to the validity of the contract. We entertain no doubt that Rindge, the agent and one of the directors and treasurer of the Eureka company, was authorized to execute the agreement, and, if any doubt existed on that point the report and payment for five hundred machines, the first month's use of the patent under that agreement, would remove the doubt. If it did not, it would very clearly amount to a ratification."

In *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 83 [6: 559], it was held that where a cashier was appointed and permitted to act in his office, for a long time, under the sanction of the directors, it was not necessary that his official bond should be accepted as satisfactory by the directors according to the terms of the charter, in order to enable him to enter legally on the duties of his office or to make his sureties responsible for the nonperformance of their duties; that the charter and the by-laws are to be considered, in this respect, as *directory* to the board, and not as *conditions precedent;* and *Mr. Justice* Story, in discussing the subject, said: "A board may accept a contract, or approve a security, by a vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof by parol evidence than if it were reduced to writing. But surely this is not a sufficient reason for declaring that the vote or assent is inoperative." See also *Pittsburg, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.* 131 U. S. 371, 381 [33: 157, 160].

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As, then, the contract in question was, upon our present assumption, within the legitimate scope of the powers of the company, was executed by that officer of the company who by the by-laws was the proper agent to perform such function, and as the company went into possession of and received the rents and profits of 523] the hotel, we conclude that the *company was bound thereby, even if the minutes of the company fail to disclose authority expressly given to the president to execute the contract.

It is, however, further claimed that the contract sued on was not within the legitimate powers of the company.

This is not a case in which, either by its charter, or by some statute binding upon it, the company is forbidden to make such a contract. Indeed, the public laws of Florida, referring to the powers of railroad companies, provide that every such corporation shall be empowered "to purchase, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of its road and canal and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to sell, lease, or buy any land or real estate not necessary for its use." McClellan's Fla. Dig. Laws, p. 276, § 10. They are likewise authorized "to erect and maintain all convenient buildings, wharves, docks, stations, fixtures, and machinery for the accommodation and use of their passengers and freight business."

Although the contract power of railroad companies is to be deemed restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may become useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers whom it is its duty to transport.

Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company, within its chartered powers, and to contribute to the comfort of those who travel thereon. To lease and maintain a summer hotel at the seaside terminus of a railroad might obviously increase the business of the company and the comfort of its passengers, and be within the provisions of the statute of Florida above cited, whereby a railroad company is authorized "to sell, lease, or buy any land or real estate not necessary for its use," and to "erect 524] and maintain all *convenient buildings . . . for the accommodation and use of their passengers."

Courts may well be astute in dealing with efforts of corporations to usurp powers not granted them, or to stretch their lawful franchises against the interests of the public. Nor would we be understood to hold that, in a clear case of the exercise of a power forbidden by its charter, or contrary to public policy, a railroad company would be estopped to decline to be bound by its own act, even when fulfilled by the other contracting party. *Davis* v. *Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25: 950]; *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 24 [35: 55]. So, too, it must be regarded as well settled, on the soundest principles of public policy, that a contract by which a railroad company seeks to render itself incapable of performing its duties to the public, or attempts to absolve itself from its obligation without the consent of the state, is void, and cannot be rendered enforceable by the doctrines of estoppel. *York & M. L. R. Co.* v. *Winans*, 58 U. S. 17 How. 30 [15: 27]; *Thomas* v. *West Jersey R. Co.* and *Central Transp. Co.* v. *Pullman Palace Car Co. supra.*

We do not seek to relax, but rather to affirm, the rule laid down by this court in *Central Transp. Co.* v. *Pullman Palace Car Co.*, above cited, that "a contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." 139 U. S. 59, 60 [35: 68, 69].

But we think the present case falls within the language of Lord Chancellor Selborne, in *Attorney General* v. *Great Eastern R. Co.* L. R. 5 App. Cas. 478, where, while *declaring 525] his sense of the importance of the doctrine of *ultra vires*, he said: "This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*." In the application of the doctrine the court must be influenced somewhat by the special circumstances of the case. As was said by Romilly, M. R. in *Lyde* v. *Eastern Bengal R. Co.* 36 Beav. 10, where was in question the validity of a contract by a railway company to work a coal mine: "The answer to the question appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coal to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the court drew from the evidence."

The principle upon which we may safely rule the present question is within the case of *Brown* v. *Winnisimmet Co.* 11 Allen, 326. There a contract made by the treasurer of a ferry company to lease one of the company's boats for a certain money consideration was alleged to be void for want of antecedent authority given by the company to the treasurer,

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and also because such a contract was not made in the legitimate exercise of the company's powers. On the first point it was ruled that, from evidence showing ratification by the company, it was proper for the jury to infer that the treasurer had been duly authorized to make the contract, and, disposing of the second question, the court, through Chief Justice Bigelow, said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or 526] transactions *not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created." See also *Davis* v. *Old Colony R. Co.* 131 Mass. 258, 272, 41 Am. Rep. 221.

The contract between the parties hereto was for leasing a hotel at the terminus of the railroad, situated at a beach, distant from any town. If not fairly within the authority granted by the statute of Florida "to erect and maintain all convenient buildings . . . for the accommodation and use of their passengers," it certainly cannot be said to have been forbidden by such laws. Nor can it be said to have been, in its nature, contrary to public policy.

To maintain cheap hotels or eating houses at stated points on a long line of railroad through a wilderness, as in the case of the Pacific railroads, or at the end of a railroad on a barren, unsettled beach, as in the present case, not for the purpose of making money out of such business, but to furnish reasonable and necessary accommodations to its passengers and employees, would not be so plainly an act outside of the powers of a railroad company as to compel a court to sustain the defense of *ultra vires*, as against the other party to such a contract.

But even if the railroad company might be answerable for the rent of the premises, it is contended that the covenant to procure insurance was so far outside of the company's powers as not to be enforceable.

No one could deny that it would not be competent for a railroad company, without the authority of the legislature, to carry on an insurance business. But this covenant to keep the premises insured is correlative to the obligation of the lessors to rebuild in case the hotel should be destroyed by fire, and to the provision that, in such an event, the rents should cease until the hotel should be put in habitable 527] condition and repair *by the lessors. Such mutual covenants are quite usual in leases of this kind, and are merely incidental to the principal purpose of the contract.

Suppose the contract proved and the defense of *ultra vires* deemed inadmissible, it is claimed by the railroad company that it is not liable in damages for its failure to procure the insurance, because it was unable to get the insurance; that its contract, in that particular, was impossible of performance.

There is such a defense known to the law as an impossibility of performance. Instances of such a defense are found in cases where the subject-matter of the contract had ceased to exist, as where there was a contract of sale of a cargo of grain supposed by the parties to be on its voyage to England, but which, having become heated on the voyage, had been unloaded and sold, and where it was held that the contract was void, inasmuch "as it plainly imputed that there was something which was to be sold and purchased at the time of the contract," whereas the object of the sale had ceased to exist. *Couturier* v. *Hastie*, 5 H. L. Cas. 673; *Allen* v. *Hammond*, 36 U. S. 11 Pet. 63 [9: 633].

So, also, where a person purchased an annuity which, at the time of the purchase, had ceased to exist owing to the death of the annuitant, it was held that he could recover the price which he had paid for it. *Strickland* v. *Turner*, 7 Exch. 208.

So, where there is obvious physical impossibility or legal impossibility which is apparent on the face of the contract, the latter is void.

But the present case does not fall within either of these classes, but is a case of impossibility of performance arising subsequently to the making of the contract.

Here, the general rule is that such impossibility, even though it arises without any fault on the part of the covenantor, does not discharge him from his liability under the contract. "The principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this *will[528 excuse performance. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts,—not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function." *The Harriman* v. *Emerick* ("*The Harriman*") 76 U. S. 9 Wall. 172 [19: 633]. Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by the party, nor was within his control." *Jones* v. *United States*, 96 U. S. 29 [24: 646].

It appears that there was some evidence to the effect that, prior to the making of the lease, the owners of the hotel had some conversation with one or more insurance agents, who refused to insure the hotel building, and upon this evidence the defendants asked the court to charge the jury that if the plaintiffs knew that the property, at the time of the making the contract, was not insurable, or, if knowing

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that they had tried to get insurance and failed, they did not so notify the defendants, then the plaintiffs acted in bad faith, and should not be permitted to recover. The court refused to so charge and very properly. The evidence disclosed by the record, even if believed by the jury, would not have justified a verdict that the plaintiffs acted in bad faith. It is not shown that they made any false representations on the subject, and the very fact that they demanded a covenant to procure insurance from the defendant put the latter on inquiry as to its ability to procure it.

Error is alleged in the refusal of the court to charge that "if the jury believed from the evidence that insurance on the property in question was sought to be obtained at the usual places where such insurance would be applied for, and such agencies applied to, representing the companies insuring property in all parts of the United States, refused to insure the property on the ground that such property **529**] was not insurable and *insurance companies would not insure such classes of property, then the agreement to insure was impossible of performance, and plaintiffs could not recover."

We are not furnished in this record, by any bill of exceptions or by a certificate of the judge, with all the evidence on which this request to charge was based, but assuming that the evidence contained in the bill of exceptions was all that there was, it would have been error in the court to have given the instruction prayed for. That evidence is very far from disclosing the state of facts assumed in the request. Two or three insurance agents, resident in the city of Jacksonville, testified that on one or two occasions, whose dates they could not fix, there had been inquiries made by some one representing the defendant about insurance. Giving the utmost effect to the testimony, it altogether failed to show such a case of impossibility as would, under the authorities, have discharged the defendant from the obligations of his contract; and we think the court would not have erred in so charging the jury. However, the court left the question as one of fact to the jury, and we perceive no misdirection in his remarks.

It remains to consider the question of the measure of damages and some objections made to the charge of the court on that subject.

If the defendant subjected itself, by a valid contract, to keep the premises insured in the sum of $6,000 during the term of the lease, and without sufficient cause failed to do so, and if the hotel was worth the sum mentioned, and was wholly destroyed by fire, the extent of the defendant's liability would obviously be the amount of the plaintiff's damages, namely, $6,000.

It is argued that the defendant received no consideration for agreeing to insure the property; that it contracted to pay the costs of insurance as part of the rental, and the cost of the premium of insurance was the proper measure of recovery. The obligation of the lessors to rebuild and repair in case of fire, and the suspension of the rent so long as the premises remained uninhabitable, formed the consideration of the defendant's agreement to insure; **530**] and we cannot accept the *proposition that the plaintiff's damages arising out of the breach of the contract are to be measured by what it would have cost the defendant to secure the stipulated insurance.

Complaint is made of the observations made by the judge when instructing the jury as to the weight which they should give to the testimony in relation to the value of the property. The testimony was somewhat conflicting, and the remark chiefly criticised was to the effect that, in coming to a conclusion, the jury should consider the testimony in the light of their own experience and knowledge. We do not regard such a caution as objectionable.

In deciding upon disputes between litigant parties, where witnesses are naturally apt to state facts strongly in favor of their respective principals, the jury well may, and, in fact, must, use their own knowledge and experience in the ordinary affairs of life to enable them to see where is the truth. This is particularly true where, as in the present case, the conflict was in matter of opinion as to the value of a building no longer in existence.

The plaintiffs conceded that all the rent had been paid except $106.67, which in the declaration was demanded. The defendant gave no evidence on the subject, and in such a state of the record and of the evidence we think no error was committed by the court in charging the jury that they could find for the plaintiffs the amount of rent demanded, unless the defendant showed that it had been paid.

These views cover all the assignments of error which we deem worthy of notice, and *the judgment of the court below is affirmed.*

ELLA L. LAING, *Plff. in Err.*, [**531**
v.
THOMAS G. RIGNEY.

(See S. C. Reporter's ed. 531-545.)

Questions of law—law of the state—opinion of an expert witness—effect of appearance—due process of law.

1. Exceptions to alleged findings of facts, because unsupported by evidence, present questions of law reviewable in courts of error.
2. In the absence of any state statute or decision on the subject the final decree of the chancery court of New Jersey, based upon an original bill, the process under which was served upon the defendant within the state, and upon a supplemental bill, a copy of which, with a rule to plead, was served upon the defendant without the state, must be deemed to express the law of the state.
3. The opinion of an attorney as an expert witness that the chancellor of New Jersey erred in thinking that jurisdiction over the defendant personally was conferred by the service on him within the state of the subpœna under the original bill, and by the service on him without the state of a copy of the supplemental bill and of a rule to plead, is insufficient to show the law of the state as against the chancellor's judgment in

NOTE.—*As to effect of appearance to cure defects in service of process, its nonservice, and want of jurisdiction of subject-matter*, see note to Knox v. Summers, 2: 510.

As to what is due process of law, see note to Pearson v. Yewdall, 24: 436.

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the case that, under the laws and practice of the state, the defendant was in his court, subject to its jurisdiction and bound by its decrees.

4. Where the defendant, after the entry of a decree against him in a state court, appears in the court by counsel and procures a modification of the decree, he cannot successfully attack the decree collaterally in a court of different jurisdiction, but his remedy, if any, is by appeal.

5. Defendant's appearance by counsel, being not to object to the jurisdiction of the court, but to effect a change in the recitals of the decree on nonjurisdictional grounds, precludes him from contending that he has been deprived of his property without due process of law, within the meaning of the Federal Constitution.

[No. 79.]

Argued and Submitted November 21, 1895. Decided January 13, 1896.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court entered in pursuance of a judgment of the Court of Appeals of that State affirming the judgment of the Special Term of the Supreme Court, dismissing the complaint in an action brought by Ella L. Laing, plaintiff, against Thomas G. Rigney, on a final decree of the New Jersey Court of Chancery, which awarded to the plaintiff certain costs, counsel fees, and alimony, as well as a decree of divorce. *Reversed, and case remanded for further proceedings.*

See same case below, 127 N. Y. 412.

Statement by *Mr. Justice* **Shiras:**

This was an action brought on August 4, 1887, in the supreme court of the state of New York against Thomas G. Rigney, on a final decree of the court of chancery of the state of New Jersey, whereby had been awarded to Ella L. Rigney, now Ella L. Laing, certain costs, counsel fees, and alimony, as well as a decree of divorce.

The action was tried at a special term of the supreme court, before a judge without a jury, and resulted in a judgment dismissing the complaint. An appeal was taken to the general term of the supreme court, and there the judgment of the special term was reversed. From the judgment of the general term an appeal was taken to the court of appeals of the state of New York, which court reversed the judgment of the general term, and affirmed that of the special term. 127 N. Y. 412. This decision of the court of appeals was duly remitted to the supreme court, and a judgment in accordance therewith was entered November 4, 1891, which, by a writ of error, has been brought to this court.

It appears that these parties were married in the state of New York on February 12, 1873, and continued to reside in that state until January, 1877, when they removed to the city of Elizabeth, in the state of New Jersey. They had two children, a girl and a boy, who were fourteen and eleven years old respectively at the time of the trial. In January, 1883, the defendant ceased to support his family, and subsequently abandoned his family.

On April 23, 1883, she, then being a resident of the state of New Jersey, filed a bill against the defendant in the court of chancery of that state wherein she alleged that the defendant, *whose legal residence was still in the [533 city of Elizabeth, had committed adultery with several persons on different occasions in the city of New York, and prayed for an absolute divorce and for alimony. On August 4, 1883, the defendant appeared in the suit, by his solicitors and counsel, and filed an answer denying the allegations of adultery in the bill.

On May 18, 1886, the plaintiff filed a supplemental bill in the divorce suit, wherein she alleged that the defendant had committed adultery with a person named in the city of New York, at various times since the commencement of the suit, and prayed that she might have the same relief against the defendant "as she might have had if the facts stated and charged by way of supplement had been stated in the original bill," and that the marriage be dissolved and a suitable allowance made to her as alimony.

On April 29, 1887, an order was made by the chancellor of New Jersey reciting the appearance and answer of the defendant to the original bill, the filing of the supplemental bill, the issuing of a subpœna thereon, and that, the defendant residing out of the state of New Jersey, process could not be served upon him, and directing that the defendant appear and plead, demur, or answer, to the supplemental bill on or before May 18, 1887, or that in default thereof such decree be made against him as the chancellor should deem equitable and just, and further directing that a copy of the order, with a certified copy of the supplemental bill, should, within five days thereafter, be served upon the defendant personally, or, in default of such service, that notice of the order be published as therein directed. On May 4, 1887, a copy of this order and of the supplemental bill was served on the defendant personally in the city of New York.

On May 19, 1887, an order was made by the chancellor, reciting that due notice of the order of the court of April 29, directing the defendant to appear and answer the said bill on or before May 18, had been duly served, with a copy of the supplemental bill, "as in said order and by the rules of this court directed and prescribed," and that the defendant had not answered the same within the time limited by law *and said order, and re- [534 ferring the case to a special master to ascertain and report on evidence as to the truth of the allegation of the said bill and his opinion thereon.

On June 10, 1887, the special master reported to the court that all material facts charged in the bill and supplemental bill were true, and that a decree of divorce should be granted as prayed for.

On June 11, 1887, a final decree was rendered by the chancellor, confirming the report, granting a divorce, and awarding costs, counsel fees, and alimony. The decree found "that the said defendant has been guilty of the crime of adultery charged against him in the said bill of complaint and the supplemental bill thereto," and it was "ordered, adjudged, and decreed that the said complainant, Ella L. Rigney, and the said defendant, Thomas G. Rigney, be divorced from the bond of

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matrimony for the cause aforesaid, and the marriage between them is hereby dissolved accordingly, and the said parties are hereby freed and discharged from the obligations thereof." It was further adjudged and decreed that the custody of the children be awarded to the plaintiff, and that the defendant pay alimony *pendente lite* at the rate of $100 per month "from the filing of the bill up to the date of this order," and thereafter at the rate of $45 per week, together with the costs of the suit, and the sum of $150 for counsel fees.

It appears by the record that in January, 1888, shortly before the trial of the present case, which occurred in April, 1888, the defendant, by the solicitor who had appeared for him and filed his answer to the original bill in the divorce suit, applied for and obtained from the chancellor an amendment of the decree of June 11, 1887, by striking out from the recitals thereof the words "*bill of complaint and the*," and "*thereto*," so as to make the recital read, "and that the said defendant has been guilty of the crime of adultery charged against him in the supplemental bill." In other respects the amended decree was precisely the same as the original, and as amended was enrolled by the procurement and at the cost of the defendant.

535] *As already stated, on August 4, 1887, Mrs. Rigney brought this action in the supreme court of New York upon the final decree of the court of chancery of New Jersey to recover the amount awarded by the decree for alimony and costs, no part of which had been paid. The complaint, served December 3, 1887, set forth the proceedings and final decree of June 11, 1887, as they are above stated; and it further alleged that the defendant, accepting the force of the decree of the New Jersey court, had on September 18, 1887, married one Abbie Ahern. The complaint also alleged that on or about May 4, 1887, a copy of the said supplemental bill and a copy of the order for publication thereof were duly served upon the defendant, in the city of New York, by the delivery thereof to him personally.

The defendant, in his answer, admitted "the making of the order of May 2, 1887, and the service thereof and of the supplemental bill upon him," but alleged that as said service was made in the state of New York, and not in the state of New Jersey, the court of chancery of New Jersey, by such service, obtained no jurisdiction to make any personal decree against him on the supplemental bill. The terms of the answer, in this particular, were as follows:

"This defendant denies that said court of chancery of New Jersey ever obtained jurisdiction of the person of this defendant under said supplemental bill or had any power to enter a personal decree against him; and he denies that such decree, so far as it is a personal decree against this defendant, is of any validity or effect; but he admits that said decree was effectual to dissolve the marriage status existing between him and the plaintiff."

The answer admitted the truth of the allegations of the complaint that the defendant, acting on the assumption of the validity of the decree of divorce, had, on September 18, 1887, married another woman, and that said marriage had been solemnized in the state of New Jersey and also in the state of New York.

Mr. **J. Hubley Ashton** for plaintiff in error.

Mr. **Hamilton Wallis** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

The Federal question presented by this record is whether the judgment of the New York courts, in dismissing plaintiff's complaint, which sought to enforce a final decree of the court of chancery of New Jersey, gave due effect to the provisions of article 4 of the Constitution of the United States, which require that full faith and credit shall be given in each state to the judicial proceedings of every other state.

The record discloses, and it is conceded, that, upon its face, the decree of the court of chancery of New Jersey purports to be a final decree, granting the divorce, and adjudging the payment of the costs and alimony to recover which this suit was brought.

But the defendant seeks to avail himself of the well-settled doctrine that it is competent for a defendant when sued in the court of his domicil on a judgment obtained against him in another state, to show that the court of such other state had not jurisdiction to render the judgment against him. To sustain this position in this court the defendant relies upon the sixth finding of the trial court, which was as follows: "That the above-named defendant was never served with process in New Jersey under said supplemental bill, and never appeared therein or answered thereto, and the decree of the court of chancery of New Jersey, which was based entirely upon charges of adultery contained in said supplemental bill, did not, under the laws of that state, become binding upon said defendant personally."

It is undoubtedly true, as claimed by the defendant in error, *that if the judgment of [540 the court of chancery of New Jersey was not binding upon the defendant therein personally in that state, no such force could be given to it in the state of New York; and it is contended that, as by the sixth finding above recited, it is found that the decree was not binding personally on the defendant, under the laws of New Jersey, the court of appeals of the state of New York and this court must accept and cannot review such finding. And upon that finding the court of appeals said:

"The trial court found upon undisputed evidence that, under the laws of New Jersey and the practice of its court of chancery, jurisdiction to render a judgment for alimony and costs on the supplemental bill, enforceable in that state against the defendant, could not be acquired without service of a new subpœna in the state, or by his appearance in the action subsequent to the filing of the supplemental bill. . . . Service within the state was found to be, under the law and practice of the court of chancery of New Jersey, an indispensable prerequisite to the rendition of a

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personal judgment." *Rigney* v. *Rigney*, 127 N. Y. 415, 416.

The plaintiff duly excepted to the findings and conclusions, and it is well settled that exceptions to alleged findings of facts, because unsupported by evidence, present questions of law reviewable in courts of error.

The only evidence adduced by the defendant to sustain his side of the issue as to the law of the state of New Jersey was the testimony of Daniel M. Dickenson, an attorney and counsellor at law of the supreme court of the state of New Jersey, and who had been employed for some years as chief clerk in the chancellor's office. This witness testified that, under the law and practice of New Jersey, a supplemental bill was, as to the matter not alleged in the original bill, an independent proceeding, and that, if there were no service of the subpœna issued under the supplementary bill and no appearance, the defendant would, as to the new matter contained in the supplementary bill, not be in court; but the same witness testified that there was no statute of New Jersey in terms requiring the issuing of a subpœna on any supplemental bill, nor 541] was *he able to specify any New Jersey statute which, in his opinion, required such process to be issued on a supplemental bill in any suit in the court of chancery of that state, nor could he cite any judicial decision in that state holding such process to be necessary. He also testified that, "by the practice in New Jersey, if the decree contains the fact that he was served, prima facie he was; if it does not, why, then there is no decree binding him personally; but so long as the decree stands against him in our state, why, of course, it is a good decree." He also stated that the statute conferring jurisdiction upon the court of chancery is in the revision of the New Jersey laws under the head of "Chancery Acts."

The plaintiff put in evidence so much of the revision as related to the court of chancery and which discloses no provision whatever requiring a new subpœna to be issued on any supplementary bill filed in the court of chancery, but it does contain provisions whereby orders directing absent defendants, whether within or without the state, to respond to the bill, and, on proof of personal service of such order, the chancellor may proceed to take evidence to substantiate the bill, and to render such decree as the chancellor shall think equitable and just, and that any defendant upon whom such notice is served shall be bound by the decree in such cause as if he were served with process within the state. New Jersey Rev. Stat. 1877.

As the defendant's only expert witness testified that the rules and regulations of the chancery court were to be found in the statutes, it would seem at least questionable whether in his opinion upon the question as to how and when that court acquires jurisdiction over a defendant in an original or supplemental bill was competent evidence in the case. At all events, we do not read his testimony as alleging that where the court has already acquired jurisdiction over a defendant by personal service within the state, and then, after appearance by counsel, absents himself from the state, and when a supplemental bill is filed in the suit, service on him of a new subpœna within the state is an indispensable prerequisite to the rendition of a personal decree on such supplemental bill. *And when[542 asked directly by defendant's counsel whether such a decree would be effectual in New Jersey to bind the defendant personally, he answered: "I have never known any case decided in New Jersey upon that point."

In the absence of any statutory direction on the subject, and of any reported decision of the supreme court of that state, we are justified in finding the law to be as declared in the very case in hand, where the chancellor of the chancery court of New Jersey has entered a final decree based upon the original bill, the process under which it was served upon the defendant within the state, and upon a supplemental bill, a copy of which with a rule to plead was served upon the defendant without the state. So long as this decree stands it must be deemed to express the law of the state. If the defendant deemed himself aggrieved thereby, his remedy was by an appeal.

In *Nash* v. *Williams*, 87 U. S. 20 Wall. 226 [22: 254], where, in a circuit court of the United States, an attempt was made to destroy the effect of a judgment rendered by a county court by alleging error, this court said:

"The power to review and reverse the decision so made is clearly appellate in its character and can be exercised only by an appellate tribunal in a proceeding directly had for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had the power to make it and did make it. It is presumed to have been properly made, and the question of its *propriety was not open to[543 examination upon the trial in the circuit court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt* v. *Turner*, 83 U. S. 16 Wall. 366 [21: 348]."

The principle was very clearly expressed by *Mr. Justice* Baldwin in *Voorhees* v. *Jackson*, 35 U. S. 10 Pet. 474 [9: 500]:

"The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so.

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In the one case it is a record importing absolute verity; in the other, mere waste paper. There can be no middle character assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained even an erroneous judgment or execution."

This rule is recognized in the state of New York. In *Kinnier* v. *Kinnier*, 45 N. Y. 542, 6 Am. Rep. 132, it was said:

"A judgment of a sister state cannot be impeached by showing irregularity in the forms of proceeding or a noncompliance with some law of the state where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered."

Even if, therefore, it was the *opinion* of Mr. Dickenson, the defendant's expert witness, that the chancellor of New Jersey erred in thinking that jurisdiction over the defendant personally was conferred by the service on him, within the state, of the subpœna under the original bill, and by the service on him, without the state, of a copy of the supplemental bill and of a rule to plead, such opinion does not support the finding of the trial court that, under the laws of the state of New Jersey, the decree sued on and offered in evidence was not binding upon the defendant personally. The opinion of the chancellor differed from that [544] of the witness, and, what is more *important, his *judgment* was that, under the laws and practice of the state of New Jersey, the defendant was in his court, subject to its jurisdiction and bound by its decree.

It is contended on behalf of the plaintiff in error that even if the defendant could not have been personally bound by a decree based on the supplemental bill because a subpœna thereunder had not been served upon him within the state of New Jersey, yet that, as the defendant, after the entry of such a decree against him, appeared in the New Jersey court by counsel, and procured a modification of the decree, he thereby subjected himself to the decree as amended.

It is also claimed that, as he admits that he acquiesced in and ratified the decree, by accepting that portion thereof which relieved him from the contract of marriage, he cannot be heard to impeach the decree in dealing with the change thus caused in his marital relations by subjecting him to the payment of costs and alimony.

The fact that the defendant appeared and procured an amendment of the decree and its enrolment in its final form took place after the bringing of the present suit, and, to form the basis for the contention that he thereby subjected himself to the decree as amended, such fact ought, perhaps, to have been made to appear by an amended or supplemental petition. But as the amended decree was put in evidence by the defendant himself, and was treated by the New York courts as the final decree, whose effect they were considering, we shall regard the amended decree as the real ground of the plaintiff's action.

As the appearance of the defendant was not for the purpose of objecting to the jurisdiction of the court, but was rather in the nature of an appeal to its jurisdiction, and as the objection successfully made to the decree as originally enrolled was restricted to one of its recitals and did not attack the decree in the respect that it adjudged that he should pay the costs and alimony, there is force in the view that he thereby waived any right to further object to the decree. At all events, he could not successfully attack the decree collaterally in a court of different jurisdiction, but his remedy, if any he had, would be by way of appeal.

*It is claimed by the defendant in error [545] that to hold him personally bound by the decree for the payment of money would, in the circumstances of the present case, deprive him of his property without due process of law. This claim is based upon the assumption that the defendant had no hearing or opportunity to be heard.

As this record discloses that the defendant was served with process under the original bill, and appeared by counsel, and made answer, and was personally served with a copy of the supplemental bill and with an order to plead, and, after permitting himself to be defaulted, did appear by counsel and procure the vacation of the original decree and the enrolment of the decree amended in accordance with his own motion, it may fairly be said that he both had an opportunity to be heard, and was heard. His appearance by counsel under the supplementary proceedings was not to object to the jurisdiction of the court, but to effect a change in the recitals of the decree on nonjurisdictional grounds. As before stated, we do not deem it necessary to consider the attentions on behalf of the plaintiff in error that by such appearance the defendant estopped himself from alleging error in the decree when thus amended, but we think he certainly precluded himself from now contending that he had been deprived of his property within the meaning of the Federal Constitution.

As, then, the evidence of the defendant did not avail to show want of jurisdiction on the part of the chancery court of New Jersey to render the decree in question, and as it was admitted that the decree remained wholly unpaid, the plaintiff below was entitled to judgment.

The judgment of the supreme court is hereby reversed, and the case is remanded to the supreme court for further proceedings not inconsistent with the opinion of this court.

BENJAMIN H. JOHNSON, *Appt.*, [546]
v.
UNITED STATES and the UTE TRIBE OR NATION OF INDIANS.

(See S. C. Reporter's ed. 546-553.)

Jurisdiction of court of claims—act of March 3, 1891—second clause of act.

1. The court of claims has no general jurisdiction over claims against the United States; it can take

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cognizance of only those matters which by the terms of some act of Congress are committed to it.

2. Under the 1st clause of the act of March 3, 1891, giving the court of claims jurisdiction of "claims for property of citizens of the United States taken or destroyed," if the property was not, when taken or destroyed, the property of a citizen, a claim therefor is clearly outside the statute, although the status of the claimant has since changed and he was a citizen at the passage of the act.

3. A claim which has never been filed in the Interior Department does not come within the category of claims provided for in the 2d clause of the said act.

[No. 325.]

Argued November 11, 1895. Decided January 13, 1896.

APPEAL from a judgment of the Court of Claims dismissing for want of jurisdiction a claim of Benjamin H. Johnson against the United States *et al.*, to recover for property taken from him by the Ute Indians. *Affirmed.*

See same case below, 29 Ct. Cl. 1.

Statement by *Mr. Justice* **Brewer:**

On March 3, 1891, Congress passed an act (26 Stat. at L. 851) vesting certain jurisdiction in the court of claims, the material portion of which is found in the 1st section, and reads as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the court of claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

"First. All claims for property of citizens of the United States, taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and under subsequent acts, subject, however, to the limitations hereinafter provided."

547] *The act of March 3, 1885, referred to in this 2d clause, is found in 23 Stat. at L. 362, and following, and the clause providing for examination is on page 376, and is as follows:

"For the investigation of certain Indian depredation claims, $10,000; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending but not yet examined, on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, including the name and address of the claimants, the date of the alleged depredations, by what tribe committed, the date of examination and approval, with a reference to the date and clause of the treaty creating the obligation for payment, to be made and presented to Congress at its next regular session; and the Secretary is authorized and empowered, before making such report, to cause such additional investigation to be made and such further testimony to be taken as he may deem necessary to enable him to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid, and by what tribe such depredations were committed; and his report shall include his determination upon each claim, together with the names and residences of witnesses and the testimony of each, and also what funds are now existing or to be derived by reason of treaty or other obligation, out of which the same should be paid."

The subsequent acts (24 Stat. at L. 44-464; 25 Stat. at L. 234-998; 26 Stat. at L. 356) simply make additional appropriations for the examination of the same claims.

On June 20, 1891, claimant filed his petition in the court of claims to recover for property taken from him on June 10, 1866, by the Ute Indians. Subsequently, and on November 17, 1893, he filed an amended petition containing these allegations:

*"Your petitioner, Benjamin H. John [548 son, a resident of Scipio, Millard county, in the territory of Utah, and a citizen of the United States, respectfully shows:

"That he was not a citizen of the United States on or about the 10th day of June, 1866, the date of the loss hereinafter described, not having taken out his final citizenship papers until 1873.

"That he moved to the United States in 1848, when he was thirteen years old, and has resided here ever since, and was a citizen of the United States at the date of the passage of the Indian depredation law of March 3, 1891. 26 Stat. at L. 851, chap. 538.

"That it is admitted in allowing claims for Indian depredations under the act of March 3, 1885 (1 Rev. Stat. Supp. (2d ed.) chap. 341, p. 913, *note*), it has been the practice of the Interior Department to interpret the words 'citizens of the United States,' therein used, as meaning only those who were citizens or had declared their intention to become citizens at the time the depredations were committed, and such citizenship was found when neither alleged nor testified to, where the contrary did not appear.

. . . . .

"That this claim was never presented to the Commissioner of Indian Affairs nor to Congress, nor any agent nor department of the government."

Whereupon the defendants moved to dismiss on the ground that "the claimant was not a citizen of the United States at the time of the depredation alleged to have been committed," which motion was sustained, and on December 4, 1893, a judgment entered dismissing the case for want of jurisdiction. 29 Ct. Cl. 1.

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Mr. **John Wharton Clark** for appellant.
Mr. **Charles B. Howry**, Assistant Attorney General, for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

549] *The principal question turns on the matter of citizenship. Claimant was a citizen at the time of the passage of the act of 1891, but not when the wrongs complained of were committed. Had the court of claims jurisdiction?

That court has no general jurisdiction over claims against the United States. It can take cognizance of only those matters which by the terms of some act of Congress are committed to it. *Schillinger* v. *United States*, 155 U. S. 163 [39: 108].

Congress did not by the act of 1891 assume, in behalf of the United States, responsibility for all acts of depredation by Indians, nor grant to the court of claims authority "to inquire into and finally adjudicate" all claims therefor. It carefully specified those which might be considered by that court.

By the 1st clause jurisdiction is given of "claims for property of citizens of the United States taken or destroyed." But claimant has no such claim. It is for property of an alien taken and destroyed. True, he is now a citizen, and was at the time of the passage of the act. But the language is not "claims of citizens for property," which might include his case. The definition is of the character of the claim and not of the status of the claimant; if the property was not, when taken or destroyed, the property of a citizen, a claim therefor was at that time clearly outside the statute; and while the status of the claimant may have changed, the nature of the claim has not. Suppose the property taken or destroyed had at the time belonged to a citizen, and an alien had succeeded by inheritance to the right to recover compensation for its loss or destruction, is it not clear that such alien would have a claim within the very terms of the act for property of a citizen taken and destroyed, and upon what construction of its language could the court have refused to take jurisdiction?

Further, the property must have been taken or destroyed by Indians "in amity with the United States." Clearly that refers to the status of the Indians at the time of the depredation. Any other construction would lead to manifest absurdities. The certainty of this date renders equally certain the date at which citizenship must exist in the owner of the property taken or destroyed.

550] *Much was said in argument and many authorities are cited in the briefs in respect to the difference between retrospective and prospective statutes, but we fail to see the pertinency of this discussion. Obviously the act is prospective in its operation, in that it grants to the court of claims a jurisdiction that it did not theretofore possess, and authorizes it in the future to hear and determine certain claims. But as to the claims thus committed to its consideration the statute is expressly retrospective. The last proviso in § 2 reads: "*And provided further*, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof." The only question for determination in this case is whether the claim presented is within either of the classes of past wrongs which are submitted by the act to the jurisdiction of the court. And, for the reasons given, we are clear that it does not come within the 1st clause defining such jurisdiction.

Is it within the 2d clause? By that, jurisdiction is extended to "cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress" of March 3, 1885, and subsequent acts. As the claimant alleges in his petition that his claim was never presented to the Commissioner of Indian Affairs, nor to Congress, nor any agent nor department of the government, it was not a case which had been examined or allowed by the Interior Department, and does not come under the first of the two classes named. We turn, therefore, to the act of March 3, 1885, to see what cases were authorized to be examined under it.

It appropriates $10,000 for the investigation of certain Indian depredation claims, and in describing them it mentions such claims as had been theretofore filed in the Interior Department and approved in whole or in part, and adds, "also such claims as are pending but not yet examined, on behalf of a citizen of the United States on account of depredations committed." In order to come within the second class the claim must be one on behalf of a citizen of the United States, and also one pending but not yet examined. *If it be assumed that claimant was, on March 3, 1885, a citizen, as may be inferred from the language of the petition, although not explicitly averred, the question arises whether the different phraseology of that act would include a claim in his favor, although he was not a citizen at the time of the depredation. But passing that question, the claim must be one then "pending but not yet examined," and this language, taken in connection with the words descriptive of the prior class, manifestly refers to such claims as had been presented for examination, and so, in a technical sense of the term, were pending, and does not embrace all cases of depredations, whether claims therefor had been presented or not. [551

We are aware of the fact that the Interior Department, acting under an opinion of its chief law clerk, of August 23, 1886, has construed the authority given by the 2d clause of this act to reach to all claims existing and not barred, whether at the date of the act on file or not in the Interior Department. We quote from that opinion, approved by the assistant secretary, as follows:

"I am of the opinion, however, that all claims that were not barred March 3, 1885, are included within the claims to be investigated, although filed after the passage of either the act of 1885 or 1886, because the act of May 29, 1872, and the rules and regulations made in pursuance thereof, require the Secretary of the Interior to investigate such claims and make report thereof to Congress in the same manner as provided for by the act of March 3, 1885. This act and the rules and regulations adopted by the Secretary, as provided for by said act, is not repugnant to any provision of § 2156,

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but provides for the enforcement and execution of that section. As no statutory bar attaches to any claim for depredations committed since the adoption of the Revised Statutes, such claims may be filed at any time."

We are unable to concur in the views thus expressed. Without stopping to inquire whether U. S. Rev. Stat. § 2156, may or may not be repealed by this act of March 3, 1885, and conceding, for the purposes of this case, that such section remains in full force and effect, we are of the opinion that the act of 552]*March 3, 1885, is special and limited in its scope. It purports to be limited, for it is for the investigation of "certain Indian depredation claims." Not only is it by these words restricted, but the meagerness of the appropriation, $10,000, indicates the narrowness of the investigation intended, and the limited number of claims which were designed to be examined. The claims to be reported are defined. First, those which "have been approved." This necessarily limits, so far as this portion of the section is concerned, the report to those claims presented, considered, and acted upon by the Interior Department. It refers to what has been and not what may be. It defines and includes, not claims which might thereafter be presented and investigated, but those which at the date of the act had been finally passed upon and determined by the Interior Department. There is no possibility of construction which would open this clause to include any claims other than those already considered and determined by the department. The other clause of the section describes "such claims as are pending, but not yet examined." That either means such claims as have been already presented and are before the department for consideration, or it includes all unallowed claims then existing and not barred. If the latter was the thought of Congress in this enactment, there was no need of a division into classes, for the one description of claims existing would include all, both those allowed and those not yet examined and allowed; those filed and those not filed. The obvious intent was not to reach all Indian claims, but to call from the Interior Department a statement of the claims then before the department, and upon such presentation to determine its future action. And the purpose of the 2d clause in the act of March 3, 1891, was to take the cases which on March 3, 1885, were pending in the department and transfer them in bulk to the court of claims.

It follows, therefore, that this claim, having been filed in the department, does not come within the category of claims provided for in the 2d clause of the act conferring jurisdiction upon the court.

It was further insisted in the argument that 553] the claimant *had taken out his first papers at the time of the depredation, and therefore that when he took out his final papers citizenship related back, and he was entitled, for all the benefits of this act, to claim the privileges of citizenship from the date of his first papers. But there is nothing in his petition to show when he took them out, and therefore the contention, if it had any foundation in law, has none in fact. It is true, mention is made in the opinion of the court of claims of the time of taking out his first papers, but we cannot act upon any such statement, but must be governed by the averments of the petition.

We see nothing else in the record which requires comment. *The judgment of the court of claims was correct, and it is affirmed.*

FRANK CARVER, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 553-556.)

Dying declarations—subsequent declaration—repetition—objection to testimony.

1. Declarations of the victim of a homicide as to the facts of the homicide, made under the impression of almost immediate dissolution, are admissible in evidence on a trial for the crime.
2. A subsequent declaration by the same person that her former dying declaration was true is not admissible when it does not appear whether she then spoke under the admonition of her approaching end or anticipated recovery.
3. The repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts, if made when hope has been regained.
4. Testimony for which a proper foundation has not been laid, and which is not legitimate rebutting testimony, is sufficiently objected to by objecting that no foundation therefor has been laid, without challenging it on the ground that it is not proper in rebuttal.

[No. 721.]

Submitted November 20, 1895. Decided January 13, 1896.

NOTE.—*For what purposes evidence of intoxication may be given by one accused of crime*, see note to Hopt v. Utah, 26: 873.

As to when confessions of accused are evidence against him, see note to Hopt v. Utah, 28: 262.

Declarations of injured party as to injury; expressions of pain, suffering, etc.—see note to Travelers' Ins. Co. v. Moseley, 19: 437.

Declarations of third persons referred to, evidence against party, see note to Clerk v. Russell, 1: 660, and Leeds v. Marine Ins. Co. 4: 266.

Dying declarations, when admissible in cases of homicide; under sense of impending death; subsequent hope of recovery; by signs or other modes; obtained by solicitation; how restricted; must relate to facts; duty of court; declarations in favor of accused.

Dying declarations are admissible only in cases of homicide, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of such declarations. Reynolds v. State, 68 Ala. 502; Johnson v. State, 50 Ala. 456; Hudson v. State, 3 Coldw. 355; Leiber v. Com. 9 Bush, 13; Wooten v. Wilkins, 39 Ga. 223, 99 Am. Dec. 456; Hill v. State, 41 Ga. 484; State v. Medlicott, 9 Kan. 257; State v. Bohan, 15 Kan. 407; Marshall v. Chicago & G. E. R. Co. 48 Ill. 475, 95 Am. Dec. 561; Barnett v. People, 54 Ill. 325; State v. Harper, 35 Ohio St. 78, 35 Am. Rep. 596; Montgomery v. State, 80 Ind. 281, 41 Am. Rep. 815; State v. McCanon, 51 Mo. 160; Wright v. State, 41 Tex. 246; Dixon v. State, 13 Fla. 636; Hackett v. People, 54 Barb. 370; People v. Davis, 56 N. Y. 95; Wilson v. Boerem, 15 Johns. 286; Crookham v. State, 5 W. Va. 510; State v. Shelton, 2 Jones, L. 360, 64 Am. Dec. 587; Brownell v. Pacific R. Co. 47 Mo. 239; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815.

Dying declarations are not incompetent because

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IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting Frank Carver of murder. *Reversed, and cause remanded with a direction for a new trial.*

Statement by *Mr. Chief Justice* **Fuller:**

Frank Carver was convicted of the murder of Anna Maledon in the circuit court of the 554] United States for the western *district of Arkansas, and sentenced to be hanged, whereupon he sued out this writ of error.

The fatal wound was inflicted by the discharge of a pistol on the night of March 25, 1895, at Muscogee, Creek Nation, in the Indian country, but the death occurred at Fort Smith, Arkansas, May 19, 1895.

In addition to other evidence, there was testimony tending to show that Carver and the deceased were attached to each other, that he was very drunk on the night of the homicide, and that he was in the habit of carrying a pistol, which he was flourishing at that time. A declaration in writing in respect of the circumstances attendant upon the commission of the act, made by the deceased March 27, 1895, was admitted in evidence against objection as made under a sense of impending death.

The testimony of the clerk of the court, Wheeler, to the effect that the deceased, after she was brought to Fort Smith, which was April 14, 1895, said that her former statement was true, was admitted subject to an exception because no proper foundation was laid for its admission.

Exceptions were also taken to certain parts of the charge.

Mr. **Wm. M. Cravens** for plaintiff in error.

Mr. **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

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of the constitutional requirement that the accused shall be confronted with witnesses against him. State v. Dickinson, 41 Wis. 299; State v. Nash, 7 Iowa, 347; Robbins v. State, 8 Ohio St. 131; People v. Glenn, 10 Cal. 32; Brown v. Com. 73 Pa. 321, 13 Am. Rep. 740; Com. v. Carey, 12 Cush. 246; Woodsides v. State, 2 How. (Miss.) 655; Campbell v. State, 11 Ga. 353; Burrell v. State, 18 Tex. 713; Walston v. Com. 16 B. Mon. 15; State v. Tilghman, 11 Ired. L. 513; State v. Vansant, 80 Mo. 67; People v. Green, 1 Denio, 614.

Dying declarations, though made with a full consciousness of approaching death, are admissible in evidence only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. Rex v. Mead. 2 Barn. & C. 605, 4 Dowl. & R. 120; Rex v. Hutchinson, 2 Barn. & C. 608, *note;* Rex v. Lloyd, 4 Car. & P. 233.

In one case where A and B were both poisoned by the same means, upon an indictment against the prisoner for the murder of A, evidence was allowed to be given of the dying declarations of B, the ground alleged being "that it was all one transaction." Rex v. Baker, 2 Mood. & R. 53; State v. Terrell, 12 Rich. L. 321; State v. Wilson, 23 La. Ann. 558.

Dying declarations are admissible in prosecutions for manslaughter. State v. Hannah, 10 La. Ann. 131.

They must be made, not merely *in articulo mortis,* but under the sense of impending death, without expectation or hope of recovery. People v. Chin Mook Sow, 51 Cal. 597; People v. Ah Dat, 49 Cal. 652; People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49; People v. Lee, 17 Cal. 79; State v. Garrand, 5 Or. 216; Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; Hays v. State, 40 Md. 633; Hill v. Com. 2 Gratt. 594; State v. Blackburn, 80 N. C. 474; Dixon v. State, 13 Fla. 636; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200; State v. Cantieny, 34 Minn. 1; State v. Cameron, 2 Chand. (Wis.) 172; Fitzgerald v. State, 11 Neb. 577; Rakes v. People, 2 Neb. 157; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; State v. Simon, 50 Mo. 370; People v. Knapp, 26 Mich. 112; People v. Simpson, 48 Mich. 474; Montgomery v. State, 11 Ohio, 424; Scott v. People, 63 Ill. 508; Powers v. State, 87 Ind. 144; Jones v. State, 71 Ind. 66; Morgan v. State, 31 Ind. 193; Smith v. State, 9 Humph. 9; Walston v. Com. 16 B. Mon. 34; Com. v. Haney, Jr. 127 Mass. 455; State v. Center, 35 Vt. 378; Brotherton v. People, 75 N. Y. 159; People v. Perry, 8 Abb. Pr. N. S. 27; People v. Knickerbocker, 1 Park. Crim. Rep. 302; Small v. Com. 91 Pa. 304; Dumas v. State, 62 Ga. 58; Thompson v. State, 24 Ga. 297; Brown v. State, 32 Miss. 433; Lewis v. State, 9 Smedes & M. 115; Jordan v. State, 31 Ala. 20; Walker v. State, 52 Ala. 192; May v. State, 55 Ala. 39; *Ex parte* Nettles, 58 Ala. 268; Benavides v. State, 31 Tex. 579; Edmondson v. State, 41 Tex. 498; State v. Brunneto, 13 La. Ann. 45; State v. Spencer, 30 La. Ann. 362; State v. Freeman, 1 Speers, L. 57; State v. Poll, 1 Hawks, 442, 9 Am. Dec. 655; State v. Peace, 1 Jones, L. 251; Vass v. Com. 3 Leigh, 786, 24 Am. Dec. 695; Bull v. Com. 14 Gratt. 613; United States v. Woods, 4 Cranch, C. C. 484; United States v. Veitch, 1 Cranch, C. C. 115; State v. Quick, 15 Rich. L. 342.

It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. Reg. v. Peel, 2 Fost. & F. 21.

The belief of a speedy dissolution is the test by which the competency of dying declarations is to be measured. It is not error to admit evidence showing the condition of the deceased at the time such dying declarations were made. Sullivan v. Com. 93 Pa. 284.

As to whether consciousness of death can be inferred from the nature of the wound, the party being speechless, see Reg. v. Morgan, 14 Cox C. C. 337, 28 Eng. Rep. (Moak's ed.) 583; Reg. v. Bedingfield, 14 Cox, C. C. 341, 28 Eng. Rep. (Moak's ed.) 587.

It is not necessary that the declarations should be stated at the time to be made under a sense of impending death. It is enough if it satisfactorily appears in any mode that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct or other circumstances of the case. People v. Taylor, 59 Cal. 640; People v. Gray, 61 Cal. 164, 44 Am. Rep. 549.

It must be made to appear that it was made under a fixed belief and moral conviction that death was then impending and certain to follow almost immediately, and otherwise under such circumstances as to exclude the supposition that the declarant in making it was influenced by malice, revenge, or any conceivable motive to misrepresent the real facts. Tracy v. People, 97 Ill. 101.

If it appears in any mode that there was a hope of recovery, however faint, still existing in the mind of the declarant, the declaration is not admissible. People v. Gray, 61 Cal. 164, 44 Am. Rep. 549; Com. v. Roberts, 108 Mass. 296; People v. Anderson, 2 Wheel. C. C. 398.

Dying declarations are not admissible in evidence if the declarant had the slightest hope of recovery, although he dies within an hour afterwards. People v. Hodgdon, 52 Cal. 72, 36 Am. Rep. 30.

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Mr. Chief Justice **Fuller** delivered the opinion of the court:

While in the admission of the declarations of the victim as to the facts of a homicide the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution, we think that the evidence of the state of mind of Anna Maledon, in that particular, when the declaration of March 27, 1895, was made, and which we need not recapitulate, was sufficient to justify the 555]circuit court in admitting *it. *Mattox* v. *United States*, 146 U. S. 140, 151 [36: 917, 921]. But the testimony of Wheeler stands on different ground and we are of opinion should not have been admitted.

In answer to leading questions, the witness said that he saw Anna Maledon after she was brought to Fort Smith; that he asked her whether the declaration of March 27, 1895, was true; and that she replied "it was, in every particular."

The deceased received the fatal wound March 25, and her statement of March 27, 1895, was admitted as a dying declaration. The interview with Wheeler was on or after April 14, 1895, and whether she then spoke under the admonition of her approaching end or anticipated recovery does not appear.

It has been held that a declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone (*Reg.* v. *Steele*, 12 Cox, C. C. 168); or if made when the person is without hope, though afterwards he regains confidence. *State* v. *Tilghman*, 11 Ired. L. 513; *Swisher* v. *Com.* 26 Gratt. 963, 21 Am. Rep. 330; 1 Greenl. Ev. (15th ed.) § 158, *note a*. But the repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts if made when hope has been regained. Nor can we perceive that this

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A hope of recovery subsequently entertained will not affect the admissibility of a declaration made under the consciousness of impending death. State v. Kilgore, 70 Mo. 546; Reg. v. Hubbard, 14 Cox, C. C. 565; Swisher v. Com. 26 Gratt. 963, 21 Am. Rep. 330; Jackson v. Com. 19 Gratt. 656.

A, when under sense of impending death, declared that the shooting was accidental; a week afterwards, while in cheerful spirits, said her former statement was a "story." Held, that her last statement was not admissible. Stewart v. State, 2 Lea, 598.

A man was wounded in a fight with the defendant, and on the same day, while expecting to die, made certain statements in relation to the fight. He lived ten days longer, and his physicians expressed the hope to him that he would recover, and he said, "I hope so too," but at last died of the wounds. It was held by the court that evidence of his statements was admissible on the trial of defendant for murder. Swisher v. Com. 26 Gratt. 963, 21 Am. Rep. 330.

The declaration may be by signs or other appropriate modes of communication. People v. Simpson, 48 Mich. 474; Rex v. Mosley, 1 Mood. C. C. 97; Com. v. Casey, 11 Cush. 417, 59 Am. Dec. 150; Reg. v. Morgan, 14 Cox, C. C. 337, 28 Eng. Rep. (Moak's ed.) 583; Reg. v. Bedingfield, 14 Cox, C. C. 341, 28 Eng. Rep. (Moak's ed.) 587.

It is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation. 3 Russell, Crimes & Misdemeanors (5th ed.) 360; Com. v. Casey, *supra*; Com. v. Haney, 127 Mass. 455; Vass v. Com. 3 Leigh, 786, 24 Am. Dec. 695; Ingram v. State, 67 Ala. 67; Jones v. State, 71 Ind. 66; People v. Vincente Sanchez, 24 Cal. 17; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; Rex v. Fagent, 7 Car. & P. 238; Rex v. Reason, 1 Strange, 499; Rex v. Woodcock, 2 Leach, C. C. 561.

An instruction that dying declarations given in evidence on the part of the state are to be received with the same degree of credit as if testified to under oath on examination is erroneous. State v. Mathes, 90 Mo. 571; State v. Vansant, 80 Mo. 67; Lambeth v. State, 23 Miss. 322.

They must be uttered under a sense of impending dissolution, and it does not matter that death failed to ensue until a considerable time after such declarations were made. 3 Russell, Crimes & Misdemeanors (5th ed.) 355; Reynolds v. State, 68 Ala. 502; Oliver v. State, 17 Ala. 587; McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; Com. v. Haney, 127 Mass. 455; Com. v. Cooper, 5 Allen, 495, 81 Am. Dec. 762; Com. v. Roberts, 108 Mass. 301; People v. Simpson, 48 Mich. 474; Rakes v. People, 2 Neb. 157; State v. Kilgore, 70 Mo. 546; Swisher v. Com. 26 Gratt. 970, 21 Am. Rep. 330; State v. Oliver, 2 Houst. (Del.) 585; State v. Tilgham, 11 Ired. L. 513; State v. Poll, 1 Hawks, 442, 9 Am. Dec. 605; State v. Daniel, 31 La. Ann. 91; People v. Simpson, 48 Mich. 474; Rex v. Woodcock, 2 Leach, C. C. 5; Rex v. Tinkler, 1 East, P. C. 354; Rex v. Mosley, Mood. C. C. 97; Rex v. Bonner, 6 Car. & P. 386; Craven's Case, 1 Lew. C. C. 77.

Dying declarations are restricted to the act of killing and to the circumstances immediately attending it and forming a part of the *res gestæ*. When they relate to former and distinct transactions, and embrace facts or circumstances not immediately illustrating or connected with the declarant's death, they are inadmissible. Walker v. State, 52 Ala. 192; Ben v. State, 37 Ala. 108; Johnson v. State, 17 Ala. 618; Faire v. State, 58 Ala. 74; Ratteree v. State, 53 Ga. 570; West v. State, 7 Tex. App. 150; People v. Fong Ah Sing, 64 Cal. 253; Nelson v. State, 7 Humph. 542; Moses v. State, 11 Humph. 232; Hudson v. State, 3 Coldw. 355; Leiber v. Com. 9 Bush, 13; Luby v. State, 12 Bush, 1; State v. Shelton, 2 Jones, L. 360, 64 Am. Dec. 587; State v. Wood, 53 Vt. 560; State v. Center, 35 Vt. 386; Wroe v. State, 20 Ohio St. 460; Hackett v. People, 54 Barb. 370; Marshall v. Chicago & G. E. R. Co. 48 Ill. 475, 95 Am. Dec. 561; State v. Vansant, 80 Mo. 67; State v. Draper, 65 Mo. 335, 27 Am. Rep. 287; State v. Chambers, 87 Mo. 406; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815; Jones v. State, 71 Ind. 66; Weyrich v. People, 89 Ill. 90; Travelers' Ins. Co. v. Mosley, 75 U. S. 8 Wall. 397 (19: 437).

What occurs before or after the act has been done does not constitute a part of the *res gestæ*, although the interval of separation may be very brief. Montgomery v. State, and Jones v. State, *supra*; Wheeler v. State, 14 Ind. 573; Binns v. State, 57 Ind. 46, 26 Am. Rep. 48; Bland v. State, 2 Ind. 608; Field v. State, 57 Miss. 474, 34 Am. Rep. 476, and note.

Dying declarations must be at the time and place of shooting, in order to be admitted on the ground that they are part of the *res gestæ*. Before such declarations, alleged to have been made some time after the shooting, will be admitted in evidence, it must be shown that the declarant was aware of his approaching death. Kane v. Com. 109 Pa. 541; Kendrick v. State, 55 Miss. 436; Kraner v. State, 61 Miss. 158; Oliver v. State, 17 Ala. 587; People v. Ah Lee, 60 Cal. 85; Territory v. Davis (Ariz.) 10 Pac. 359; Lund v. Tyngsborough, 9 Cush. 36; Chapin v. Marlborough, 9 Gray, 244, 69 Am. Dec. 281; Com. v. Densmore, 12 Allen, 535; Wroe v. State, 20 Ohio St. 460; Hurd v. People, 25 Mich. 405; People v. Grunzig, 1 Park. Crim. Rep. 299.

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is otherwise, because the record states that Wheeler was sworn "in rebuttal." Rebutting evidence is evidence in denial of some affirmative case or fact which defendant has attempted to prove. Our attention has been called to no attempt on behalf of defendant below to prove that Anna Maledon made on her death bed, after her declaration of March 27, any retraction thereof, or any statement inconsistent with it, if evidence to that effect would have justified the introduction of this testimony as tending to rebut it.

It is true that counsel for plaintiff in error rested their objection on the ground that no foundation for the admission of the testimony was laid. But while the omission to challenge the evidence as not properly in rebuttal may have waived the mere order of proof, this did not concede that the want of foundation could be excused for any reason. The contention was that the foundation must be laid, and that covered *sufficiently every suggestion that [556 the evidence was admissible without it. And as this was not legitimate rebutting testimony, it could not be admitted without the proper foundation, although the order of proof was waived.

As we understand the record, a sharp controversy was raised over what deceased had said at the time of the homicide; and the evidence of Wheeler may have had so important a bearing that its admission must be regarded as prejudicial error.

Whether the homicide was committed under such circumstances as to reduce the grade of the crime from murder to manslaughter, or as to permit an acquittal on the ground of misadventure, were questions raised in the case on behalf of plaintiff in error; and it is urged that the exception should be sustained to the statement in the charge that "if a man does

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The exclamations of deceased at the time he was shot, "O God! O my God!"—are admissible as part of the *res gestæ*. People v. Brown, 59 Cal. 345; Stagner v. State, 9 Tex. App. 440; State v. Porter, 34 Iowa, 131; State v. Wagner, 61 Me. 178; Burns v. State, 61 Ga. 192; Jackson v. State, 52 Ala. 305; Com. v. Hackett, 2 Allen, 136; Lewis v. State, 9 Smedes & M. 115.

The following question to the wounded man, and his answer, are not admissible: "Had either of them threatened to injure you before?" "Yes; my wife (one of the respondents) has threatened a thousand times to kill me before. She threatened to kill me before she went away the last time. She went away in July; I think, though, it was August 10th. She came back day before yesterday." State v. Wood, 53 Vt. 560.

Where the declaration was: "I believed he (defendant) was going after his pistol when he went into the house. . . . I had seen him at the house with a pistol before,"—held, that this ought to have been excluded. State v. Vansant, 80 Mo. 67.

The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the latter. Boyle v. State, 105 Ind. 469, 55 Am. Rep. 218; State v. Hamilton, 27 La. Ann. 400; Sylvester v. State, 71 Ala. 17; State v. Johnson, 76 Mo. 121; Lister v. State, 1 Tex. App. 739.

Where the deceased said, on the evening before the morning of her death, "Mr. F. has killed me," and, about the same time, "I am dead; Mr. F. has killed me,"—it was held that the declarations were admissible of the dying declarations of the deceased. State v. Freeman, 1 Speers, L. 57.

Where two persons were killed and A was found dead at a short distance from his house, and B, his wife, was found in the house mortally wounded,—held, that her dying declarations were not admissible upon the trial for the murder of A. Brown v. Com. 73 Pa. 321, 13 Am. Rep. 740; State v. Bohan, 15 Kan. 407; Krebs v. State, 3 Tex. App. 348; State v. Sullivan, 51 Iowa, 142; State v. Fitzhugh, 2 Or. 227; Rex. v. Hind, 29 L. J. M. C. 147.

The declarations of the deceased are admissible only as to those things as to which he would have been competent to testify if sworn as a witness in the cause. They must relate to facts only, and not to mere matters of opinion or belief. People v. Taylor, 59 Cal. 640; People v. Vincente Sanchez, 24 Cal. 26; Warren v. State, 9 Tex. App. 629, 35 Am. Rep. 745; Roberts v. State, 5 Tex. App. 141; Walker v. State, 39 Ark. 221; State v. Chambers, 87 Mo. 406; State v. Draper, 65 Mo. 335, 27 Am. Rep. 287; McPherson v. State, 22 Ga. 478; Whitley v. State, 38 Ga. 50; Ratteree v. State, 53 Ga. 570; Savage v. State, 18 Fla. 909; Reynolds v. State, 68 Ala. 502; Ben v. State, 37 Ala. 103; Johnson v. State, 17 Ala. 618; Mose v. State, 35 Ala. 421; McLean v. State, 16 Ala. 674; People v. Olmstead, 30 Mich. 431; Moeck v. People, 100 Ill. 242, 39 Am. Rep. 38; Collins v. Com. 12 Bush, 271; Nelson v. State, 7 Humph. 542; Binns v. State, 46 Ind. 311; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815; Wroe v. State, 20 Ohio St. 460; State v. Williams, 67 N. C. 12; People v. Shaw, 63 N. Y. 38; United States v. Veitch, 1 Cranch, C. C. 115.

The ascertainment of the primary facts is for the court. The judicial mind must be satisfied and when satisfied that the requisite predicate is established, the duty to receive the evidence is imperative. Ward v. State, 78 Ala. 441; McLean v. State, 16 Ala. 672; Wills v. State, 74 Ala. 21; Kilpatrick v. Com. 31 Pa. 198; Kehoe v. Com. 85 Pa. 127; People v. Smith, 104 N. Y. 491, 58 Am. Rep. 537; Donnelly v. State, 26 N. J. L. 601; Com. v. Murray, Ashm. 41; State v. Frazier, 1 Houst. Crim. Rep. 176; Swisher v. Com. 26 Gratt. 963, 21 Am. Rep. 330; State v. Williams, 68 N. C. 62; Owens v. State, 59 Miss. 547; Lambeth v. State, 23 Miss. 322; Bolin v. State, 9 Lea, 516; State v. Cantieny, 34 Minn. 1; State v. Elliott, 45 Iowa, 486; State v. Johnson, 76 Mo. 121; Doles v. State, 97 Ind. 555; Jones v. State, 71 Ind. 66; Starkey v. People, 17 Ill. 17; People v. Glenn, 10 Cal. 32; State v. Ah Lee, 7 Or. 237.

But the court can determine only as to the admissibility of dying declarations. Their weight or credit must be left to the jury. Campbell v. State, 38 Ark. 509; State v. McCanon, 51 Mo. 160; Walker v. State, 37 Tex. 366; People v. Abbott (Cal.) 4 Pac. 769; Donnelly v. State, 26 N. J. L. 463, and 601; Doles v. State, *supra;* Com. v. Casey, 11 Cush. 417, 59 Am. Dec. 150.

Dying declarations may be given in evidence, as well to acquit as to convict the prisoner. Moore v. State, 12 Ala. 764.

The dying declarations of the deceased are not only admissible against a prisoner, but also in his favor. Rex v. Scaife, 1 Mood. & R. 551; People v. Knapp, 26 Mich. 112; Moore v. State, *supra;* Moeck v. People, 100 Ill. 242, 39 Am. Rep. 38; Adams v. People, 47 Ill. 376; Mattox v. United States, 146 U. S. 140 (36: 917).

When the declarant, if living, would have been incompetent to testify by reason of infamy and the like, his dying declarations are inadmissible. 1 Greenl. Ev. (14th ed.) § 157; Nesbit v. State, 43 Ga. 238; Walker v. State, 39 Ark. 221.

The dying declaration of a husband is competent evidence against the wife, on her trial for his murder, to show her guilt; and on the trial of the husband for the murder of his wife, her dying declarations are evidence against him. Moore v. State, 12 Ala. 764; People v. Green, 1 Denio, 614; Pennsylvania v. Stoops, Add. 381.

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not exercise the highest possible care that he can exercise under the circumstances, when handling firearms, his act passes out of that classification known as an accident." But we do not feel called upon to consider this question or any of the other errors assigned, as they may not arise on a new trial in the form in which they are now presented.

Judgment reversed, and cause remanded with a direction to set aside the verdict and grant a new trial.

MISSOURI PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* MARY FITZGERALD, Administratrix of JOHN FITZGERALD.

(See S. C. Reporter's ed. 556-584.)

Federal question—when not presented—denial of Federal right—order of circuit court, how reviewed—when reviewable on state judgment—removal of cause.

1. A decision of a state court which rests on independent ground not involving a Federal question, and broad enough to maintain the judgment, cannot be reviewed in this court.
2. A decision of a state court which does not question the validity of an act of Congress or deny any right claimed under it does not present a Federal question.
3. The appointment of a receiver for a corporation by a Federal court before such an appointment is made by a state court is ineffectual to devest the control of the state court over the assets of the corporation, or defeat its right to enforce its judgment for an accounting and other relief sought in a suit which had been pending several years, and in which a receiver had been asked and direction therefor made by an appellate court on remanding the case prior to the appointment by the Federal court.
4. The decision of a state court that the rule that the court which first acquires jurisdiction of the subject-matter of an action will retain it until the controversy is finally determined applies, and that the appointment of a receiver by the United States circuit court was under the circumstances ineffectual to devest the control of the state court over the assets of a company,—denies no Federal right.
5. An order of the circuit court remanding a cause to a state court cannot be reviewed in this court by any direct proceeding for that purpose.
6. If a state court proceeds to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable in this court after final judgment, under U. S. Rev. Stat. § 709.
7. If a case be removed to the circuit court and a motion to remand be made and denied, then after final judgment the action of the circuit court in refusing to remand may be reviewed here on error or appeal.
8. If the circuit court and the state court go to judgment respectively, each judgment is open to revision in the appropriate mode.
9. The denial of an application to remove a cause to a Federal court is not prejudicial when the cause is remanded by the Federal court to the state court, which has taken no action in the mean time.
10. If the circuit court remands a cause and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment.

[No. 627.]

Submitted December 9, 1895. Decided January 13, 1896.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment of that court against the defendant, The Missouri Pacific Railway Company, in an action brought by John Fitzgerald, on behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company against said railway company *et al.* for an accounting, and to declare null and void certain action of the directors and arrangements between the Missouri Pacific Company and the construction company, and for the payment of moneys due the construction company, etc. Pending the action, Mary Fitzgerald was appointed administratrix of John Fitzgerald. *On motion to dismiss or affirm. Dismissed.*

See same case below, 45 Fed. Rep. 812, 41 Neb. 374.

Statement by *Mr. Chief Justice* **Fuller:**

This was a petition filed December 24, 1888, in the district court for Lancaster county, Nebraska, by John Fitzgerald, suing on behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company against that company and the Missouri Pacific Railway Company, a corporation organized under the laws of Missouri, Kansas, and Nebraska. The petition was based on two contracts (copies of which were annexed), one bearing date April 28, 1886, between the Fitzgerald & Mallory Construction Company and the Denver, Memphis, & Atlantic Railway Company, a corporation *organized under [558 the laws of the state of Kansas. By this contract the construction company agreed to build a railroad in Kansas from the east to the west line of that state; to furnish all materials and money; to equip the same with at least $1,000 of rolling stock per mile; to grade the line according to the engineer's surveys; to furnish oak ties on curves not less than 2,600 to the mile, and steel rails not less than 26 pounds to the yard; to build such depots and stations as the Denver company should require, and all necessary sidings or turnouts, and, generally, to construct the road equal to railroads then

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; Commercial Bank v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37: 267.

As to removal of causes from state to Federal courts where United States Constitution, act of Congress or treaty comes in question, see note to Little York Gold Washing & W. Co. v. Keyes, 24: 656.

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being built in southern Kansas. The Denver company agreed to pay $16,000 per mile of its full-paid capital stock for every mile of completed road constructed, and $16,000, in its first-mortgage bonds, per mile of single track of the road, which bonds were each to be for $1,000, or such other denomination as the parties should agree upon, draw interest at 6 per cent, be dated July 1, 1886, run thirty years from date, and be secured by a trust deed on the line and branches. They were to be delivered as the construction company required them. The Denver company was also to deliver to the construction company all municipal and county bonds voted and to be voted in aid of the railroad, and all donations thereto, and procure the right of way in advance of the work so as not to delay the construction, but the construction company was to pay for the right of way.

The other contract, dated May 4, 1886, was between the Missouri Pacific Railway Company and the construction company. It recited the contract of April 28, and also that the Missouri Pacific company desired to obtain control of the railway. The construction company agreed to sell to the Missouri Pacific company all the securities which it should receive under the first contract, for which the Missouri Pacific company was to deliver to it 5 per cent bonds at the rate of $12,000 per mile of completed road. The Missouri Pacific company also agreed to transport at cost the men and materials of the construction company while it was carrying on the work.

The petition alleged that the construction [559] company was a *corporation of Iowa, having a capital of a million and a half, divided into shares of $100 each, of which Fitzgerald held $1,500, S. H. Mallory, $1,500, and Gould and other citizens of New York, something over $10,000; that the holders of over 8,000 shares were officers and directors of the Missouri Pacific company; and that the bankers of the latter company held 2,000 shares. It was further alleged that shortly after the execution of the two contracts, all the directors of the Denver company, except Fitzgerald and Mallory, resigned, and their places were filled by officers and directors of the Missouri Pacific company; that the directory of the construction company was so changed that of its five directors three were connected with the Missouri Pacific company, Fitzgerald and Mallory being the other two. The work in the field was carried on by Fitzgerald and Mallory, and the financial dealings of the Denver and the construction companies were in the hands of the New York directors. Fitzgerald complained of many transactions of the New York directors of the construction company which were prejudicial to himself and other creditors and stockholders and in the interest of the Missouri Pacific company.

The road was built by the construction company, and Fitzgerald alleged that, after that was accomplished, he made efforts to secure an accounting between the Missouri Pacific and the construction companies, which were unsuccessful, and he brought the suit as a stockholder for the purpose of settling the dealings between the two companies.

The petition also averred that the Denver company failed to comply with the provisions of the contract in reference to procuring the right of way, to the damage of the construction company, for which it charged that the Missouri Pacific company was liable.

It was also alleged that the construction company not only owed Fitzgerald a large amount of money, but for money expended in the bringing of this as well as other suits, for attorneys' fees, and other like matters, for which he asked reimbursement.

*The prayer of the petition was that an [560] accounting be had between the Missouri Pacific company and the construction company; that certain action of the board of directors and arrangements between the Missouri Pacific company and the construction company be declared null and void; that the Missouri Pacific company be compelled to account in relation to certain enumerated matters and generally, and pay over all moneys found due to the construction company; also that complainant "be reimbursed for all expenses and attorneys' fees in other suits that he has been forced by the action of said directors to commence, as well as in this case;" and for general relief.

The answer of the Missouri Pacific company was filed January 19, 1889, and admitted that defendant was a corporation duly organized under the laws of Missouri, Kansas, and Nebraska; but averred that the liability proceeded on, if any, was a liability of the company incorporated under the laws of the state of Kansas. It charged that while the contract between the Denver and construction companies required the Denver company to acquire the right of way, the construction company undertook to procure it and became responsible to the Missouri Pacific company for a good title; that some 15 or more miles of the railroad were built over the public lands without complying with the act of Congress of March 3, 1875, granting to railroads the right of way through the public lands, so that for that distance of the road the Missouri Pacific company did not acquire such title as it was entitled to, and it claimed that if there should be an accounting between the construction company and itself, it should not be required to pay or account for any portion of the line where the lawful right of way had not been secured, and that a deduction of $12,000 per mile of railroad so situated should be made. The answer further alleged that Fitzgerald had theretofore commenced suit in the district court of Lancaster county, Nebraska, against the construction company to recover a sum exceeding $50,000, and caused garnishee proceedings to be instituted against the Missouri Pacific company, upon which it was required to *answer as to all moneys in its hands or [561] under its control belonging to the construction company or due from the Missouri Pacific company thereto, but that it had no interest in Fitzgerald's individual claim or knowledge concerning the merits thereof. Various other admissions, denials, and averments were made in the answer upon the merits, which it is unnecessary to set forth. The construction company filed a demurrer to the petition.

On the same day, January 19, 1889, the Missouri Pacific company filed its petition to remove the cause to the circuit court of the

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United States for the district of Nebraska on two grounds, diverse citizenship and the question raised by the claim of the Missouri Pacific company in respect of part of the road constructed over the public lands. It appeared from the pleadings that Fitzgerald was a citizen of Nebraska, and that the construction company was a corporation of Iowa; that the Missouri Pacific company was a corporation organized under the laws of Kansas, Missouri, and Nebraska; but in its answer, as already stated, the Missouri Pacific company claimed that it was not the corporation referred to in the petition, and that the liabilities arising under the contract were liabilities of the company organized and existing under the laws of Kansas. The construction company also filed a petition for removal.

The district court denied the petitions and refused to accept the bonds. The Missouri Pacific company, however, filed the record in the circuit court of the United States, and Fitzgerald filed a motion to remand and a plea to the jurisdiction, which motion was denied and the plea overruled, and the cause was referred to a special master to take proofs.

May 6, 1891, the cause came on to be heard upon the pleadings, proofs, and the report of the master, and the circuit court held that the cause had been improperly removed from the state court, and ordered it remanded at the costs of the Missouri Pacific company. The reasons for this conclusion are given in an opinion reported 45 Fed. Rep. 812. The cause having been returned to the district court of the state, the parties entered into a stipulation [562] that the action be *continued to the next September term, then to be tried, and that the depositions taken in the circuit court might be read as if taken in the state court. An amended petition and an amended and supplemental answer were filed. Trial was had as agreed in the district court of Lancaster county, which made a finding of facts, and rendered judgment against the Missouri Pacific company.

The forty-seventh finding of fact was as follows: "(47) That about 15 miles of railroad were laid out over government land; that no maps were filed with the Secretary of the Interior, showing the lines of way over said government land in the state of Kansas, but maps were filed with the local land officers of the United States at Wa Keeney, Kansas, duly certified to, showing said right of way."

Both parties appealed to the supreme court of the state, and that court rendered a judgment against the Missouri Pacific company. 41 Neb. 374. The Missouri Pacific company made application for a rehearing, pending which Fitzgerald died and Mary Fitzgerald, as his administratrix, filed her petition for revivor and for a receiver of the construction company to collect the judgment. In support of the application for a receiver, it was alleged that about the time Fitzgerald recovered judgment, the Missouri Pacific company caused a suit to be brought against the construction company in the name of the Kansas & Colorado Pacific Railway Company, which was owned by the Missouri Pacific company, and it was charged on various grounds that the action was collusive and contrived to deprive the supreme court of the state of its jurisdiction, and Fitzgerald of the fruits of its judgment, and that a receiver had been procured to be appointed by the circuit court in that action in furtherance of that object.

The Missouri Pacific company filed an answer and plea to this petition, denying collusion and urging objections to the application for a receiver in this case, which, so far as necessary, are hereafter stated. A reply was filed by Mrs. Fitzgerald to this answer and plea. The supreme court having granted a rehearing entered an order of revivor, rendered judgment *against the Missouri Pacific [563] company, and appointed a receiver. 41 Neb. 463. The pending writ of error was then sued out, and a motion to dismiss the writ for want of jurisdiction or to affirm the judgment was made.

The following are the errors assigned:

"1. The court erred in taking or assuming any jurisdiction and in holding that it had any jurisdiction of this cause, forasmuch as it appeared by the record that the defendant, the Missouri Pacific Railway Company, duly and seasonably and as within the time provided by the act of Congress, filed and presented its petition and bond for removal of said cause to the United States circuit court for the proper district, to wit, the United States circuit court for the district of Nebraska, on the ground that in said suit there was a controversy wholly between citizens of different states, removable under said act to said United States circuit court for the district of Nebraska, which said bond was refused and which said petition was denied, the defendant at the time duly excepting to such refusal and denial.

"2. The said court erred in taking or assuming any jurisdiction and in holding that it had any jurisdiction of this cause, forasmuch as in and by said petition for removal of this cause to the United States circuit court for the district of Nebraska, the said Missouri Pacific Railway Company set up and claimed a right, claim, privilege, immunity, and authority under an act of Congress approved March 3, 1875, entitled 'An Act Granting to Railroads the Right of Way through Public Lands of the United States,' and by reason of said act of Congress claimed that said cause arose under the laws of the United States, which said claim and petition of said defendant were erroneously overruled by said district court of Lancaster county, Nebraska, and by said supreme court of Nebraska.

"3. The said supreme court of the state of Nebraska erred in taking or assuming jurisdiction or in holding that it had jurisdiction of this cause, forasmuch as it appeared by the record in said cause that the defendant, the Missouri Pacific Railway Company was, at the time when said cause was *commenced, [564] a citizen, resident, and inhabitant of the state of Missouri, within the meaning of the acts of Congress of the United States relating to the jurisdiction of the Federal courts, and the plaintiff, John Fitzgerald, was a citizen, resident, and inhabitant of the state of Nebraska, but his said action was to enforce a cause of action as a stockholder of and for the benefit of the defendant, the Fitzgerald & Mallory Construction Company, which was at said

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time a citizen, resident, and inhabitant of the state of Iowa, within the meaning of said acts of Congress, and the controversy was therefore a controversy between citizens of different states within the meaning of the said acts of Congress relating to removal of causes. It further appeared from the record that the matter in dispute in said cause exceeded, exclusive of interest and costs, the sum or value of $2,000. It further appeared from the record that the defendant, the Missouri Pacific Railway Company, upon the grounds aforesaid, including the ground of such diversity of citizenship and jurisdictional amount, duly and seasonably made and filed its petition in this cause in said court, to wit, the district court of Lancaster county, Nebraska, at the time or at a time before the said defendant was required by the laws of said state of Nebraska or by the rule of said state court in which such suit was brought, to answer or plead to the declaration or complaint or petition of the plaintiff, for the removal of such suit into the said circuit court of the United States to be held in the district where such suit was pending, to wit, the circuit court of the United States in and for the district of Nebraska, and said defendant made and filed therewith, to wit, with its said petition, a bond with good and sufficient surety for its entering in such circuit court on the first day of its then next session a copy of the record in said suit, and for paying all costs that might be awarded by the said circuit court if said circuit court should hold that such suit was wrongfully and improperly removed thereto, which said petition was erroneously denied and which said bond was erroneously refused by said state court, to which denial and refusal the said Missouri Pacific Railway Company then and there duly excepted.

565] *"4. The said supreme court of the state of Nebraska erred in taking or assuming or in undertaking to exercise jurisdiction of this cause and of the parties thereto, by reason of the proceedings for the removal thereof hereinbefore recited, and in denying the right and authority set up and undertaken to be exercised by the said defendant, the Missouri Pacific Railway Company, under the statute and laws of the United States relating to the removal of causes of civil nature from the state to the Federal courts.

"5. The said supreme court of the state of Nebraska erred in taking or assuming to exercise jurisdiction in this cause and to hear and determine the same and to pronounce final judgment therein, forasmuch as it was made to appear to said court, and did appear, by the record in this cause, that the circuit court of the United States in and for the district of Nebraska had duly taken and undertaken to exercise jurisdiction of said cause and of the parties thereto, and had by due judgment and order overruled and denied application of the plaintiff herein to remand said cause to said state court, to wit, the district court of Lancaster county, Nebraska, and had by due order and judgment overruled a plea in abatement interposed by the said plaintiff to the jurisdiction of the said Federal court, all of which orders and judgments of said Federal court then remained in full force and effect, unappealed from and unreversed.

"6. The supreme court of the state of Nebraska erred in denying and overruling the plea in abatement to its jurisdiction interposed by the said defendant, the Missouri Pacific Railway Company, in answer and reply to the petition of Mary Fitzgerald, administratrix, to revive this action and cause in her name, as the successor of John Fitzgerald, the original plaintiff, then deceased.

"7. The said supreme court of the state of Nebraska erred in denying the claim set up and claimed by the said defendant, the Missouri Pacific Railway Company, to immunity from any recovery for or in respect of 17 miles of railroad constructed over the public domain by the said Fitzgerald & Mallory Construction Company in the name of the *Denver, [566 Memphis, & Atlantic Railway Company, without compliance with an act of Congress of the United States, approved March 3, 1875, entitled 'An Act Granting to Railroads the Right of Way through Lands of the United States,' specifically referred to and set forth in the answer of the said defendant, the Missouri Pacific Railway Company, in this cause.

"8. Said supreme court of Nebraska erred in denying and overruling the plea in abatement of the defendant, the Missouri Pacific Railway Company, to the jurisdiction of said court, wherein and whereby it appeared that on the 24th day of December, 1888, John Fitzgerald, the original plaintiff herein, instituted an action in his own name against the Fitzgerald & Mallory Construction Company to recover from said company an amount alleged to be due from said company, and thereby by due proceedings caused an attachment to issue and garnishment notice to be served upon the Missouri Pacific Railway Company charging it as garnishee, and thereby placing whatever fund or moneys might be due from it to said construction company in the custody of the law; and whereby it further appeared that by due proceedings had, said action so instituted by said John Fitzgerald was in due time properly removed from the district court of Lancaster county, Nebraska, in which it was instituted, to the circuit court of the United States in and for the district of Nebraska, and under and by virtue of § 4 of the removal act of Congress, March 3, 1875, the said attachment and garnishment proceedings were wholly removed into said circuit court of the United States, and said court then and there, by virtue thereof, acquired exclusive jurisdiction of said fund and moneys due from said Missouri Pacific Railway Company to said Fitzgerald & Mallory Construction Company, and of any controversy between said companies with respect to such fund.

"9. The said supreme court of Nebraska erred in holding and deciding that under and by virtue of said removal act of Congress the said fund so garnished in the hands of the Missouri Pacific Railway Company was not placed in the custody and under the exclusive control of said circuit court of the *United [567 States, by reason of said removal of said action of John Fitzgerald against the Fitzgerald & Mallory Construction Company.

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"10. The supreme court of the state of Nebraska erred in appointing a receiver of the Fitzgerald & Mallory Construction Company, and in investing or undertaking to invest the said receiver with any cause of action against the defendant, the Missouri Pacific Railway Company, forasmuch as it was made to appear and did appear by the record in said court in said cause that in a certain cause entitled 'The Kansas & Colorado Pacific Railroad Company against The Fitzgerald & Mallory Construction Company,' theretofore and then pending in the circuit court of the United States in and for the district of Nebraska, by due proceedings had in the said circuit court had appointed a receiver of said Fitzgerald & Mallory Construction Company, and of all of the property and assets thereof, and said receivership so appointed by said circuit court of the United States for the district of Nebraska had not been terminated and vacated, and said receivership had not been discharged.

"11. The supreme court of Nebraska erred in allowing, as a charge against the Missouri Pacific Railway Company in favor of said Fitzgerald & Mallory Construction Company, various items of alleged indebtedness of the Denver, Memphis, & Atlantic Railway Company to the said Fitzgerald & Mallory Construction Company.

"12. The supreme court of Nebraska erred in refusing to allow, as proper charges against the Fitzgerald & Mallory Construction Company, the several items of indebtedness of said construction company to the Missouri Pacific Railway Company.

"13. The supreme court of the state of Nebraska erred in holding that it had any jurisdiction to render and in rendering any judgment whatever against the defendant, the Missouri Pacific Railway Company, in this cause."

Messrs. **J. M. Woolworth,** *J. W. Deweese,* and *F. M. Hall* for defendant in error, in favor of motion.

Messrs. **John F. Dillon, Winslow S. Pierce,** and **B. P. Waggener** for plaintiff in error, in opposition.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Was any title, right, privilege, or immunity under the Constitution or any statute of, or authority exercised under, the United States, specially set up or claimed by plaintiff in error, denied by the decision of the state court?

575] *An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below, but we may refer to such assignment by way of convenience to ascertain the contentions of plaintiff in error.

Of the errors assigned here those which do not involve matters purely within the jurisdiction of the state courts may be grouped as follows:

That the supreme court of Nebraska erred—

First. In that the court decided against a right set up by plaintiff in error, under the act of Congress of March 3, 1875, entitled "An Act Granting to Railroads the Right of Way through the Public Lands of the United States" (18 Stat. at L. 482, chap. 182), by its refusal to allow damages for the failure of the construction company to properly comply with the act.

Second. In that the court in maintaining jurisdiction decided against the claim of plaintiff in error that by reason of process of garnishment in attachment against the Missouri Pacific company, in the action brought by Fitzgerald against the construction company to recover an amount alleged to be due him individually, in the state court and removed into the circuit court, the circuit court acquired exclusive jurisdiction and custody of the fund or moneys due from the Missouri Pacific company to the construction company, and of any controversy in respect thereof.

Third. In that the court in appointing a receiver of the construction company to collect the amount of the decree against the Missouri Pacific company, and disburse the same under the direction of the court, decided against the claim of the plaintiff in error that a receiver appointed by the circuit court in the cause therein pending, in favor of the Kansas & Colorado Pacific Railway Company and against the construction company, was entitled to the possession of the latter's assets.

Fourth. In that the court in exercising jurisdiction, notwithstanding the cause had been wrongfully remanded by the circuit court, decided against the plaintiff in error that the cause had been properly removed. And *herein also that the court in main-[576 taining jurisdiction decided against the claim of plaintiff in error that the state district court erred in denying its application to remove.

1. We repeat what we said in *California Powder Works* v. *Davis,* 151 U. S. 389, 393 [38: 206, 207], that "it is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented." *Eustis* v. *Bolles,* 150 U. S. 361 [37: 1111], and cases cited.

In the case at bar, the state court did not decide a Federal question in this connection, but its decision rested on an independent ground broad enough to sustain the judgment.

The contention of plaintiff in error was that, although the contract between the Denver company and the construction company required the Denver company to secure the right of way, it was understood that when the Missouri Pacific company and the construction company entered into their contract the construction company should use the name of the Denver company, exercise its power of eminent domain, comply with the act of Congress, and secure the right to build

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the road over the public lands; that the construction company failed to secure the lawful right of way as to a portion of the road; that the Missouri Pacific company should be allowed a deduction for each and every mile so situated; and that the controversy in this regard depended upon a right construction of the act of Congress. It would seem that this dispute between the parties turned on whether the construction company had failed in its duty to the Missouri Pacific company, and not on any difference between them as to the proper 577] *meaning of the act, but it is sufficient to say that the validity of the act of Congress was not questioned, and that the decision of the state courts denied no right claimed under it. The finding of fact was that about 15 miles of road were laid out over government land, and that no maps were filed with the Secretary of the Interior, showing the lines of way thereon, though they were filed with the local land officers. In *Real* v. *Hollister*, 20 Neb. 112, it was decided that in an action for breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of possession, or has yielded to a paramount title, and, applying that doctrine in this case, the state courts held that the Missouri Pacific company could not maintain its claim for damages, because its possession had not been disturbed or its title questioned. 41 Neb. 451.

2. The answer and plea of the Missouri Pacific company to Mrs. Fitzgerald's petition for an order of revivor and the appointment of a receiver, filed January 29, 1895, set up that on December 24, 1888, which was the same day that he instituted this suit as a stockholder, Fitzgerald brought an action against the construction company to recover an amount alleged to be due him; that notice of garnishment was served on the Missouri Pacific company; that the cause was then removed into the circuit court, and there Fitzgerald recovered judgment; and that control over the indebtedness of the Missouri Pacific company to the construction company and of the accounting between them was thus transferred to the circuit court.

The matter of the garnishment proceedings was referred to in the original answer of the Missouri Pacific company, filed in this cause January 19, 1889, but the position now taken was put forward for the first time in the answer and plea to Mrs. Fitzgerald's petition in the supreme court. Apart, however, from the objection that the course of proceedings could not be obstructed in this way at so late a date and in the court of appellate jurisdiction, the position cannot be maintained, for it was not 578] made to appear but that the *notice of garnishment may have been issued and served after jurisdiction had attached in this suit; and, moreover, it did not appear that the garnishment process was prosecuted or that any order or judgment charging the Missouri Pacific company was rendered. Under Neb. Code, §§ 224, 225 (Neb. Comp. Stat. 1895, 1170, 1171), the garnishee must deliver the property of the defendant in the action or pay the money due, as disclosed on his examination, into court, or give bond that the amount shall be paid or the property be forthcoming, as directed by the court, or if the garnishee fail to appear and answer, or his disclosure is not satisfactory, or he fail to comply with the order of the court, etc., the plaintiff may proceed against him by action and recover judgment as in other cases, defendant being substituted as plaintiff when plaintiff is satisfied.

The supreme court of Nebraska disposed of this objection by saying "that the attachment proceeding was evidently abandoned in the circuit court, where the record shows an ordinary judgment for damages, unaccompanied by an order against the Missouri Pacific company as garnishee."

We are unable to perceive that that court in declining to entertain the objection so passed upon a Federal question as to furnish ground for the interposition of this court.

3. By the amended petition filed May 4, 1891, the appointment of a receiver was prayed, but the judgment of the district court was rendered December 28, 1891, for $429,573.43, to be paid to the clerk of the court to abide its further order, execution to issue on failure of payment.

The cause having been taken to the supreme court by appeal, judgment was there rendered, June 26, 1894, for $764,942.08, with interest from December 24, 1893, and the cause remanded to the district court, with instructions to enforce the collection of said judgment, and to appoint a receiver to collect and pay out the proceeds thereof and of such other assets of the construction company as might be within the jurisdiction of the court. December 30, 1894, pending an application for a rehearing, Fitzgerald died, and Mrs. Fitzgerald, having been appointed special administratrix *of his estate, filed, January 15, 1895, [579 her petition for an order of revivor, and also that a receiver be appointed by the supreme court.

January 5, 1895, a rehearing was granted, and on April 4 the supreme court entered the order of revivor, and modified its former judgment by reducing the amount to $300,906.33. And on April 6, 1895, the court appointed a receiver, having reviewed and overruled the Pacific company's objections thereto presented by its answer and plea to Mrs. Fitzgerald's application. 44 Neb. 463.

July 2, 1891, the Kansas & Colorado Pacific Railway Company brought its action in the state district court against the construction company with garnishee notice to the Missouri Pacific company, which cause was removed into the circuit court on July 8, 1891. January 12, 1895, the Kansas company filed an amended and supplemental complaint, and a receiver was appointed by the circuit court, the district judge presiding.

As the state courts had been in possession of the *res* for years before January 12, 1895, when, pending the modification by the supreme court of its judgment of June 26, 1894, the circuit court permitted the amended and supplemental complaint to be filed by the Kansas company against the construction company, and thereupon appointed a receiver, the supreme court of Nebraska held that the rule that the court which first acquires jurisdiction of the subject-matter of an action will retain it until the controversy is finally deter-

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mined, applied, and that the appointment of a receiver by the circuit court was, under the circumstances, ineffectual to devest the control of the supreme court over the assets of the construction company, or defeat its right to enforce its judgment in the accounting.

In our opinion the supreme court in so holding denied no Federal right of the Missouri Pacific company.

4. It is contended that by its judgment the supreme court affirmed the order of the state district court denying the application to remove, and that that order was erroneous. But as the Missouri Pacific company, notwithstand-
580] ing such denial, *filed the record in the circuit court, and the cause proceeded in that court to final hearing, when it was remanded, and as the state court in the meantime awaited the action of the circuit court, the order worked no prejudice, and if any error were committed in that regard, it became wholly immaterial.

5. We are thus brought to the remaining and most important question arising on this motion.

Under the act of Congress of March 3, 1887 (24 Stat. at L. 552, 553, chap. 373), as re-enacted for the purpose of correcting the enrolment, by the act of August 13, 1888 (25 Stat. at L. 433, 435, chap. 866), is the order of the circuit court remanding the cause to the state court open to review on this writ of error? If not, then we cannot take jurisdiction to revise the proceedings of the state court. Nor can the inquiry be affected by the fact that a motion to remand had been previously made and denied. That order was subject to reconsideration, as the question of jurisdiction always is, until final judgment, and, indeed, it was the duty of the circuit court under the statute, if it appeared at any time that jurisdiction was lacking, to dismiss or remand as justice might require. 18 Stat. at L. 470, chap. 137, § 5.

Prior to the passage of the act of March 3, 1875, just cited, an appeal or writ of error would not lie to review an order of the circuit court remanding a suit which had been removed because such an order was not a final judgment or decree. This was expressly held in *Chicago & A. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 [23: 103], decided at October term, 1874, and it was also ruled that the remedy was by mandamus. But by the last paragraph of § 5 of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), it was provided that "the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ of error or appeal as the case may be."

By § 6 of the act of March 3, 1887, however, this paragraph was expressly repealed, and by the last paragraph of § 2 it was enacted that "whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed
581] and order the same to be *remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such case shall be allowed."

These provisions were referred to by *Mr. Chief Justice* Waite in *Morey* v. *Lockhart*, 123 U. S. 56, 57 [31: 68], and the *Chief Justice* said:

"It is difficult to see what more could be done to make the action of the circuit court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed."

It was subsequently decided in the case of *Ex parte Pennsylvania Co.* 137 U. S. 451, 454 [34: 738, 740], that the power to afford a remedy by mandamus when a cause, removed from a state court, is improperly remanded, was taken away by the acts of March 3, 1887, and August 13, 1888.

Adverting to the clause just quoted from § 2 of those acts, *Mr. Justice* Bradley said:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition *of appeal and writ of error, is [**582**
strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are therefore of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

We see no reason for reconsidering these conclusions and it may be regarded as settled that an order of the circuit court remanding a cause cannot be reviewed in this court by any direct proceedings for that purpose.

If a state court proceeds to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable here after final judgment, under U. S. Rev. Stat. § 709. *Stone* v. *South Carolina*, 117 U. S. 430 [29: 962].

If a case be removed to the circuit court and a motion to remand be made and denied, then, after final judgment, the action of the circuit court in refusing to remand may be reviewed here on error or appeal. *Graves* v. *Corbin*, 132 U. S. 571 [33: 462].

If the circuit court and the state court go to judgment respectively, each judgment is open to revision in the appropriate mode. *Meyer* v. *Delaware R. Const. Co.* ("*Removal Cases*") 100 U. S. 457 [25: 593].

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But if the circuit court remands a cause and the state court proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment.

A state court cannot be held to have decided against a Federal right when it is the circuit court and not the state court which has denied its possession.

The supreme court of Nebraska rightly recognized the courts of the United States to be the exclusive judges of their own jurisdiction and declined to review the order of the circuit court.

As under the statute a remanding order of the circuit court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that "no appeal or writ of error from the decision of the circuit court re-
583] manding such cause shall be *allowed." And it is entirely clear that a writ of error cannot be maintained under § 709 in respect of such an order, where the state court has rendered no decision against a Federal right but simply accepted the conclusion of the circuit court.

We regard this result as intended by Congress, in effectuation of the object of the act of March 3, 1887, to restrict the jurisdiction of the circuit court and to restrain the volume of litigation which, through the expansion of Federal jurisdiction in respect of the removal causes, had been pouring into the courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315 [33: 635]; *Ex parte Pennsylvania Co.* 137 U. S. 451 [34: 738]; *Fisk* v. *Henarie*, 142 U. S. 459, 467 [35: 1080, 1082].

So far as the mere question of the forum was concerned, Congress was manifestly of opinion that the determination of the circuit court that jurisdiction could not be maintained should be final, since it would be an uncalled-for hardship to subject the party who, not having sought the jurisdiction of the circuit court, succeeded on the merits in the state court, to the risk of the reversal of his judgment, not because of error supervening on the trial, but because a disputed question of diverse citizenship had been erroneously decided by the circuit court; while as to applications for removal on the ground that the cause arose under the Constitution, laws, or treaties of the United States, that this finality was equally expedient, as questions of the latter character, if decided against the claimant, would be open to revision under § 709, irrespective of the ruling of the circuit court in that regard in the matter of removal.

It must be remembered that when Federal questions arise in causes pending in the state courts, those courts are perfectly competent to decide them, and it is their duty to do so.

As this court, speaking through *Mr. Justice* Harlan, in *Robb* v. *Connolly*, 111 U. S. 624, 637 [28: 542, 546], said: "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the
584] judges of the state courts *are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court in the state in which the question could be decided to this court for final and conclusive determination."

Writ of error dismissed.

FRANK P. DICKSON, *Appt.*,
v.
RICHARD C. PATTERSON ET AL.

(See S. C. Reporter's ed. 584-592.)

Setting aside conveyance for fraud—accounting.

1. Where two persons have purchased land to be sold on joint account, a claim by one against the other for his share of the proceeds of sales, made without knowledge that a conveyance by the latter to a third person was fraudulent, will not constitute such an election by the former as to preclude him, on discovering the fraud, from suing to set aside such conveyance and asserting his rights in the property.

NOTE.—*As to estoppel in pais*, see note to Stowe v. United States, 22: 144.

As to when vendee is estopped from disputing the title of his vendor,—see note to Watkins v. Holman, 10: 873.

Actionable fraud; elements necessary to constitute; rescission of deeds or contracts for fraud; false representations.

In order to render fraud actionable in any case, the following essential elements should be present:

1. The misrepresentation must be of a matter of fact, and not of law. Upton v. Tribilcock, 91 U. S. 45, 49 (23: 204, 205); Seeley v. Reed, 25 Fed. Rep. 361; Clodfelter v. Hulett, 72 Ind. 137; Dillman v. Nadlehoffer, 119 Ill. 567; Fish v. Cleland, 33 Ill. 238; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556; Gormely v. Milwaukee Gymnastic Asso. 55 Wis. 350.

2. The misrepresentation must be of a fact, as distinguished from a mere expression of opinion. Reynolds v. Palmer, 21 Fed. Rep. 433; Buckner v. Street, 15 Fed. Rep. 365; Bristol v. Braidwood, 28 Mich. 191; Hubbell v. Meigs, 50 N. Y. 480, 489; Sawyer v. Prickett, 86 U. S. 19 Wall. 146 (22:105).

3. The misrepresentation must be of a fact at the time or previously existing, and not a mere promise for the future. Fenwick v. Grimes, 5 Cranch. C. C. 439; Long v. Woodman, 58 Me. 49; Burt v. Bowles, 69 Ind. 1; Fouty v. Fouty, 34 Ind. 433; Bethell v. Bethell, 92 Ind. 318; Bigham v. Bigham, 57 Tex. 238; Wilson v. Eggleston, 27 Mich. 257; Dowd v. Tucker, 41 Conn. 197; Gross v. McKee, 53 Miss. 536; Farrar v. Bridges, 3 Humph. 566; Miller v. Howell, 2 Ill. 499, 32 Am. Dec. 36; Higgins v. Higgins, 57 N. H. 224.

4. The misrepresentation must be of a material matter. 2 Pom. Eq. Jur. § 898; Hall v. Johnson, 41 Mich. 286; Clark v. Everhart, 63 Pa. 347; Yeates v. Pryor, 11 Ark. 58; Lynch v. Mercantile Trust Co. 18 Fed. Rep. 486; Seeberger v. Hobert, 55 Iowa, 756; Noel v. Horton, 50 Iowa, 687; Ohio First Nat. Bank v. Yocum, 11 Neb. 328.

5. The misrepresentation must be relied upon by the person to whom it is made or whose action it is intended to influence. Nye v. Merriam, 35 Vt.

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2. One who joins with another in purchasing land under an agreement that they are to pay equally for the land and subdivide and sell it, and share equally in all sales, is not entitled, on discovering that, from the misrepresentations of the other as to the purchase price, he has been led to pay all that was paid for the land, to claim the whole property and all the proceeds of the sales, but his remedy is by an accounting in which he shall be credited for what he has paid and one half of such proceeds.

[No. 15.]

Submitted October 15, 1895. Decided January 6, 1896.

APPEAL from a decree of the Circuit Court of the United States for the District of Nebraska in favor of Richard C. Patterson *et al.*, defendants, dismissing a suit in equity brought by Frank P. Dickson to procure a decree rescinding certain sales of real estate on the ground of fraud. *Reversed, and cause remanded for further proceedings.*

The facts are stated in the opinion.

Messrs. **Westel & Morsman** and *Chas. Offutt*, for appellant:

The facts upon which the trial judge based his conclusions of law utterly fail to constitute a ratification of the sale by Dickson, because Dickson did not then possess full knowledge of the fraud.

Anderson's Appeal, 36 Pa. 496; *Reaves* v. *Garrett*, 34 Ala. 558; *Wilson* v. *Higbee*, 62 Fed. Rep. 723.

The fraud practised by Patterson upon Dickson was so gigantic as to beggar belief. It was so monstrous that a court of chancery cannot say that Dickson acquiesced in it.

Complainant offered to repay the supposed purchase money received from Patterson, and there is nothing to indicate that this offer was not made within a reasonable time.

Clough v. *London & N. W. R. Co.* L. R. 7 Exch. 35; *Wicks* v. *Smith*, 21 Kan. 412, 30 Am. Rep. 438; *Marston* v. *Simpson*, 54 Cal. 189; *Williamson* v. *New Jersey S. R. Co.* 29 N. J. Eq. 311.

Appellees having failed to plead the alleged acquiescence and election of appellant as a defense, the trial court could not grant any relief based upon this theory, even though the evidence had established such acquiescence and election.

Philadelphia, W. & B. R. Co. v. *Howard*, 54 U. S. 13 How. 307 (14: 157); *Mabury* v. *Louisville & J. Ferry Co.* 60 Fed. Rep. 645; *Wood* v. *Ostram*, 29 Ind. 179; *Robbins* v. *Magee*, 76 Ind. 390; *Cole* v. *Lafontaine*, 84 Ind. 448; *Stewart* v. *Beck*, 90 Ind. 458.

Messrs. **Jno. L. Webster** and *H. D. Estabrook*, for appellees:

Complainant is estopped from insisting upon the frauds charged for the reason that he ratified the sales by his conduct; failed to rescind

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438; Hagee v. Grossman, 31 Ind. 223; Taylor v. Guest, 58 N. Y. 262, 266; Roseman v. Canovan, 43 Cal. 110; Percival v. Harger, 40 Iowa, 286; Tuck v. Downing, 76 Ill. 71; Slaughter v. Gerson, 80 U. S. 13 Wall. 379 (20: 627); Pollock, Torts, 251.

Where false representations of the character indicated are so made for the purpose of being acted upon, and are so acted upon, the party to whom and for whom they are made may ordinarily maintain an action for such damages as proximately result from the deception. Cooley, Torts, 475; Pollock, Torts, 240; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; Sellar v. Clelland, 2 Colo. 532; Byard v. Holmes, 34 N. J. L. 296; Busterud v. Farrington, 36 Minn. 320.

It is sufficient to constitute actionable fraud, so far as the question of knowledge is concerned, if the person making the misrepresentations had no knowledge and no belief upon the subject, and recklessly made them with intent to deceive; or even if he supposed his representations to be true, but had no reason therefor, and nevertheless made them as of positively known facts, and thereby induced the person to whom they were made to act upon them to his damage. Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598; Weed v. Case, 55 Barb. 534; Ormrod v. Huth, 14 Mees. & W. 652; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Taylor v. Ashton, 11 Mees. & W. 401; Beebe v. Knapp, 28 Mich. 53; Fisher v. Mellen, 103 Mass. 503; Litchfield v. Hutchinson, 117 Mass. 195; Frenzel v. Miller, 37 Ind. 1, 10 Am. Rep. 62; Bennett v. Judson, 21 N. Y. 238; Allen v. Hart, 72 Ill. 104; Bethell v. Bethell, 92 Ind. 318; West v. Wright, 98 Ind. 335; Humphrey v. Merriam, 32 Minn. 197; Cooper v. Schlesinger, 111 U. S. 148 (28: 383).

Generally, no one but the party to whom they are made is entitled to rely on representations of another intended for him. Ashuelot Sav. Bank v. Albee, 63 N. H. 152, 56 Am. Rep. 501; Carter v. Harden, 78 Me. 528.

Where representations are made to one to be communicated to another for the purpose of influencing the latter, and not the former, there is no actionable fraud as to the former; but there may be actionable fraud as to the party to whom they were intended to be communicated. Wells v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436; McCracken v. West, 17 Ohio, 16; Eaton, C. & R. Co. v. Avery, 83 N. Y. 31, 34; Langridge v. Levy, 2 Mees. & W. 519; Carvill v. Jacks, 43 Ark. 454.

And where representations are made for the express purpose of influencing the public generally, and inducing any individual members thereof that may be so influenced, as one of the public, to act upon them, whoever so receiving and relying upon them does act in the manner intended may, if deceived thereby to his damage, treat them as a fraud upon himself. Holmes v. Harrington, 20 Mo. App. 661; Carvill v. Jacks, *supra;* Gerhard v. Bates, 2 El. & Bl. 476; Peck v. Gurney, L. R. 13 Eq. Cas. 79, 1 Eng. Rep. (Moak's ed.) 567; Terwilliger v. Great West. Teleg. Co. 59 Ill. 249; Booth v. Wonderly, 36 N. J. L. 250; Morse v. Swits, 19 How. Pr. 275; Denton v. Great Northern R. Co. 25 L. J. Q. B. 129.

Where a party can protect himself by ordinary care and prudence, he must do so; and if, with full means of knowledge, being equally able to judge of a matter for himself, he relies upon the representations of another with whom he stands on equal footing, without exercising the means of knowledge open to him, neither the courts of law nor courts of equity will relieve him from the effects of such folly. 1 Story, Eq. Jur. (3d ed.) §§ 199, 200; Ætna Ins. Co. v. Reed, 33 Ohio St. 283; Slaughter v. Gerson, 80 U. S. 13 Wall. 379 (20: 627); Brown v. Leach, 107 Mass. 364; Long v. Warren, 68 N. Y. 426; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Vincent v. Berry, 46 Iowa, 571; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Mamlock v. Fairbanks, 46 Wis. 415, 32 Am. Rep. 716; Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215; Schwabacker v. Riddle, 99 Ill. 343; Redgrave v. Hurd, L. R. 20 Ch. Div. 1.

Where the parties stand on an unequal footing, and the one making the representations is an ex-

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upon the discovery of the alleged fraud; failed to put the defendant *in statu quo;* and acquiesced in the sale with knowledge of the facts.

Where a party intends to abandon or rescind a contract on the ground of fraud he must do so promptly and decidedly on the first information of such fraud. If with full knowledge, or with sufficient notice or means of knowledge of his rights and all the material facts, he lies by for a considerable time, or abstains from impeaching the transaction, this will be construed as an acquiescence; and the transaction, although originally impeached, ceases to become so in equity.

Grymes v. *Sanders*, 93 U. S. 62 (23: 802); *Wood* v. *Carpenter*, 101 U. S. 141 (25: 809); *Dickey* v. *Lyon*, 19 Iowa, 547; *Cambridge Valley Bank* v. *Delano*, 48 N. Y. 340; *Merrill* v. *Wilson*, 66 Mich. 232; *Paine* v. *Harrison*, 38 Minn. 346; *Bailey* v. *Fox*, 78 Cal. 389; *Bell* v. *Keepers*, 39 Kan. 105; *Estes* v. *Reynolds*, 75 Mo. 563; Bigelow, Fraud, 288.

Dickson cannot maintain this bill because he did not return or offer to return the purchase money received by him, to wit, the $1,500 and the $112.50.

An action to rescind a sale of land on the ground of fraud will not lie unless the consideration paid is returned or tendered before suit; and an election that the vendor is able and willing to return it, and now offers to do so, is insufficient.

Van Trott v. *Wiese*, 36 Wis. 439; *Masson* v. *Bovet*, 1 Denio, 69; *Cobb* v. *Hatfield*, 46 N. Y. 533; *Latham* v. *Hicky*, 21 La. Ann. 425; *Wilbur* v. *Flood*, 16 Mich. 40; *Woodbury* v. *Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Dotomer* v. *Smith*, 32 Vt. 1, 76 Am. Dec. 148; *Evans* v. *Gale*, 17 N. H. 573, 43 Am. Dec. 614; *Young* v. *Arntze*, 86 Ala. 116; *Thompson* v. *Peck*, 115 Ind. 512.

The rescission must be *in toto*, and property received under the rescinded contract must be returned and the adverse party put as far as possible *in statu quo*, whatever may be the ground of rescission.

Conner v. *Henderson*, 15 Mass. 319, 8 Am. Dec. 103; *Carneal* v. *May*, 2 A. K. Marsh. 587, 12 Am. Dec. 453; *Durrett* v. *Simpson*, 3 T. B. Mon. 517, 16 Am. Dec. 115; *Southern L. Ins. & T. Co.* v. *Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Perley* v. *Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Kimball* v. *Cunningham*, 4 Mass. 502, 3 Am. Dec. 230; *Fay* v. *Oliver*, 20 Vt. 118, 49 Am. Dec. 764; *Jennings* v. *Gage*, 13 Ill. 610, 56 Am. Dec. 476; *Emerson* v. *McNamara*, 41 Me. 565; *Estabrook* v. *Sweet*, 116 Mass. 303; *Cook* v. *Gilman*, 34 N. H. 556; *Herman* v. *Haffenegger*, 54 Cal. 161.

This rule is so stringent that even a married woman cannot avoid a sale of property made

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pert in the matter in hand, or has means of knowledge not open to the other, such representations, if false, will be fraudulent in many cases in which there would be no actionable fraud if the parties stood on the same footing. Clough v. Adams, 71 Iowa, 17; Fishback v. Miller, 15 Nev. 428; Schwenk v. Naylor, 102 N. Y. 683; Jackson v. Armstrong, 50 Mich. 65; Haygarth v. Wearing, L. R. 12 Eq. 320; Allin v. Millison, 72 Ill. 201; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Hanger v. Evins, 38 Ark. 334.

Suppressio veri or concealment will amount to fraud where the concealment is of material facts which one party is under some legal or equitable duty to communicate to the other, and which the latter has a right, *juris et de jure*, to know. Dambmann v. Schulting, 75 N. Y. 55, 62; Bench v. Sheldon, 14 Barb. 66; Fox v. Mackreth, 2 Bro. C. C. 420; 1 Story, Eq. Jur. (3d ed.) § 207; Hadley v. Clinton County Importing Co. 3 Ohio St. 502, 62 Am. Dec. 454; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Conover v. Wardell, 22 N. J. Eq. 492.

Where parties deal "at arm's length" on equal terms, and no particular relation of trust or confidence exists between them, there is usually no obligation to speak, and either may remain silent and be safe. Archbold v. Lord Howth, L. R. 2 Ir. C. L. 608; People's Bank v. Bogart, 81 N. Y. 101, 108, 37 Am. Rep. 481; Law v. Grant, 37 Wis. 548; Fisher v. Budlong, 10 R. I. 525; Laidlaw v. Organ, 15 U. S. 2 Wheat. 178 (4: 214); Ward v. Packard, 18 Cal. 391; Barnett v. Stanton, 2 Ala. 181; Kerr, Fraud & Mistake (Bump's ed.) 100; Allen's Appeal, 99 Pa. 196, 44 Am. Rep. 101; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24 (25: 532).

But where one party knows that the other places a peculiar trust and confidence in him, or where they occupy a fiduciary relationship, there is usually an obligation to disclose all material facts; and silence or concealment thereof will, in such cases, constitute fraud. Emmons v. Moore, 85 Ill. 304; Young v. Hughes, 32 N. J. Eq. 372; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Pilling v. Armitage, 12 Ves. Jr. 78; Pidcock v. Townsend, 3 Barn. & C. 605; 2 Pom. Eq. Jur. § 902.

So, when one "stands by" and hears false representations made about a matter in which he is interested, without correcting them where it is his duty to do so, or remains silent while another asserts rights which he knows are his own, to the prejudice of a third person whom he thus allows to incur liability on the faith thereof, which would not have been incurred except for such silence, he will be estopped on the ground of fraud from afterwards setting up such rights as against that person. Michigan Paneling Mach. & Mfg. Co. v. Parsell, 38 Mich. 475; Kent v. Quicksilver Min. Co. 78 N. Y. 159; Storrs v. Barker, 6 Johns. Ch. 166, 169, 10 Am. Dec. 316; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Thompson v. Sanborn, 11 N. H. 201, 35 Am. Dec. 490; Olliver v. King, 8 DeG. M. & G. 118; Pickard v. Sears, 6 Ad. & El. 474; Shepherd v. Sharpe, 4 L. T. 270; Davies v. Davies, 6 Jur. N. S. 1322; Lee v. Munroe, 11 U. S. 7 Cranch, 366, 368 (3: 373, 374); 1 Story, Eq. Jur. (3d ed.) § 384.

And there are numerous cases in which the rule is applied where there are latent defects or circumstances materially affecting the subject-matter of a sale, known to the seller and incapable of being discovered by the purchaser, who has not equal means of knowledge. Mellish v. Motteux, Peake, 156; Smith v. Harrison, 26 L. J. Ch. 412; Prout v. Roberts, 32 Ala. 427; Turner v. Huggins, 14 Ark. 21; Glasscock v. Minor, 11 Mo. 655; Cecil v. Spurger, 32 Mo. 462, 82 Am. Dec. 140; Lunn v. Shermer, 93 N. C. 164.

One who buys on credit without evil design is not bound to volunteer a statement of his financial condition where no questions are asked. Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; *Ex parte* Whittaker, L. R. 10 Ch. App. 446; Nichols v. Pinner, 18 N. Y. 295; Redington v. Roberts, 25 Vt. 686; Klopenstein v. Mulcahy, 4 Nev. 296; Garbutt v. Prairie du Chien Bank, 22 Wis. 384; Belding v. Frankland, 8 Lea, 67, 41 Am. Rep. 630; Mears v. Waples, 3 Houst. (Del.) 581.

But where one who is insolvent buys on credit, with the intention or preconceived design of not paying for what he buys, he is guilty of fraud. Ayres v. French, 41 Conn. 142; Donaldson v. Far-

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by her, without restoring the consideration given by the purchaser.

Pilcher v. *Smith*, 2 Head, 208.

And the same rule will apply to infants, if at the time of calling for rescission they still have in their possession and control the consideration received for the sale.

Bartlett v. *Cowles*, 15 Gray, 445.

The failure to offer to return the consideration received will be treated as an affirmance of the contract.

Sanborn v. *Osgood*, 16 N. H. 112; *Ayers* v. *Hewett*, 19 Me. 281; *Rowley* v. *Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; Bigelow, Fraud, p. 410.

Dickson, after discovering the fraud as indicated by his letter of February 27, 1886, should immediately have elected to rescind or abide by the contract. He elected to abide by the contract by retaining what he had already received, and by the writing of the letters demanding that Patterson pay to him the balance of the money arising from the sale to Otto Boehme.

Dennis v. *Jones*, 44 N. J. Eq. 513; *Arnold* v. *Hagerman*, 45 N. J. Eq. 186; *Grabenheimer* v. *Blum*, 63 Tex. 369; *Nounnan* v. *Sutter County L. Co.* 81 Cal. 1, 6 L. R. A. 219; *Whiting* v. *Hill*, 23 Mich. 399; *Vernol* v. *Vernol*, 63 N. Y. 45.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought to procure a decree rescinding certain sales of real estate on the ground of fraud.

The case made by the original and amended bill of the appellant, who was plaintiff below, is substantially as follows:—

Plaintiff and defendant Patterson married sisters and had been friends for a long time. The former had expressed a wish to join the latter upon equal terms in the purchase of real estate in or near Omaha, Nebraska, with a view to platting the same into lots as an addition to that city.

*Defendant accordingly wrote to plain- [586 tiff on May 18, 1885, stating that he was about to purchase 10 acres of land, and that "this 10 acres of land will cost $4,800. $2,500 cash. They will make 48 lots worth $250 each. If you want to go in, it will cost you $1,250 cash, balance to suit." The plaintiff having made further inquiries by letter, defendant answered that the expenses of surveying, advertising, and platting the property would be about $300, and the net profits at least $6,000; that they would probably not be called upon to make the deferred payments; that he, defendant, had realized large profits from other like ventures; that other persons desired to join him, and he urged plaintiff to do so.

Relying upon the above statements, plaintiff accepted the proposition, and subsequently sent defendant Patterson the sum of $1,250 as his half of the cash payment. His wife joining him, he signed a mortgage for the balance

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well, 93 U. S. 631 (23: 993); Stewart v. Emerson, 52 N. H. 301; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366; Mulliken v. Millar, 12 R. I. 296; Fox v. Webster, 43 Mo. 181; Peters v. Hiles, 48 Md. 506, 512; Shipman v. Seymour, 40 Mich. 274; Buckley v. Artcher, 21 Barb. 585; Kline v. Baker, 99 Mass. 253; Davis v. McWhirter, 40 U. C. Q. B. 598; Wright v. Brown, 67 N. Y. 1.

Any contract, the making of which is induced by the fraud of either party practised upon the other at the time the contract is made, or while negotiations in regard to it are being carried on, is voidable and may be rescinded at the election of the party defrauded. Smith v. Richards, 38 U. S. 13 Pet. 26 (10: 42); Daniel v. Mitchell, 1 Story, 172; Warner v. Daniels, 1 Woodb. & M. 90, 91; Foreman v. Bigelow, 4 Cliff. 508; Taylor v. Fleet, 1 Barb. 471; Buckner v. Street, 15 Fed. Rep. 365; Addington v. Allen, 11 Wend. 375; Masson v. Bovet, 1 Denio, 69; Dauchy v. Silliman, 2 Lans. 361; Schwenk v. Naylor, 102 N. Y. 683; Babcock v. Case, 61 Pa. 427, 100 Am. Dec. 654; Sheldon Axle Co. v. Scofield, 85 Mich. 177; Dennis v. Leaton, 72 Mich. 586; Skinner v. Brigham, 126 Mass. 132; Bowker v. Delong, 141 Mass. 815; Hickey v. Drake, 47 Mo. 369; Reed v. Peterson, 91 Ill. 288; Bradley v. Luce, 99 Ill. 234; Wright v. Haskell, 45 Me. 489; Farris v. Ware, 60 Me. 482; Leeds v. Boyer, 89 Ind. 289; Leake v. Ball, 116 Ind. 214; Dietz v. Sutcliffe, 80 Ky. 650; White v. Cox, 3 Hayw. 79; Pendarvis v. Gray, 41 Tex. 326; Cook v. Moore, 39 Tex. 255; Tyner v. Cotter, 67 Wis. 482; Foster v. Gressett, 29 Ala. 393; Lindsey v. Veasy, 62 Ala. 421; West v. Waddill, 33 Ark. 575; Grindrod v. Wolf, 38 Kan. 292; Wampler v. Wampler, 30 Gratt. 454; Davis v. Henry, 4 W. Va. 571; Preston v. Reeve, 65 N. H. 6; Gates v. Bliss, 43 Vt. 299; Yoeman v. Lasley, 40 Ohio St. 190.

In regard to false representations, it is primarily essential that they be positive statements of facts, and not of mere matters of opinion. Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Broughton v. Winn, 60 Ga. 486; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Bishop v. Small, 63 Me. 12; Gordon v. Parmelee, 2 Allen, 212; Hazard v. Irwin, 18 Pick. 105; Mooney v. Miller, 102 Mass. 217; Tucker v. White, 125 Mass. 344; Clark v. Everhart, 63 Pa. 347; McClanahan v. McKinley, 52 Iowa, 222; Lucas v. Crippen, 76 Iowa, 507; Hunter v. McLaughlin, 43 Ind. 38; Netdefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; Foster v. Caldwell, 18 Vt. 176; Jaffray v. Moss, 41 La. Ann. 548; Sawyer v. Prickett, 86 U. S. 19 Wall. 146 (22: 105); Stebbins v. Eddy, 4 Mason, 414; New Brunswick & C. R. & L. Co. v. Conybeare, 9 H. L. Cas. 711.

Where a representation is made of a fact which has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving such representation has the absolute right to rely on its truthfulness, although the means of ascertaining its falsity are fully open to him. Mead v. Bunn, 32 N. Y. 275; David v. Park, 108 Mass. 501; Kiefer v. Rogers, 19 Minn. 32; Matlock v. Todd, 19 Ind. 130; Keller v. Equitable F. Ins. Co. 28 Ind. 170; Reynell v. Sprye, 8 Hare, 222.

Where parties stand in a confidential relation to each other, there is always an obligation on the part of one to communicate whatever may be known to him and unknown to the other in regard to the subject-matter of the contract. Emmons v. Moore, 85 Ill. 304; Young v. Hughes, 32 N. J. Eq. 372; Cornelius v. Molloy, 7 Pa. 300. So of persons standing in a fiduciary relation. Narcissa v. Watham, 2 B. Mon. 241.

In the case of principal and agent, the right to rescind for the agent's fraud, in case of false representations, depends on whether the representation was within the scope of the agent's authority; in such case, the party defrauded may rescind. Weir v. Bell, L. R. 3 Exch. Div. 238; Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259; Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476; Durst v. Burton, 47 N. Y. 167, 7 Am. Rep. 428; Krumm v. Beach, 25 Hun, 293; Kennedy v. McKay, 43 N. J. L. 288, 39 Am. Rep. 581; Perley v. Catlin, 31 Ill. 533.

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of the purchase money, dated June 10, 1885, the same to be executed also by defendant and wife. This mortgage was sent to Dickson by Patterson for execution.

On June 9, 1885, the premises were conveyed by deed to plaintiff and Patterson, jointly, the consideration stated in it being $4,800. The deed was duly recorded.

Patterson caused the premises to be laid out in lots and streets, the plat of which was recorded as "Patterson and Dickson Place." After writing several letters to plaintiff, speaking in the most encouraging terms of the probability of realizing large returns from the venture, Patterson, on October 21, 1885, wrote to Dickson: "I have sold our 10 acres to-day for $6,000, an advance of $1,200. It did not turn out as well as I expected. . . . This is a very handsome profit for the length of time we have held it. He pays $3,000 cash and the other $700 inside of six months, and assumes the mortgage and all taxes. It nets us a little over $500 each profit."

On October 30, 1885, Patterson inclosed his check for $1,500 to plaintiff, correcting his statement as to net profits by the statement that $224.18 was yet due and coming to the plaintiff. He also inclosed a deed to one Otto Boehme, 587] to be *signed by plaintiff and wife, in which the consideration was expressed to be $6,000. That deed was dated October 28, 1885, and was duly executed by plaintiff and wife, but the amount of the consideration as set forth in the deed was thereafter changed without plaintiff's knowledge to $10,000. On the day after the conveyance to Boehme, the latter, without plaintiff's knowledge, reconveyed the property to Patterson, the consideration recited being $10,000. On February 23, 1886, Patterson vacated the plat made by him and plaintiff, and replatted the premises as "East Side Addition," of which he sold several lots.

After the filing of the original bill, Patterson filed for record a deed dated June 4, 1887, conveying all the premises, with the exception of eight lots, to one Isaac Martin, who was made a party defendant in the amended bill. That deed purported to have been made in execution of an agreement with Martin, he having failed to make payment pursuant to a prior contract alleged to have been made on February 17, 1887.

Long after the transactions above referred to, it became known to Dickson — and he so charged in his bill—that the purchase price of the premises in question was not $4,800 but $3,600 and the cash payment $1,250 and no more, all of which was paid by the plaintiff; that the conveyance to Boehme and reconveyance by him to Patterson were fraudulent, having been made without consideration, and executed in pursuance of the preconcerted design of the latter to vest the title in himself.

Whereupon the plaintiff prayed that inasmuch as he had paid all the consideration for the premises, and as the defendant Patterson had advanced no part thereof, he, the plaintiff, was entitled to have all of the said premises and all the advantages arising from the said purchase. He further prayed that inasmuch as the deed to Boehme and the deed from Boehme to Patterson were fraudulent and void, an accounting be directed of all sums received by Patterson in that behalf, and also all sums received by plaintiff from him, and that it be ascertained what sum, if any, plaintiff should repay to him, which he offered and stood ready to pay as soon *as ascertained; [588 that it be decreed that the plaintiff was entitled to have all the benefits of the original purchase; and that by the deed made to plaintiff and Patterson, the latter became seised in fee of an undivided half of the premises *in trust for the plaintiff*, and not otherwise. The bill further prayed that the deed made by plaintiff and wife, together with Patterson and wife, to Boehme, and as well as the deed made by Boehme to Patterson, and the deed from Patterson to Martin, be declared fraudulent and void; that it be decreed that Patterson convey the premises to the plaintiff in fee, except such lots as had been sold to other parties for a valuable consideration without his knowledge; that Patterson account to the plaintiff for the sums of money realized from such sales; and also that he be restrained from selling any other lots, or receiving any money on account of said sales, or transferring any security therefor, etc.

The bill was dismissed upon the ground that the plaintiff, after acquiring knowledge of the fraud, elected to retain what he had received from the sale of the land in question, and to pursue his claim for moneys claimed to be still due; that the fraud alleged having come to his knowledge, he was bound promptly to make his election, and having elected to let the sale stand, he could not thereafter maintain an action to set it aside.

This ruling was based upon certain letters offered in evidence from which it appeared that Dickson first charged Patterson with fraud in 1886, and wrote him on February 27th of that year, stating, among other things: "In your letter last October you state you sold it for $6,000, and the deed called for the same amount, but I notice the records, etc., call for $10,000,—a slight difference of $4,000. This change seems to have occurred after the paper left Kansas City. Then, too, I object to the original cost of the land as stated in your letter last May, *viz.*, $4,800 ($2,500 cash and $2,500 in note), when I know now that the land only cost $3,600, or a difference of $1,200, making my half interest cost $600 less than you stated, which, taken together with my half of the $4,000 which you did not report, would be something like $2,600 which you are owing me. I *cannot say with you, 'thus far my[589 feelings alone have been affected,' but you have taken money from me by false representations, the knowledge of which fact has only lately come to my hands. Now I wish to know when you propose to pay me the above amount due me." Patterson replied to this letter on March 3, 1886, explaining that the amount of consideration in the deed had been changed at Boehme's request; and as to the land being purchased originally for $3,600, it was not true. He added that he did not blame him for being aroused over such a false report, but that he, Patterson, could "explain all discrepancies in a manner that cannot be impeached, and when necessary can be proven up with living testimony and plenty of it." Boehme,

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also, at the instance of Patterson, wrote to Dickson, under date of March 2, 1886, stating that the consideration paid by him for the land was $6,000 and no more; that the amount expressed in the deed to him was changed at his request in order that he might the more easily secure a large profit; and that he believed Patterson was honest and straight and bore that reputation.

After some further correspondence with a view to a settlement,—Patterson insisting that a balance was due him from plaintiff on account of a certain other real-estate transaction in Kansas City,—Dickson on August 4, 1887, filed his bill in equity praying a rescission of these sales and an accounting, as hereinbefore set forth.

The bill having been dismissed for the reasons above stated, Dickson took an appeal to this court.

The evidence fully sustained the allegations of fraud made in the original and amended complaint. We cannot doubt from the record that after the land in question was purchased and conveyed to the plaintiff and defendant Patterson, jointly, the latter conceived the purpose of acquiring the title to the whole of it. To that end he pretended to have made a sale of it to Boehme, and induced the plaintiff not only to believe that it was a real sale at a named price, but to join in the deed to Boehme. The day after the title was vested in Boehme the latter reconveyed the property to Patterson. According to the preponderance [590] of evidence that transaction *was a sham, but not more so than the pretended sale and conveyance to one Martin. That which purports to be a deed to Martin, reciting a consideration of $19,425 in hand paid, was in fact executed after the institution of this suit, although dated and certified to have been acknowledged on the 4th day of June, 1887. It would subserve no useful end to set forth in this opinion all the facts and circumstances bearing upon the issue of fraud. But we may remark that, according to the evidence, some one assumed the name of Martin long enough to go through the form of a purchase from Patterson, after which he disappeared, his whereabouts pending this suit being unknown although his answer was filed by direction of Patterson.

We content ourselves with saying that the proof makes it clear that the pretended sales to Boehme and Martin were in execution of a scheme devised by Patterson to deprive Dickson of his interest in these lands without his receiving the full value of such interest, and thus to become himself the sole owner.

This was substantially the view taken of the case by the circuit court. The presiding judge not only expressed the fear that the charges of fraud and misconduct were well founded, but said that the testimony of the defendant Patterson was impeached by so many circumstances that it could not be safely made the basis of judicial action. Assuming the charges of fraud to have been proved, the court dismissed the bill upon the ground that the plaintiff's letters, written in 1886, show that he, "with knowledge of the fraud, not only retained what he had received from the sale, but elected to let it stand and pursue his claim for the moneys still due him thereon." Undoubtedly it appears from these letters that the plaintiff charged that Patterson had falsely represented the original cost of the land (one half of which Dickson was to pay) to have been $4,800, when it was only $3,600, and that the deed to Boehme, at the time it was executed by plaintiff and his wife, recited the consideration to be $6,000 (the amount for which Patterson said he had sold the 10 acres), and yet, when put on record, it recited $10,000 as the *consideration. Upon the basis of [591] $3,600 as the price originally paid for the lands by Patterson, representing himself and the plaintiff, and $10,000 as the amount paid by Boehme, the plaintiff rightfully claimed a larger sum than had been paid to him by Patterson. If this were the whole case there would be force in the suggestion that Dickson, with information of the fraud practised upon him, had elected to affirm the sale to Boehme and to claim the additional sum that he supposed to be due him upon a proper accounting.

But there are other considerations which preclude Patterson from insisting that Dickson made his election of remedies, and must abide by that election. During the correspondence that took place between the parties in 1886, Dickson, so far as the record shows, was not aware that the sale and conveyance to Boehme was merely fictitious, and in execution of Patterson's scheme to defraud him. Patterson assured him that that sale was a real one, and there is no proof to show that Dickson, at the time, knew or believed anything to the contrary. If it was a real sale, Dickson, having joined in the deed to Boehme, could not go behind it, unless he could show that the latter did not purchase in good faith. But from what Patterson wrote to him, he had no reason to doubt the validity of the sale to Boehme. Besides, Patterson induced Boehme to inform Dickson by letter that the amount paid was only $6,000, and that it was changed in the deed to $10,000 at his, Boehme's, request, and that Patterson was an honest man, with a good reputation. All this was well calculated to make the impression upon Dickson that the only relief he could have against Patterson was to obtain an accounting and a decree or judgment for such additional sum as was justly due him.

After the correspondence between the parties ended in the latter part of the year 1886, the plaintiff, as we must assume from the record, ascertained for the first time all the facts as they are now disclosed, and, without unreasonable delay, commenced the present suit. We should not be justified by the record in saying that he had, for any considerable time before the bringing of this suit, such knowledge of all the *circumstances of [592] this transaction as enabled him to know with certainty what his rights were, and to determine what course should be taken to vindicate them. If, as the evidence shows, the real facts were concealed from him by one from whom he had reason to expect a frank disclosure of all the material circumstances as they occurred, he is not, for that reason,—no rights of innocent third parties having intervened,—to be denied the fullest relief to

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which, according to the principles of equity, he is entitled.

The plaintiff in his amended complaint claims that he paid the original consideration for these lands, and is entitled to a conveyance of them upon his paying to the defendant Patterson such sum as, upon a proper accounting, he ought to pay, Patterson being charged with such sums as he received on account of the premises or the lots into which they were divided by him.

We are of opinion that the plaintiff is not entitled to relief to that extent. But he is entitled to a decree setting aside and annulling the deed purporting to have been executed by Patterson to Martin, the deed from Boehme to Patterson, and the deed to Boehme from Patterson and Dickson and their wives, respectively, leaving the title to the premises in question where it was prior to the execution of the last-named deed; such decree to be without prejudice to any valid rights acquired by parties who purchased in good faith from Patterson while the fee was in him alone. The cause should be referred to a commissioner for an accounting between Dickson and Patterson in respect of the sums paid by them respectively on the original purchase as evidenced by the deed of June 9, 1885, from Tukey and Keysor and their wives, respectively, to Patterson and Dickson; Dickson, in such accounting, to have credit for one half of all amounts received by Patterson, on the sales by him of any of the lots into which the 10 acres were subdivided, and Patterson to have credit for any sums paid by him in discharge of taxes or other charges upon the property.

The decree is reversed and the cause remanded for such further proceedings as are not inconsistent with this opinion.

593] UNITED STATES, *Appt.*,
v.
HENRY C. FULLER.

(See S. C. Reporter's ed. 593-598.)

Mate in naval service, when entitled to a ration.

A mate in the United States Navy, attached to and serving on a United States receiving ship, is entitled to a ration while so serving, or to the commutation price thereof, under U. S. Rev. Stat. §§ 1579, 1585.

[No. 805.]

Submitted January 9, 1896. Decided January 20, 1896.

APPEAL from a judgment of the Court of Claims in favor of Henry C. Fuller, claimant, against the United States for the commutation price of a ration to which he was entitled as a mate in the Navy. *Affirmed.*

NOTE.—*As to extra pay or compensation to officers, see note to United States v. Macdaniel, 8: 587.*

Statement by *Mr. Justice* **Brown:**

This was a petition for a commutation of rations alleged to be due to claimant as a "mate" in the Navy.

The petitioner alleged his appointment as mate on March 4, 1870, and that from March 20, 1888, until August 12, 1891, he was attached to the receiving ship Vermont at the Navy Yard in Brooklyn; that, under U. S. Rev. Stat. §§ 1579, 1585, he was entitled to rations while so serving, or to the commutation price thereof; but that the same had been refused him, and he therefore prayed judgment in the sum of $380.

The court of claims found the following facts:

1. The claimant, a mate in the United States Navy, was attached to and served on the United States receiving ship Vermont from March 20, 1888, to August 14, 1891.

2. During his said service he was not allowed a ration nor commutation therefor.

3. Mates have not been regarded as petty officers by the Treasury Department, nor by the Navy Department, prior to the adoption of the Navy Regulations of 1893.

4. From the year 1799 master's mates in the United States Navy were warrant officers, except when acting under temporary and probationary appointments. Warrants were issued to them after at least one year's sea service under a probationary appointment. No such warrants were, however, issued after 1843, and in 1847 a regulation of the Navy Department forbade commanding officers to make such probationary appointments.

On October 7, 1863, the Secretary of the Navy issued the following circular:

*"Seamen enlisted in the naval service [594 may hereafter, as formerly, be advanced to the rating of master's mate, and such rating may be bestowed by the commander of a squadron, subject to the approval of the department, or by the commander of a vessel, with the previous sanction of the department.

"Seamen so rated will be entitled to the same pay, rank, and privileges as appointed or warranted master's mates, but will not be released by their rating from the obligations of their enlistment, and may be disrated by the order or with the sanction of the department. They will not, while rated as master's mates, be considered as subject to trial by a summary court-martial, nor be disrated by transfer, as in the case of petty officers.

"Seamen rated as master's mates will not be discharged with that rating, and will be considered as disrated to seamen upon the expiration of their enlistment, but upon their immediate re-enlistment the rating of master's mate may be considered as renewed. The acceptance of such renewed rating will be considered as a renunciation of any claim to additional pay for re-enlistment. All ratings of master's mates made by order of the commander of a squadron, and all such ratings renewed by re-enlistment, will be reported to the department as early as practicable."

Upon these facts the court held, as a conclusion of law, that the claimant was entitled to recover the sum of $372.60, for which judgment was entered, and the government appealed.

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Messrs. **J. E. Dodge,** Assistant Attorney General, and **Charles C. Binney,** for appellant.

Messrs. **John Paul Jones** and *Robt. B. Lines* for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Petitioner's claim is based upon the exception contained in U. S. Rev. Stat. § 1579, which reads as follows: "No person not actually 595]*attached to and doing duty on board a seagoing vessel, *except the petty officers*, seamen, and ordinary seamen attached to receiving ships, or to the ordinary of a navy yard, and midshipmen, shall be allowed a ration," which, by § 1585, for the purpose of commutation, is fixed at 30 cents.

The personnel of the Navy is divided generally into commissioned officers, noncommissioned or warrant officers, petty officers, and seamen of various grades and denominations. That a mate is not a commissioned officer is entirely clear, and is not disputed by either party. It is equally clear that he is above the grade of seaman, and the real question is whether he is a noncommissioned or warrant officer, a person "temporarily appointed to the duties of a commissioned or warrant officer," or a "petty officer."

We think little is to be gained in the solution of this question by a detailed examination of the several acts of Congress and Navy Regulations which antedate the Revised Statutes. Prior to 1843 "master's mates" were recognized by the law as warrant officers, or as "warranted master's mates," and appear to have been sometimes appointed by the President and sometimes rated (that is, promoted from lower grades) by commanding officers. But shortly after this time they seem to have fallen into disuse, and no further appointments were made, although the grade was not formally abolished, and those who had been previously appointed continued to hold their offices and receive their pay.

At the outbreak of the Civil War, however, a great increase in all the naval forces became necessary, and the Secretary of the Navy made temporary appointments of "acting masters and master's mates," which were confirmed by act of Congress of July 24, 1861 (12 Stat. at L. 272). By act of March 3, 1865 (13 Stat. at L. 539), their names were changed to that of "mates," and the Secretary of the Navy was authorized to increase their pay and to rate them from seamen and ordinary seamen who had enlisted in the naval service for not less than two years. By act of July 15, 1870 (16 Stat. at L. 321, 330), they were formally recognized as a part of the naval forces, and their pay was fixed at $900 when at sea, $700 596] on shore *duty, and $500 on leave or waiting orders. These amounts were raised in 1894. 28 Stat. at L. 212.

By the Revised Statutes, which were intended to consolidate and codify all the prior enactments upon the subject, the President was authorized to appoint (§ 1405) "as many boatswains, gunners, sailmakers, and carpenters as may, in his opinion, be necessary and proper," who (§ 1406) "shall be known and shall be entered upon the naval register as warrant officers in the naval service of the United States," and whose pay was specified in a separate paragraph of § 1556, fixing the pay of the naval forces.

By § 1408 "mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years." By § 1556 their pay was fixed at the rates provided by the acts of July 15, 1870, and by § 1410 "all officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commission or warrant officer, and except secretaries and clerks, shall be deemed *petty officers*, and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings." By § 1569 "the pay to be allowed to petty officers, *excepting mates*" (whose pay was fixed by § 1556), "and the pay and bounty upon enlistment of seamen, firemen, and coalheavers in the naval service, shall be fixed by the President," with the further provision (§ 1579) that "no person not actually attached to and doing duty on board a seagoing vessel, *except the petty officers*, seamen, and ordinary seamen attached to receiving ships or to the ordinary of a navy yard, and midshipmen, shall be allowed a ration."

From this summary of the Revised Statutes it appears reasonably clear:

1. That boatswains, gunners, sailmakers, and carpenters are warrant officers to be appointed by the President, and that they are the only ones specifically mentioned as such.

2. That mates are officers not holding commissions or warrants, and not entitled to them, but are petty officers *promoted by the [597 Secretary of the Navy from seamen of inferior grades, who have enlisted for not less than two years, and that they are distinguished from other petty officers only in the fact that their pay is fixed by statute instead of by the President. From this it would seem to follow that, although their pay is fixed by law instead of by the President, they are in other respects entitled to the emoluments of petty officers, among which are rations.

The exception of mates from § 1569 merely indicates that, Congress having already fixed their pay, such pay need not be fixed by the President. But they are still within the exception of "petty officers, seamen, and ordinary seamen attached to receiving ships," who are inferentially allowed a ration by § 1579. The exception of mates from other petty officers in § 1569 indicates that they are petty officers, and the exception of petty officers from those who are not entitled to rations under § 1579 indicates that, as such, they are entitled to a ration.

We think there is no authority for saying that they are temporarily appointed to the duties of a warrant officer. While the words "acting master's mates," sometimes employed prior to the Revised Statutes, might indicate, by the use of the word "acting," a person temporarily appointed to the duties of a master's mate, officers who are recognized by law, and whose pay is fixed by a permanent statute, cannot be said to be temporarily appointed. The argument that a "warrant" is defined to

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be "an instrument conferring authority upon persons, inferior to a commission," and that mates must therefore be warrant officers because they are appointed by the Secretary of the Navy, proves too much; since all petty officers hold by some sort of designation from a superior authority, and if a warrant be an instrument inferior to a commission, this would make all petty officers warrant officers. On the other hand, as, by § 1405, warrant officers are appointed by the President, it would seem to follow that, if they held their appointments from an inferior authority, they were not to be considered as warrant officers. There is also an implication to the same effect from the act of 598]*August 1, 1894 (28 Stat. at L. 212), raising the pay of mates, and providing that "the law regulating the retirement of warrant officers in the Navy shall be construed to apply to the twenty-eight officers now serving as mates." This provision would be quite unnecessary if, under the general provisions of law, they fell within the designation of warrant officers.

After some hesitation and apparent confusion of opinion on the part of the Navy Department, this was the construction of the Revised Statutes finally settled upon by the Navy Regulations of 1893, art. 28, and we think it is correct. The only difficulty in the case seems to have arisen from certain acts prior to the Revised Statutes, notably the act of 1813, which dealt with warranted "master's mates," under which mates continued to be classified by the Navy Department as warrant officers, until the Revised Statutes were adopted.

The judgment of the court of claims is therefore affirmed.

UNITED STATES, *Appt.*,
v.
STATE OF NEW YORK.

STATE OF NEW YORK, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 598-624.)

Transmission to the court of claims—claims for adjudication—limitation—claim of state—interest paid by state.

1. The power of an executive department to transmit claims for final adjudication, under U. S. Rev. Stat. § 1063, to the court of claims when they involve disputed facts or controverted questions of law where the amount in controversy exceeds $3,000, or in certain cases without regard to the amount involved, is not taken away by the Bowman act or the Tucker act, but all these statutes are to be regarded as parts of one general system and standing together, without conflict in any essential particular.
2. Such claims, if not barred by the statute of limitations, and if such as the court of claims could take cognizance of at the suit of the claimant, may be so transmitted to that court for final adjudication.
3. A claim presented to the Treasury Department before it was barred by limitation may be transmitted to the court of claims for adjudication, under U. S. Rev. Stat. § 1063, after the expiration of six years from the time the cause of action accrued; such transmission is only a continuation of the original proceeding.
4. Interest paid by the state of New York on its bonds issued to defray the expenses of raising troops for the national defense is a part of the "costs, charges, and expenses properly incurred" within the meaning of the act of Congress of July 27, 1861, to be reimbursed to the state by the general government.
5. Interest paid by the state of New York to its canal fund on moneys borrowed from that fund, under an agreement by its officers to pay such interest, is an expense properly incurred by the state in raising troops for the national defense, to be repaid by the United States to that state, as the state could not legally borrow from the canal fund without paying interest.

[Nos. 45, 136.]

Argued April 11, 1895. Ordered for reargument April 15, 1895. Reargued October 17, 18, 1895. Decided January 6, 1896.

APPEALS from a judgment of the Court of Claims in favor of the State of New York against the United States for $91,320.84, for interest paid on the bonds of said state in anticipation of taxes imposed for the public defense. The state appealed on the ground that it was entitled to judgment for the additional sum of $39,867.13 paid by it to its canal fund for interest upon moneys borrowed from that fund for the national defense. *Motion to dismiss denied, judgment reversed, and case remanded for further proceedings.*

See same case below, 26 Ct. Cl. 467.

The facts are stated in the opinion.

Messrs. **David B. Hill** and *T. E. Hancock*, Attorney General of New York, for New York.

Messrs. **Edward B. Whitney**, Assistant Attorney General, and **J. E. Dodge**, Assistant Attorney General, for the United States.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 3d day of January, 1889, the Secretary of the Treasury transmitted to the court of claims all the papers and vouchers relating to a claim of the state of New York against the United States, then pending in the Treasury Department, for interest paid on money borrowed and expended in enrolling, subsisting, clothing, supplying, arming, and equipping troops for the suppression of the rebellion of 1861. That claim, the Secretary certified, involved controverted questions of law, and exceeded $3,000 in amount. The communication accompanying the papers stated that the case was transmitted to the court of claims under and by authority of U. S. Rev. Stat. § 1063, to be there proceeded in according to law.

In further prosecution of this claim, the state promptly filed its petition in the court below and asked judgment against the United States for the sum of $131,188.02, with interest from the first day of July, 1862, together with such other relief as would be in conformity with law.

This claim was based on the act of Congress of July 27, 1861, chap. 21, providing that "the

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Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any state or to his duly authorized agents the costs, charges, and expenses properly incurred by such state for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury." 12 Stat. at L. 276.

By a joint resolution of Congress, approved **601**]March 8, 1862, *it was declared that the above act should be construed "to apply to expenses incurred as well after as before the date of the approval thereof." 12 Stat. at L. 615.

Before July 4, 1861, the state of New York —pursuant to a statute passed by its legislature April 15, 1861, chap. 277—enlisted, enrolled, armed, equipped, and caused to be mustered into the military service of the United States, for the period of two years or during the war, thirty thousand troops to be employed in suppressing the rebellion. That statute provided that all expenditures for arms, supplies, or equipments necessary for such forces should be made under the direction of the governor and other named officers, and that the moneys therefor should, on the certificate of the governor, be drawn from the treasury on the warrant of the comptroller, in favor of such person or persons as from time to time were designated by the governor; and the sum of $3,000,000, or so much thereof as was necessary, was appropriated out of any moneys in the Treasury, not otherwise appropriated, to defray the expenses authorized by that act, or any other expenses of mustering the militia of the state or any part thereof into the service of the United States. That act also imposed, for the fiscal year commencing on the 1st day of October, 1861, a state tax to meet the expenses authorized, not to exceed 2 mills on each dollar of the valuation of real and personal property in the state. N. Y. Laws 1861 (84th Sess.) p. 634.

There was no money in the treasury of the state in 1861 that had not been specifically appropriated for the expenses of the state government; none that could have been used to defray the expenses of enlisting, enrolling, arming, equipping, and mustering troops into the service of the United States.

Under the laws of the state the moneys authorized to be raised by the act of April 15, 1861, did not reach the state treasury, and were not available for use until the months of April and May, 1862.

The total state tax rate fixed at the session of the legislature beginning on the first Tuesday in January, 1861, was 3½ mills, of which, 1½ mills **602**]was the amount authorized by the *above statute of 1861. The moneys realized from this tax were paid into the state treasury during the year 1862.

The state had no other means of raising the money required for the purpose of immediately defraying the expenses of enlisting, enrolling, arming, equipping, and mustering in such troops, except by borrowing money in *anticipation of* the collection of its taxes; and between June 3, 1861, and July 2, 1861, in order to provide for the public defense, it issued bonds in anticipation of such taxes to the amount of $1,250,000 payable on July 1, 1862, except that $100,000 was made payable June 1, 1862, at the rate of 7 per cent per annum, which at that time was the legal rate of interest under the laws of the state.

The issuing of these bonds was necessary for the purpose of providing the money required, and upon their sale the full amount of their face value was received and was used and applied by the state, together with other moneys, in raising troops. The entire sum so expended between the 23d day of April, 1861, and the 1st day of January, 1862, was $2,873,501.19, exclusive of interest upon the bonds or loans made by the state for that purpose.

In addition to the above sums, the state, during the years 1861 and 1862, paid, on account of interest that accrued on its bonds issued in anticipation of the tax for the public defense, the sum of $91,320.84.

By a statute of New York of April 12, 1862, the legislature specifically appropriated the sum of $1,250,000 for the redemption of comptroller's bonds issued for loans in anticipation of the tax imposed by the act of April 15, 1861, and the additional sum of $91,320.84 for the payment of the accruing interest on those bonds. N. Y. Laws 1862 (85th Sess.) chap. 192, p. 364.

Of the remainder of the above sum of $2,873,501.19 necessarily expended by the state of New York for the purpose stated, between April 23, 1861, and January 1, 1862, after deducting the amount of $1,250,000 raised by issuing bonds, $1,623,501.19 was taken from the canal fund of the state. That fund, under the Constitution of the state, was a sinking *fund for the ultimate pay- [**603** ment of what is known as the canal debt. N. Y. Const. 1846, art. 7, § 1.

Under the tax rate of 1860 there had been levied and collected and paid into the treasury of the state the sum of $2,039,663.06 for the benefit of and to the credit of the canal fund. That sum reached the state treasury in April and May, 1861, subject to be invested by the state officers pursuant to the requirements of law and the Constitution of the state, in securities for the benefit of the canal fund. On May 21, 1861, the lieutenant governor, comptroller, treasurer, and the attorney general, constituting the commissioners of the canal fund, authorized the comptroller to use $2,000,000 of the canal fund moneys for military purposes until the 1st of October next, and $1,000,000 until the 1st day of January, 1862, at 5 per cent; and of this amount the sum of $1,623,501.19 was used by the comptroller for the purpose of defraying the expenses of raising and equipping such troops. The following was the order: "State of New York, Canal Department, Albany, May 21, 1861. The comptroller is to be permitted to use $2,000,000 of the canal fund moneys for military purposes until the first day of October next, when the commissioners of the canal fund will invest $1,000,000 of the canal sinking fund under § 1, art. 7, in the tax levied for military purposes until the 1st of July, 1862, at 5 per cent, and the comptroller may

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use $1,000,000 of the tax levied to pay interest on the $12,000,000 debt until the 1st of January, 1862, when the commissioners will, if they have the means, replace that or as large an amount as they may have the means to do it with, from the toll of the next fiscal year, so as that the whole advance from the canal fund on account of the tax be $2,000,000. It is understood the comptroller will retain the taxes now in process of collection for canal purposes until the above investments are made, paying the funds 5 per cent interest therefor." This order was signed by the commissioners of the canal fund.

On December 28, 29, and 31, 1861, the United States repaid to the state, on account 604] of moneys so expended by the latter, *the sum of $1,113,000 which sum with interest was placed in the canal fund on April 4, 1862. This left $510,501.19 unpaid of the moneys used from the canal fund.

The amount of interest at 5 per cent per annum on the moneys of the canal fund during the time it was used by the state in raising troops was $48,187.13. But during the same time the state had received interest on portions of those moneys, while it was lying in bank unused, to the amount of $8,819.95, and the net deficiency of the state on account of interest on such moneys during the period when they were so used was $39,867.18, which sum was paid into the canal fund from the state treasury.

The total amount paid by the state for interest upon its bonds issued in anticipation of the tax for the public defense, and upon the moneys of the canal fund used for the purpose of defraying the expenses of raising and equipping troops, was $131,188.02. No part of that sum has been paid by the United States.

The moneys above specified as actually expended by the state of New York were necessarily expended for the purpose of enlisting, enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting such troops, and causing them to be mustered into the military service of the United States, and were so paid and expended at the request of the civil and military authorities of the United States.

Prior to January 3, 1889, the state had presented, from time to time, various claims and accounts to the Treasury Department of the United States for charges and expenses incurred by it in enlisting, enrolling, arming, equipping, and mustering troops into the military service of the United States. Those claims amounted in the aggregate to $2,950,479.46, and included charges for all the moneys paid and placed as hereinbefore specified. The department, from time to time, allowed thereon various sums aggregating $2,775,915.24, leaving a balance of $174,564.22 not allowed, and the claims for which were pending in the department unadjusted when this case was transmitted to the court of claims on the 3d day of January, 1889. Of that sum of 605] $174,564.22, the sums *hereinbefore specified amounting to $131,188.02, constituted a part.

The claim of the state for expenditures in furnishing troops with clothing and munitions of war was filed in the Treasury Department in May, 1862, and included the above items of interest. The claim for interest has from that time been suspended in the department, and was so suspended at the time it was transmitted to the court of claims.

The court, after finding the facts substantially as above stated, gave judgment in favor of the state for $91,320.84, on account of interest paid upon its bonds issued in anticipation of taxes imposed for the public defense. From that judgment the United States appealed. The state also appealed, and claims that it was entitled to judgment for the additional sum of $39,867.13 paid into what is called the canal fund as interest upon the moneys it has borrowed from that fund to be repaid with interest.

The government has moved to dismiss the state's appeal, its contention being that the judgment brought here by the state for review is not obligatory in character and appealable, but only ancillary and advisory. This motion assumes that the court below was without jurisdiction under existing legislative enactments to render a final judgment, reviewable by this court, upon any claim, whatever its amount, made against an executive department and transmitted to the court of claims to be there proceeded in according to law.

We recognize the importance of the question thus presented, and have bestowed upon it the most careful consideration. Its solution can be satisfactorily reached only by an examination of the various statutes regulating the jurisdiction of the court of claims, including those known as the Bowman act of March 3, 1883, chap. 116 (22 Stat. at L. 485), and the Tucker act of March 3, 1887, chap. 359 (24 Stat. at L. 505).

By the act of Congress of July 27, 1861, chap. 21, the Secretary of the Treasury was directed, out of any money in the treasury not otherwise appropriated, and upon vouchers to be passed upon by the accounting officers of that department, to pay the *costs, charges, [606 and expenses properly incurred by any state in enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops to be employed in suppressing the rebellion of 1861. 12 Stat. at L. 276.

The claim of New York was founded on the above act of Congress of July 27, 1861, if not on contract with the United States. It was transmitted by the Secretary of the Treasury to the court of claims under U. S. Rev. Stat. § 1063, as one involving controverted questions of law.

By the act of June 25, 1868, chap. 71, § 7, the jurisdiction of the court of claims was enlarged so as to embrace several classes of claims that might be transmitted to it by the head of an executive department for adjudication. 15 Stat. at L. 75, 76.

The provisions of that act were preserved in U. S. Rev. Stat. § 1063, which is as follows: "§ 1063. Whenever any claim is made against any executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds $3,000, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount

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involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any auditor or comptroller of the Treasury, direct any account, matter, or claim, of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided*, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason [607] of the subject-matter and character, *the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."

It is clear that under this section no claim against an executive department, not otherwise described than as one "involving disputed facts or controverted questions of law," could be transmitted to the court of claims for adjudication unless the amount in controversy exceeded $3,000. It is equally clear that that section did not make the amount jurisdictional where a claim of that class is transmitted as one the decision of which would affect a class of cases, or furnish a precedent for the action of the executive department in adjusting a class of cases, nor where any authority, right, privilege, or exemption was claimed or denied under the Constitution of the United States. But, as bearing on the inquiry to be presently made whether that section was superseded by subsequent enactments, it should be here noted that there might be claims in the hands of an auditor or of the comptroller of the Treasury for examination, which in the first instance were to be passed on by some other department than that of the Treasury. Claims of that special class could not be transmitted by the Secretary of the Treasury to the court of claims, under U. S. Rev. Stat. § 1063, for adjudication, except "upon the certificate of the auditor or comptroller of the Treasury" having it under examination. This is indicated not only by the words of that section, but by §§ 1064 and 1065, the first of which sections provides that "all cases transmitted by the head of any department, *or* upon the certificate of any auditor or comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the court of claims, and shall, in all respects, be subject to the same rules and regulations;" and the latter, that "the amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the court of claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court."

[608] *We come now to what is known as the Bowman act of March 3, 1883, chap. 116, entitled "An Act to Afford Assistance and Relief to Congress and the Executive Departments in the Investigation of Claims and Demands against the Government." 22 Stat. at L. 485.

By the 1st section of that act it is provided: "§ 1. Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or House may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the House by which the case was transmitted for its consideration."

The 2d section is in these words: "§ 2. When a claim or matter is pending in any of the executive departments, which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted for its guidance and action."

As the Bowman act contains no words of express repeal, the question arises whether, by necessary implication, its 2d section superseded § 1063 of the Revised Statutes, in respect of claims transmitted by an executive department to the court of claims.

The court of claims was required by U. S. Rev. Stat. § 1063, to adjudicate any claim properly transmitted from an executive department by a final judgment, while the Bowman act prohibited any judgment being entered for *or against a claim transmitted under [609] that act; the duty of the court, in cases involving controverted questions of fact or law, transmitted to and heard by it under the Bowman act, being only to report its findings of fact and conclusions of law to the proper department, for "its guidance and action."

It is nevertheless suggested that the Bowman act, although without words of repeal, covers the entire subject of claims involving controverted questions of fact or law that may be transmitted to the court of claims from an executive department, and it is argued that we must apply the rule that a prior statute is to be regarded as repealed or modified where "the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute." *Frost v. Wenie*, 157 U. S. 46, 58 [39: 614, 619].

If that act be held to have displaced the whole of U. S. Rev. Stat. § 1063 (except the clause relating to claims transmitted by the Secretary of the Treasury, upon the certificate of an auditor or of the comptroller of the treasury) the result would be that, after its passage, the court of claims was wholly without jurisdiction to render *judgment* on any claim for

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money transmitted from an executive department, whatever its nature or amount. Such a construction would exclude from judicial cognizance by that court not only claims exceeding $3,000 in amount, and specifically designated as claims involving controverted questions of law and fact, but even claims the determination of which would affect a class of cases, or furnish a precedent for the future action of an executive department, and claims that involved an authority, right, privilege, or exemption asserted or denied under the Constitution of the United States. Congress, when it passed the Bowman act, must have had in view the provisions of U. S. Rev. Stat. § 1063, under which the court of claims had so long exercised jurisdiction of claims for money made against an executive department and transmitted to that court for final adjudication. As the Bowman act makes no reference to that section, and contains no words of repeal, we cannot suppose that Congress intend-[610]ed to take from the *court of claims jurisdiction to render judgment in cases coming before it under the Revised Statutes. The object of that act is expressed in its title, and was to afford assistance and relief to Congress and the executive departments in the *investigation* of claims and demands against the government. To that end, and in respect of claims and demands involving controverted questions of fact or law and pending in the executive departments, authority was given to the heads of such departments upon their own motion, and whether the claimant desired it or not, to obtain, for their "guidance and action," findings of fact and conclusions of law, without regard to the amount involved. *Re Billings*, 23 Ct. Cl. 166, 174. Neither expressly nor by necessary implication did that act take from an executive department the right to send to the court of claims, for *final adjudication*, any claim made against it that was embraced by U. S. Rev. Stat. § 1063. So far as the Bowman act relates to claims for money pending in an executive department, it only authorized the head of the department to send them to that court for a report of facts and conclusions that would not have the force of a judgment reviewable by this court. In this view, there is no conflict between the Bowman act and the Revised Statutes. As there are no words of repeal in the Bowman act, we have given it such construction as will make it consistent with previous legislation, and thus avoid the abrogation of existing statutes which Congress had not repealed either expressly or by necessary implication. The 2d section of the Bowman act should be construed as if it were a proviso to U. S. Rev. Stat. § 1063. Thus construed, the later statute is not in conflict with the earlier one.

We turn now to the act of March 3, 1887, chap. 359, known as the Tucker act, entitled "An Act to Provide for the Bringing of Suits against the Government of the United States." 24 Stat. at L. 505.

The 1st section of that act gives the court of claims original jurisdiction to hear and determine all claims founded upon the Constitution of the United States or any law of Con-[611]gress, *except for pensions, or upon any regulation of an executive department or upon contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable; nothing, however, in that section to be construed as giving to any of the courts mentioned in the act jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," nor other claims therefor rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same. Jurisdiction was also given of all set-offs, counterclaims, claims for damages whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant. It also provided that no suit against the government of the United States should be allowed under that act unless the same was brought within six years after the right accrued for which the claim is made.

Other sections of that act are as follows: "§ 12. That when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, *with the consent of the claimant*, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court of claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted. § 13. That in every case which shall come before the court of claims, or is now pending therein, under the provisions of an act entitled 'An Act to Afford Assistance and Relief to Congress and the Executive Departments in the Investigation of Claims and Demands against the Government,' approved March 3, 1883 [the Bowman act], if it shall appear to the satisfaction of the court, upon the *facts established, that it has jurisdiction[612] to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the department by which the same was referred to said court." By its 16th section all laws and parts of laws inconsistent with that act were repealed.

What is the scope of the 12th section of the Tucker act? Did that section supersede § 1063 of the Revised Statutes, or § 2 of the Bowman act?

It is difficult to tell what was intended by the words "with the consent of the claimant," in the 12th section of the Tucker act. If Congress intended that no claim, large or small in amount, involving controverted questions of fact or law, and pending in an executive department, should be transmitted to the court of claims, except with the consent of the claimant, that intention would have been expressed in words that could not have been misunderstood; for that court had long exer-

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cised jurisdiction in cases of that kind. But, in view of the words used, no such purpose can be imputed to Congress. The Tucker act cannot be held to have taken the place of § 2 of the Bowman act; for § 13 of the Tucker act distinctly provides for *judgment in every case* then pending in or which might come before the court of claims *under the Bowman act*, of which that court could have taken judicial cognizance if the case had been commenced originally by suit instituted in that court by the claimant. That Congress did not intend to supersede the Bowman act is made still more apparent by the 14th section of the Tucker act, declaring "that whenever any bill, except for a pension, shall be pending in either House of Congress, providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the house in which such bill is pending may refer the same to the court of claims, who shall proceed with the same *in accordance with the provisions of the act* approved **613**]March 3, 1883, entitled 'An *Act to Afford Assistance and Relief to Congress and the Executive Departments in the Investigation of Claims and Demands against the Government' [the Bowman act], and report to such House the facts in the case and the amount, where the same can be liquidated, etc." It thus appears that any bill, except for a pension, in either House of Congress, providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, may be transmitted to the court of claims, to be proceeded in, not, let it be observed, under the Tucker act, but under the Bowman act of March 3, 1883, and to report the facts, etc., to such House. It is impossible, therefore, to hold that the Tucker act displaced or repealed the 2d section of the Bowman act.

In our opinion the 12th section of the Tucker act should be construed as not referring to claims which an executive department, proceeding under U. S. Rev. Stat. § 1063, seeks to have finally adjudicated by the court of claims, nor to claims described in that section, in respect of which the department, upon its own motion, and whether the claimant consents or not, desires from that court a report, under the Bowman act, of facts and law for its guidance and action. It refers only to claims which the head of an executive department, with the express consent of the claimant, may send to the court of claims in order to obtain a report of facts and law which the department may regard as only advisory. It no doubt often happened that the head of a department did not desire action by the court of claims in relation to a particular claim, but, in order to meet the wishes of the claimant, was willing to have a finding by that court which was not followed by a judgment nor by any report for the guidance and action of the department. So that U. S. Rev. Stat. § 1063, the 2d section of the Bowman act, and the 12th section of the Tucker act may be regarded as parts of one general system, covering different states of case, and standing together without conflict in any essential particular.

The claim of New York being for money, **614**]and founded on *an act of Congress, was within the general jurisdiction of the court of claims. If not barred by limitation it could, in the discretion of the Secretary of the Treasury, have been transmitted or certified to the court of claims under the Bowman act after its passage, for a finding of facts or law, and that court, when the Tucker act came into operation, could, under its 13th section, have rendered a final judgment, sending, however, to the Treasury Department a report of its proceedings. But the Secretary of the Treasury, in the exercise of an authority given him by statute and never withdrawn, chose to certify or transmit this claim to the court of claims, under U. S. Rev. Stat. § 1063, for final adjudication.

Touching the suggestion that the 12th section of the Tucker act entirely superseded the 2d section of the Bowman act, it may be further observed that the Tucker act repeals only such previous statutes as were inconsistent with its provisions. There is no inconsistency between the sections just named; one, as we have said,—the 2d section of the Bowman act,—relating to claims involving controverted questions of fact or law, which an executive department may transmit to the court of claims without consulting the wishes of the claimant, in order to obtain a report of facts and law for its guidance and action; the other,—the 12th section of the Tucker act,—relating to claims of the same class transmitted to that court with the express consent of the claimant in order to obtain a report of facts and law that would be only advisory in its character.

The object of the 13th section of the Tucker act is quite apparent. A case transmitted under the Bowman act is, we have seen, one in which the findings of fact and law are made for the guidance and action of the executive department from which it came, and therefore a rendition of judgment in such a case, if it be one of which the court could at the outset have taken cognizance at the voluntary suit of the claimant, would be a saving of time for all concerned. If the cases embraced by the 12th section of the Tucker act were only those provided for by the 2d section of the *Bow- [**615** man act, the 13th section of the Tucker act, authorizing a final judgment or decree where the claim was one of which the court could originally have taken jurisdiction for purposes of final adjudication, would not have made special reference to cases coming before the court of claims under the Bowman act.

Our conclusions then as to the several statutes under examination, so far as they relate to claims pending in an executive department, are:—

First. Any claim made against an executive department, "involving disputed facts or controverted questions of law, where the amount in controversy exceeds $3,000, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States,"—may be transmitted to the court of claims by the head of such department, under U. S. Rev. Stat. § 1063, for final adjudication;

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provided such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.

Second. Any claim embraced by U. S. Rev. Stat. § 1063, without regard to its amount and whether the claimant consents or not, may be transmitted under the Bowman act to the court of claims by the head of the executive department in which it is pending, for a report to such department of facts and conclusions of law for "its guidance and action."

Third. Any claim embraced by that section may, in the discretion of the executive department in which it is pending and with the expressed consent of the plaintiff, be transmitted to the court of claims, under the Tucker act, without regard to the amount involved, for a report, merely advisory in its character, of facts or conclusions of law.

Fourth. In every case involving a claim of [616] money, *transmitted by the head of an executive department to the court of claims under the Bowman act, a final judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court, at the time such claim was filed in the department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication.

Whether the words "or matter" in the 2d section of the Bowman act embrace any matters except those involving the payment of money, and of which the court of claims under the statutes regulating its jurisdiction could, at the voluntary suit of the claimant, take cognizance for purposes of final judgment or decree, need not be now considered.

It results that as the claim of New York exceeded $3,000, and was certified under U. S. Rev. Stat. § 1063, as one involving controverted questions of law, the court below had jurisdiction to proceed to a final judgment, unless, as suggested by the Assistant Attorney General, the claim when transmitted to the court of claims by the Secretary of the Treasury was barred by limitation.

At the time the claim of New York was filed in the Treasury Department there was no statute of limitations in force expressly applicable to cases in the court of claims. But by the act of March 2, 1863, chap. 92, § 10, it was provided that (within certain exceptions that have no application to this case) every claim against the United States, cognizable by the court of claims, should be barred unless the petition setting forth a statement of it was filed in or transmitted to that court within six years after the claim first accrued; claims that had accrued before the passage of that act not to be barred, if filed or transmitted as above stated, within three years after the passage of the act. 12 Stat. at L. 765, 767. This limitation of six years was preserved in the Revised Statutes and in the Tucker act. Rev. Stat. § 1069; 24 Stat. at L. 505.

Was the claim of New York barred because more than six years passed after it accrued before it was transmitted to the court of claims? In *Finn* v. *United States*, 123 U. S. 227, 232 [31: 617] 128, 130], *this court said: "The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the court of claims against the United States. An individual may waive such a defense, either expressly or by failing to plead the statute; but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the court of claims. Since the government is not liable to be sued as of right by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the court of claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous." To the same effect was *De Arnaud* v. *United States*, 151 U. S. 483, 495 [38: 244, 248].

But, in *United States* v. *Lippitt*, 100 U. S. 663, 668, 669 [25: 747, 749], where the question was whether a claim that accrued in 1864, and which was presented to the War Department in 1865, and in 1878 was transmitted to the court of claims as one involving controverted questions of law, the decision whereof would affect a class of cases, the court said: "Limitation is not pleadable in the court of claims against a claim cognizable therein, and which has been referred by the head of an executive department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued; that is, within six years after suit could be commenced thereon against the government. Where the claim is of such a character that it may be allowed and settled by an executive department, or may, in the discretion of the head of such department, be referred to the court of claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such cases, the statement of the facts upon which the claim rests, in the form of a petition, is only another mode of asserting *the same demand which had previously [618] and in due time been presented at the proper department for settlement. These views find support in the fact that the act of 1868 describes claims presented at an executive department for settlement, and which belong to the classes specified in the 7th section, *as cases* which may be transmitted to the court of claims. 'And all the cases mentioned in this section, which shall be transmitted by the head of an executive department, or upon the certificate of any auditor or comptroller, shall be *proceeded in* as other cases pending in said court, and shall in all respects be subject to the same rules and regulations,' with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the court of claims they are to be 'proceeded in as other cases pending in said court.'"

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The same principle was recognized in *Finn v. United States*, 123 U. S. 227, 232 [31:128, 130], in which case the court, referring to the act of 1863 limiting the time for bringing suits in the court of claims, also said: "The duty of the court under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that—except where the claimant labors under some one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the government."

Upon the authority of those cases we adjudge that as the claim of New York was presented to the Treasury Department before it was barred by limitation, its transmission by the Secretary of the Treasury to the court of claims for adjudication was only a continuation of the original proceeding commenced in that department in 1862. The delay by the department in disposing of the matter before the expiration of six years after the cause of [619] action accrued, could not impair *the rights of the state. Of course, if the claim had not been presented to the Treasury Department before the expiration of that period the court of claims could not have entertained jurisdiction of it.

For the reasons we have stated, a motion of the United States to dismiss the appeal of the state is denied, and we proceed to the examination of the case upon its merits.

The entire sum for which the state asked judgment was $131,188.02, of which $91,320.84 represented the amount paid as interest on moneys borrowed for the purpose of raising troops for the national defense, and for the repayment of which, with interest at 7 per cent, the state executed its short-time bonds. The balance, $39,867.18, represented the amount paid as interest on moneys received by way of loan from the canal fund and applied by the state for the same purpose.

On behalf of the government it is contended that payment by the United States of the above sum of $91,320.84 is prohibited both by the statute (act of March 3, 1863, 12 Stat. at L. 765; Rev. Stat. § 1091) providing that interest shall not be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest, and by the general rule based on grounds of public convenience, that interest "is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers." *United States* v. *North Carolina*, 136 U. S. 211, 216 [34:336, 338]; *United States* v. *Bayard* ("*Angarica* v. *Bayard*") 127 U. S. 251, 260 [32:159, 162].

The allowance of the $91,320.84 would not contravene either the statute or the general rule to which we have adverted. The duty of suppressing armed rebellion having for its object the overthrow of the national government was primarily upon that government and not upon the several states composing the Union. New York came promptly to the assistance of the national government by enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting troops to be employed in putting down the *rebellion. Imme- [620] diately after Fort Sumpter was fired upon, its legislature passed an act appropriating $3,000,000, or so much thereof as was necessary, out of any moneys in its treasury not otherwise appropriated, to defray any expenses incurred for arms, supplies, or equipments for such forces as were raised in that state and mustered into the service of the United States. In order to meet the burdens imposed by this appropriation, the real and personal property of the people of New York were subjected to taxation. When New York had succeeded in raising thirty thousand soldiers to be employed in suppressing the rebellion, the United States, well knowing that the national existence was imperiled, and that the earnest cooperation and continued support of the states were required in order to maintain the Union, solemnly declared by the act of 1861 that "the costs, charges, and expenses properly incurred" by any state in raising troops to protect the authority of the nation, would be met by the general government. And to remove any possible doubt as to what expenditures of of a state would be so met, the act of 1862 declared that the act of 1861 should embrace expenses incurred before, as well as after, its approval. It would be a reflection upon the patriotic motives of Congress if we did not place a liberal interpretation upon those acts, and give effect to what, we are not permitted to doubt, was intended by their passage. Before the act of July 27, 1861, was passed, the Secretary of State of the United States telegraphed to the governor of New York, acknowledging that that state had then furnished fifty thousand troops for service in the war of the rebellion, and thanking the governor for his efforts in that direction. And on July 25, 1861, Secretary Seward telegraphed: "Buy arms and equipments as fast as you can. We pay all." And on July 27, 1861, that "treasury notes for part advances will be furnished on your call for them." On August 16, 1861, the Secretary of War telegraphed to the governor of New York: "Adopt such measures as may be necessary to fill up your regiments as rapidly as possible. We need the men. Let me know the best the Empire State can do to aid the country in the present emergency." And on February 11, *1862, he [621] telegraphed: "The government will refund the state for the advances of troops as speedily as the treasurer can obtain funds for that purpose." Liberally interpreted, it is clear that the acts of July 27, 1861, and March 8, 1862, created, on the part of the United States, an obligation to indemnify the states for *any* costs, charges, and expenses *properly incurred* for the purposes expressed in the act of 1861, the title of which shows that its object was "to *indemnify* the states for expenses incurred by them in defense of the United States."

So that the only inquiry is whether, within the fair meaning of the latter act, the words, "costs, charges, and expenses properly incurred," included interest paid by the state of

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New York on moneys borrowed for the purpose of raising, subsisting, and supplying troops to be employed in suppressing the rebellion. We have no hesitation in answering this question in the affirmative. If that state was to give effective aid to the general government in its struggle with the organized forces of the rebellion, it could only do so by borrowing money sufficient to meet the emergency; for it had no money in its treasury that had not been specifically appropriated for the expenses of its own government. It could not have borrowed money any more than the general government could have borrowed money, without stipulating to pay such interest as was customary in the commercial world. Congress did not expect that any state would decline to borrow and await the collection of money raised by taxation before it moved to the support of the nation. It expected that each loyal state would, as did New York, respond at once in furtherance of the avowed purpose of Congress, by whatever force necessary, to maintain the rightful authority and existence of the national government. We cannot doubt that the interest paid by the state on its bonds, issued to raise money for the purposes expressed by Congress, constituted a part of the costs, charges, and expenses properly incurred by it for those objects. Such interest, when paid, became a principal sum, as between the states and the United States, that is, became a part of the aggregate sum properly paid by the state for the [622] United States. The principal *and interest so paid constitute a debt from the United States to the state. It is as if the United States had itself borrowed the money, through the agency of the state. We therefore hold that the court below did not err in adjudging that the $91,320.84 paid by the state for interest upon its bonds issued in 1861 to defray the expenses to be incurred in raising troops for the national defense was a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon.

The court of claims disallowed so much of the state's demand as represented interest paid by it on moneys borrowed from the canal fund. The instalment of interest paid into that fund by the state was $48,187.13. But as the state itself earned interest to the amount of $8,319.95 on a part of the money obtained by it from the commissioners of the canal fund, it only claimed $39,867.18 on account of interest paid to that fund.

The canal fund was made by the Constitution of the state a sinking fund for the ultimate liquidation of what is know as the canal debt of New York. In April and May, 1861, $2,039,663.06 from the taxes of 1860 reached the treasury of the state, and under the Constitution and laws of New York that amount should have been invested in securities for the benefit of the canal fund, and the interest derived from those securities paid into the fund. The state was permitted to use a part of the above sum under an agreement by its officers that interest thereon at the rate of 5 per cent should be paid. It recognized and fulfilled that agreement, and now claims that the interest it so paid to the canal fund constituted a charge or expense properly incurred in raising, subsisting, and supplying troops to suppress the rebellion.

We are of opinion that, so far as the question of the liability of the United States is concerned, there is, on principle, no difference between the claim for $91,320.84 and the claim for $39,867.18. We do not stop to inquire whether the *action of the canal commissioners, [623] in allowing the state to use a part of the moneys collected for the benefit of the canal fund, was strictly in accordance with law. Suffice it to say, that the canal fund was entitled to any interest earned upon moneys belonging to it, and fidelity to the Constitution and laws of New York required the state to recognize that right in the only way it could at the time have been done, namely, by paying the interest that ought to have been realized by the commissioners of the canal fund, if they had invested in interest-paying securities the money they permitted the state to use for military purposes. If the canal fund money, used by the state comptroller to defray the expenses of raising and equipping troops, had been borrowed upon the bonds of the state sold in open market, the interest paid on such bonds would, for the reasons we have stated, be a just charge against the United States on account of expenses properly incurred by the state for the purposes expressed by Congress. And such would have been the result if the moneys of the canal fund had been invested by the commissioners directly in bonds of the state, bearing the same rate of interest that was paid to the commissioners of that fund. The substance of the transaction was that the state, for moneys that could not be legally appropriated for the ordinary expenses of its own government, and which the law required to be so invested as to earn interest for the canal fund, used those moneys for military purposes, under an agreement by its officers, subsequently ratified by the state, to pay interest thereon. It was, in its essence, a loan to the state by the commissioners of the canal fund, of money to be repaid with interest. The obligation of the United States to indemnify the state, on account of such payment, is quite as great as it would be if the transaction had occurred between the state and some corporation from which it borrowed the money. It is not the case of the state taking money out of one pocket to supply a deficiency in another over which it had full power; for, although the moneys brought into its treasury by the collection of taxes was under its control, the state was without power to manage and control taxes collected for the *canal fund, except as [624] provided in its Constitution and laws. It could not legally have become a party to any arrangement or agreement involving the use, without interest, of the moneys of the canal fund that had been set apart for the ultimate payment of the canal debt.

We are of opinion that the claim of the state for money paid on account of interest to the commissioners of the canal fund, is not one against the United States for interest as such, but is a claim for costs, charges, and ex-

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penses properly incurred and paid by the state in aid of the general government, and is embraced by the act of Congress declaring that the states would be indemnified by the general government for moneys so expended.

As the state was entitled to a larger sum than $91,320.84, the judgment is reversed, and the cause is remanded with directions for further proceedings not inconsistent with this opinion.

Reversed.

E. NALLE & CO., *Appts.*,
v.
WADE R. YOUNG ET AL.

(See S. C. Reporter's ed. 624-643.)

Mortgage sale—revival of mortgage—wife's general mortgage—party to foreclosure—Louisiana law—redemption.

1. Under La. Code, arts. 679, 683, 684, no sale of mortgaged property can be made under a junior mortgage unless the price bid is sufficient to discharge the prior mortgage if that was conventional or special; but if the prior mortgage was legal or judicial this requirement does not apply, and the property passes to the purchaser subject to the payment of the prior lien.
2. Where mutual debts between two persons are discharged by agreement and compensate each other and are reciprocally extinguished, a mortgage securing one of them falls with the extinguishment of the debt which is secured, and will not be revived though the indebtedness be reacknowledged in favor of another—the wife of the mortgagor—in consideration of the release of her pharaphernal claims against her husband.
3. The general mortgage which the wife has in Louisiana on the property of her husband for the reimbursement of her paraphernal property cannot be extinguished by the transfer of a special mortgage of a third party satisfied as between the immediate parties thereto; or if it can be done at all can only be when taking place in accordance with arts. 2379 and 2390, and recorded as required by art. 3345 of the Code of that state.
4. The rendition of judgment for all the paraphernal claims of a wife, without any recognition of a special conventional mortgage to secure them, seems conclusive that none such existed, or at least is persuasive proof thereof.
5. A prior mortgagee is not a necessary party in Louisiana to the foreclosure of a subsequent mortgage, and purchasers take subject to the prior lien.
6. In Louisiana a subsequent mortgagee need not be made a party to the foreclosure of a prior mortgage containing the *pact de non alienando*, but must take notice of the proceedings at his peril. He may, however, apply to set aside the sale.
7. Redemption from a mortgage sale is not allowable as such in Louisiana in any foreclosure case.

[No. 17.]

Submitted October 15, 1895. Decided January 20, 1896.

NOTE.—*As to strict foreclosure of mortgage,*—see note to Clark v. Reyburn, 19: 354.

As to who is entitled to redeem from the lien of a mortgage,—see note to Noyes v. Hall, 24: 909.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Louisiana in a foreclosure case brought by Edward Nalle *et al.* against Wade R. Young, upon an intervening petition in that case by Mrs. B. F. Young, wife of Wade R. Young, against Nalle *et al.*, and upon a cross bill filed by defendant, decreeing that a foreclosure sale of property be set aside, and that a special mortgage of said Mrs. B. F. Young be recognized as the first mortgage on the property, etc. *Reversed, and cause remanded with instructions to enter a decree overruling the objections to the sale, dissolving the injunction, adjudicating the property to Mrs. Mary Nalle, and ordering the delivery of possession to her.*

Statement by *Mr. Chief Justice* **Fuller:**

Edward Nalle & Co., composed of Edward Nalle and Walter C. Flower, doing business in the city of New Orleans, filed their petition in the district court for the ninth district of Louisiana, holding sessions in and for the parish of Tensas, on May 30, 1883, against Wade R. Young, to foreclose a mortgage executed on June 2, 1882, to secure Young's note for *$1,632.61, payable December 1, 1882, on [626 his interest in certain real estate in that parish, known as the St. Peter plantation. The petition alleged "that said Wade R. Young resides permanently out of the state of Louisiana and is not represented in this state," and prayed for the appointment of a curator *ad hoc*. The appointment of a curator was made and citation served upon him. On June 25, 1883, Wade R. Young filed his answer to the petition, wherein he described himself as "a resident and citizen of the state of Mississippi," and on the same day filed his petition for the removal of the cause, accompanied by a removal bond; and June 28, the district court entered an order transferring the case to the United States circuit court for the western district of Louisiana, which was done accordingly. Plaintiffs thereupon prayed in that court that their petition be allowed to stand as a bill in equity, and October 12, 1883, the defendant Young filed his answer thereto, admitting the execution of the note and mortgage, but alleging in substance that he had been compelled to pay usurious interest; that the account current between the parties was composed of excessive and objectionable charges; that plaintiffs failed to carry out their agreement and understanding with him; and that upon a proper taking of accounts there was nothing or but little due.

In addition to his answer, to which a replication was filed, defendant made a reconventional demand, on which, upon a trial thereof, judgment passed against him. November 11, 1884, the cause was revived as to the heirs of Edward Nalle, who had deceased, and they entered their appearance March 24, 1885.

Proofs were taken, and the cause was referred to a master to state an account, who made a report of the amount due to Nalle & Co., less a specified credit. The cause coming on to be heard on the pleadings and proofs and oral testimony then adduced, a decree was entered November 6, 1886, "that plaintiff's mortgage on the property described in the act

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of mortgage annexed to the bill of complaint herein, *viz.:* [here follows description] the said interest of Wade R. Young in the above lands having been ascertained by a survey [627] made by *John Johnson, surveyor, on the 15th of March, 1879, be, and the same is, hereby recognized and ordered to be enforced to satisfy the sum of $1,632.61 with 8 per cent per annum interest thereon from the 1st day of December, 1882, until paid, subject to the credit aforesaid, and also for the payment of the attorney's fees stipulated by said act of mortgage, being 5 per cent on said amount, and the costs of this suit, to be taxed."

An execution was thereupon issued, and the mortgaged premises seized and sold by the marshal, July 30, 1887, to Mrs. Mary Nalle, wife of Eustis F. Golson.

October 12, 1887, Mrs. B. F. Young, wife of Wade R. Young, on motion of her husband as her solicitor, was allowed to file "her bill and intervening petition, by her husband and next friend," against Nalle & Co., in which she averred that she was married to Wade R. Young in October, 1865, and resided with him continually in the state of Louisiana until the month of February, 1876; that in the year 1870 her father died in the parish of Catahoula, Louisiana, and left her a policy of insurance on his life for the sum of $5,000, which was collected by her husband for her and by him converted to his own use and to the use of the community existing between them; that her father also left a large estate, consisting of property, real and personal, which was sold at probate sale in 1881, and her interest therein, amounting to $2,500, adjudicated to her husband for his own sole use, benefit, and advantage, and for that of the community existing between them; and that her husband had so received the paraphernal moneys and property of complainant in the sum of $7,500, which had been converted by him to his own use and that of the community, and was now legally due complainant by her husband.

The petition further alleged that by an act of mortgage in 1868 by Margaret A. Young, William C. Young, and Wade R. Young, as joint owners, St. Peter plantation was mortgaged to Miss Eliza H. Young, to secure their joint and several note for $11,250, with interest at 8 per cent from January 1, 1867; and averred that in the year 1876, by a transaction between her husband and Mrs. S. J. Metcalfe, [628] as *sole surviving residuary legatee of Miss Eliza H. Young, and complainant, an undivided four-ninths of that note and mortgage, being the individual indebtedness of her husband thereon, was assigned to her by Mrs. Metcalfe by express warranty; that a new note was then made and delivered to her and accepted by her in replacement of her paraphernal moneys and property, so secured and converted by her husband. It was further averred that in 1881 complainant brought suit against her husband for a dissolution of the community and a separation of property in the ninth district court in the parish of Tensas, and obtained judgment therein on the — day of — for said sum of $7,500, and interest, with a recognition of her mortgage on the property described and a decree dissolving the community of acquets and gains between them; that in 1882, her husband, desiring to execute a mortgage on the property in favor of Nalle & Co. to secure advances of money and supplies to enable him to carry on certain planting operations, at the request of Nalle & Co., applied to complainant to renounce her prior right of mortgage in favor of Nalle & Co. by authorizing the canceling and erasure of the inscription of the mortgage transferred to her by Mrs. Metcalfe, so as to give Nalle & Co. the first mortgage; that Nalle & Co. refused to make any advances until given priority of rank; that for that purpose complainant executed a mandate and power of attorney authorizing the canceling and erasure of her mortgage, and "upon such authority the said mortgage was attempted to be canceled;" that the mortgage to Nalle & Co. was then executed by her husband; and that the inscription of her mortgage was then renewed. Petitioner then alleged that at the October term, 1886, a decree was rendered at the suit of Nalle & Co. against her husband for the foreclosure of their mortgage, the amount of indebtedness fixed, and the sale of the property ordered; that final process was issued in execution of that decree, and in obedience thereto the marshal advertised the property for sale for cash on Saturday, July 2, 1887; that on that day the property was appraised according to the requirements of the Louisiana law and offered to the highest bidder for cash at not less than two*thirds of the ap- [629] praised value, which had been placed at the sum of $6,000, and, no bid having been made, was advertised for sale on a credit of twelve months; that on July 30, 1887, her husband, as defendant, served notice and protest on the marshal of the prior encumbrance in favor of complainant for $7,500 and interest, and that any sale for a price less than the amount of such prior encumbrance would be invalid; that notwithstanding the notice and protest the marshal, acting under the direction of Nalle & Co.'s solicitor, accepted the bid of one of them for $2,000. Complainant charged that her attempted renunciation of her rights authorizing the erasure of her mortgage was of no effect under the laws of Louisiana, and set forth the grounds on which that charge was based; that her mortgage was the first encumbrance and superior to the mortgage in favor of Nalle & Co.; that no sale could be made to a purchaser for less than the amount of such mortgage; and that the attempted sale was absolutely null and void. It was further averred that Nalle & Co. pretended to have paid the taxes on the mortgaged property for the years 1882, 1883, 1884, 1885, and 1886, amounting to the sum of $624.60, and to have become subrogated by such payments to the privilege of mortgage existing in favor of the state and parish, and claimed a priority of lien on the mortgaged premises in consequence of such payment and subrogation; that no such taxes were legally due on the mortgaged property; and that Nalle & Co. and Mrs. Mary Nalle acquired no right by such payment and attempted subrogation. The petition then charged that the revenue acts of Louisiana for 1880, 1882, 1884, and 1886, in pursuance of which these taxes were levied, were uncon-

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stitutional and void as repugnant to the state Constitution. It was further alleged that notwithstanding complainant had a first and prior encumbrance for $7,500 and interest, Nalle & Co. did not make complainant a party to the foreclosure proceedings, according to the practice of the circuit court as a court of equity, and had caused the proceedings to be brought in disregard of complainant's rights, and had endeavored to have the mortgaged property sold and adjudicated to one of themselves [630] for a low price, etc.; that if the *renunciation of complainant was invalid as charged, no valid sale could be made for a price not exceeding the amount of the prior mortgage, and the attempted sale would be null and void; that if the renunciation for any reason not known to the complainant was valid and binding, complainant was entitled to redeem by paying the amount of the prior encumbrances, if any such there might be; and that for the purpose of securing equitable protection, it had become necessary for complainant to intervene in the foreclosure suit, and to oppose the confirmation of the sale in order that a reference might be made to determine the priority of liens and adjust all conflicting claims.

Petitioner therefore prayed to be allowed to file this intervention *pro interesse suo*, and that Nalle & Co. (that is, Flower and the heirs of Nalle) be summoned to answer by writ of subpœna served on their solicitor; that the sale of the mortgaged premises by the marshal on July 30, 1887, be not confirmed, but be set aside; that a reference be made to have the priority of liens determined and all conflicting claims adjusted; that a valid title be assured to the purchaser and a sale made for the best interests of all concerned; that the attempted renunciation of her mortgage in favor of Nalle & Co. be declared null and void, and her mortgage recognized as the first and superior encumbrance on the property; that the revenue acts of Louisiana for 1880, 1882, 1884, and 1886 be declared unconstitutional, null, and void; that the taxes levied in pursuance thereof be declared of no effect, and for general relief. This intervention was not sworn to, and was signed "Wade R. Young, Solicitor." On the 24th of October, 1887, Mrs. Young and her husband prayed to amend their original petition by alleging that although Young removed with his family from Louisiana to Mississippi in 1876, he did not, at that time, establish a residence in Mississippi, and that it was not until January, 1883, that he abandoned finally his intention to return to Louisiana, renounced his residence and citizenship there, and declared himself a citizen of Mississippi with the intention of remaining permanently.

The copy attached to the intervening petition [631] showed an *act of mortgage, March 18, 1868, by Wade R. Young, William C. Young, and Margaret A. Young, of the parish of Tensas, to Miss Eliza H. Young, to secure their certain promissory note for $11,250, payable, with interest at 8 per cent, one year after date, on the property in question, being part of Lake St. Peter's plantation, with a confession of judgment; Mrs. B. F. Liddell, wife of Wade R. Young, and Mrs. Willie T. Evans, wife of William C. Young, ratifying said act of mortgage, and renouncing all their rights in the property therein mortgaged, upon due examination separate and apart from their husbands; and an acceptance by Eliza H. Young. Upon the record of this mortgage in the parish of Tensas appeared the cancelation of five ninths thereof, being the indebtedness of W. C. Young, one of the mortgagors, and special legatee for M. A. Young, deceased, leaving four ninths of the indebtedness of Wade R. Young for himself and as special legatee for M. A. Young, deceased, still unpaid; also the cancelation and erasure of the mortgage to the extent of the remaining four ninths on the 5th of June, 1882, under a power of attorney signed by Wade R. Young and his wife, Mrs. B. F. Young, whereby Charles Young of the parish of Tensas was constituted and appointed attorney in fact with full and complete power in the name of Mrs. Young to cause the act of mortgage to be canceled and erased. This power of attorney was executed June 1, 1882, in the presence of two witnesses, who signed the act with the parties, as did also the notary. The cancelation and power of attorney were duly certified as correct copies of the original as the same appeared on file and of record in the office of the clerk of the ninth district court of Tensas parish.

The act of transfer from Mrs. Metcalfe to Mrs. Young was dated December 2, 1876, and stated that Mrs. Metcalfe, residing in the parish of Catahoula; Wade R. Young of the parish of Concordia; and Mrs. B. F. Liddell, wife of Wade R. Young, "herein represented by her special attorney and attorney in fact, Volney M. Liddell, with a procuration hereto annexed,"—personally appeared before the notary and declared that whereas Mrs. Metcalfe, as sole surviving residuary legatee of Miss *Eliza H. Young, was the holder and [632] owner of the note of Wade R. Young, William C. Young, and Margaret A. Young for the sum of $11,250, secured by act of mortgage; and whereas Mrs. Metcalfe was indebted to Wade R. Young for certain sums of money; and whereas Wade R. Young was indebted to his wife, Mrs. B. F. Liddell, for $7,500, the dotal and paraphernal property of his wife, received by him, and converted to his own use, for the repayment of which his wife had a legal mortgage on the interest of her husband in his father's estate; therefore Mrs. Metcalfe transferred and assigned to Mrs. Young four-ninths interest in said promissory note and mortgage, being the portion thereof due by Wade R. Young, and bearing on his interest in the St. Peter plantation, and warranted the validity thereof; and Wade R. Young declared that, in consideration of the transfer and warranty by Mrs. Metcalfe, he thereby acknowledged the receipt of the four-ninths interest of the note and mortgage, and granted to Mrs. Metcalfe an acquittance *pro tanto* of the sums due by her to him; and Mrs. Young declared that she accepted the transfer and assignment of said four-ninths interest, and, in consideration thereof, and of the warranty by Mrs. Metcalfe of the validity of the note and mortgage, joined her husband "in so far as the mortgage accorded to her by law to secure the repayment of her paraphernal funds may bear upon the interest of her said

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husband in the succession of his deceased father, in giving to the said Mrs. S. J. Metcalfe an acquittance and release *pro tanto* of the sum due by her." This was signed by Wade R. Young, V. M. Liddell, attorney, S. J. Metcalfe, two witnesses, and the notary public, and a certificate was attached by the recorder of Catahoula parish that the foregoing was a true and correct copy of the original act of transfer and agreement on file in his office and recorded in its records December 6, 1876. There was also a certificate, under date of October 18, 1887, of the clerk of the ninth district court of Tensas parish that the foregoing was a true and correct copy of the copy of the act of transfer and agreement, "as the same now appear on file in my office, and of record there." The copy of the judgment of Mrs Young against her husband was as follows:

633]* "9th District Court, Parish of Tensas.

"Mrs. Bethia F. Liddell
vs. } No. 3050.
"Wade R. Young, her husband.

"In this case a regular trial was had after issue joined, and the law and the evidence being in favor of the plaintiff and against the defendant, it is ordered, adjudged, and decreed that there be judgment of separation, dissolving the community of acquets and gains between the plaintiff, Mrs. Bethia F. Liddell, and the defendant, Wade R. Young, and that the said plaintiff do have and recover judgment against the defendant for the sum of $7,500, seven thousand five hundred dollars, with a recognition of her mortgage on the property described in the petition, and that the same be sold to satisfy said judgment and costs.

"Thus done, read, and signed in open court this 9th day of July, 1881.

"Wade H. Hough,
"Judge 9th District."

This was certified to by the clerk of the ninth district court as "a true and correct copy of original judgment rendered in suit of 'Bethia F. Liddell *vs.* Wade R. Young, her husband,' as the same appears on file and of record in my office in mortgage book 'O,' pages 649 *et seq.*, on June 5, 1882."

On the same day the intervening petition was filed, Young filed what was entitled an "opposition to confirmation of sale," in which it was alleged that plaintiffs had attempted to proceed according to the practice of the courts of Louisiana, and in doing so had violated the rules and practice prescribed in the conduct of equity cases in the circuit court; that there was a want of parties; that there existed a prior encumbrance on the property fully equal to or exceeding its value, and that by the laws of Louisiana no valid sale of the property could be made for a price not exceeding the amount of such prior encumbrance. He then set forth the mortgage of 1868 in favor of Miss Eliza H. Young, to secure the $11,250 note; the transaction between Mrs. Metcalfe, his wife, 634]and *himself of 1876; the judgment of 1881 in favor of his wife for $7,500; the renunciation by his wife of her prior right of mortgage in favor of Nalle & Co.; and the execution of the mortgage to Nalle & Co. to secure the payment of his note for $1,632.61, with interest at 8 per cent, until paid; and charged the renunciation to have been invalid. The rendition of decree in favor of Nalle & Co. against defendant for the foreclosure of their mortgage; the issue of final process in execution of the decree, and the proceedings and sale thereunder, were rehearsed at length, as in the intervening petition; and it was averred that his wife's mortgage was a first encumbrance, and that no sale or adjudication could be made to a purchaser for less than the amount of the mortgage. It was further alleged that the marshal in the second advertisement of the property for sale on twelve months' credit required the purchaser out of the price to deduct and pay in cash an amount for printing, marshal's fees, and clerk's fees, as well as taxes due on the property, and that much the largest amount required to be paid was claimed by Nalle & Co., or one of them, for taxes alleged to have been paid by them or him on the property, the legality of which was contested by defendant and by his wife; that this requirement was an oppressive and unjust act towards the mortgagor, and deterred a purchaser with whom defendant had arranged to buy; and other irregularities were set forth. As to the claim of the payment of taxes for the years 1882, 1883, 1884, and 1885, and as to the taxes pretended to be due for the year 1886, the payment of which the marshal made a condition precedent to the accepting of any bid, no taxes were due and no necessity existed for the payment thereof, and that Nalle & Co. acquired no rights by such payment and subrogation, and thereupon the grounds on which the illegality was charged were given at considerable length. Defendant prayed that the sale be not confirmed and be set aside; that his wife be made or allowed to become a party to the suit; that a reference be made to a master to settle the priority of liens; that the renunciation of his wife be declared invalid, and her mortgage for $7,500 and interest be decreed the *first lien on the property and prior[635 in rank to Nalle & Co.; that the revenue acts of Louisiana for the years 1880, 1882, 1884, and 1886 be decreed unconstitutional, null, and void, and the inscription of the mortgage to secure the taxes be erased as a cloud, and for general relief. And he further prayed that, if it be determined that the sale was a valid sale, he might be allowed to redeem by paying to complainants the amount of the debt, interest, and costs, and such other sums as might be found to be legally due.

Defendant also filed what he styled a cross bill against the marshal, Mrs. Mary Nalle and her husband Golson, and Nalle & Co., alleging the sale of the property by the marshal and the acceptance of the bid of Mrs. Mary Nalle, notwithstanding a written protest by defendant against the acceptance of any bid not exceeding $7,500, the amount of the prior encumbrance; that the marshal attempted to transfer the possession of the property to Nalle & Co. or Mrs. Mary Nalle for them, by giving complainants' solicitor an order to take such possession; and that the marshal and Mrs. Mary Nalle were now seeking to evict defendant from the possession of his property, and were trespassing thereon, all of which was without color of right; that the marshal had no power to pass the title to Mrs. Nalle until the oppositions to the sale had been tried and

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determined and the sale confirmed, and that, even if he had, the sale was absolutely null and void because the amount of the bid did not exceed the amount of the prior special mortgage; and prayed for an injunction, whereupon a restraining order was issued, and subsequently a writ of injunction.

Nalle & Co. demurred to the petition of intervention, and moved to dismiss the opposition and dissolve the injunction. The motion was denied and the demurrer overruled. Thereupon Nalle & Co. answered the intervening petition of Mrs. Young and the cross-bill and opposition to confirmation of sale of Wade R. Young, alleging that Mrs. Young was, at the time of the erasure and cancelation of her alleged mortgage, to wit, June 1, 1882, a citizen of the state of Mississippi, and as such *sui juris* in every respect, having, under the laws of said state, full capacity as a *feme sole* to **636**] make any contract *whatever; denying that Wade R. Young moved his family to the state of Mississippi in 1876 with the intention of retaining, or that he did retain, either an actual or constructive domicil in the state of Louisiana; averring that the alleged agreement between Mrs. B. F. Young and Mrs. Metcalfe and Wade R. Young, under date of December, 1876, was null and void for reasons given; and that Mrs. Young and Wade R. Young were, in equity and good conscience, estopped from setting up her alleged mortgage. Wade R. Young and his wife filed a replication to the answer of Nalle & Co. and others "to the cross bill and intervening petition."

The case came on to be heard "upon the cross bill and opposition to the confirmation of the sale and the intervening petition" and the various papers heretofore referred to were offered in evidence as well as sundry depositions, and "generally everything of record in the suit." On June 9, 1890, the court entered a decree, whereby it was "ordered, adjudged, and decreed that the sale of the mortgaged property made by the marshal, in pursuance and execution of the foreclosure decree, be set aside, canceled, and avoided. And it is further ordered, adjudged, and decreed that the attempted renunciation by the intervening petitioner, Mrs. Bethia F. Young, of her special mortgage on the property, was and is invalid and of no effect, and that said mortgage be recognized as the first mortgage on the property, superior in rank to the mortgage of the plaintiffs, E. Nalle & Co., and entitled to be paid by preference. And it is further ordered that the plaintiffs, E. Nalle & Co., pay the costs of the sale and of these proceedings."

From this decree Nalle & Co. and Mrs. Mary Golson, as purchaser, appealed to this court.

Messrs. **Charles J. Boatner** for appellants.

Mr. **Wade R. Young** for himself *et al.*, appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

637]*The proceedings in the state court were ordinary and not executory, and in the circuit court the petition stood as a bill in equity to foreclose a mortgage. The decree of November 6, 1886, was a final decree, and the execution may be regarded as the equivalent of a direction to a master or commissioner to make sale in the enforcement thereof. Under the Civil Code and Code of Practice of Louisiana judicial sales are conducted by the sheriff or other public officer in the manner minutely described and adjudicated to the purchaser, who thereupon becomes the owner of the article adjudged. La. Civ. Code, arts. 2601-2621; La. Code Prac. 663 *et seq.* But in an equity foreclosure in a circuit court, while the requirements of the state law should be complied with and the forms of proceeding pursued as nearly as practicable, it is proper for the officer who makes the sale to make a report or return to the court for confirmation. Resistance to such confirmation may be made, under circumstances, and this sometimes results in the setting aside of the sale and an order for a resale. But the scope of these pleadings was much wider. To the confirmation of the sale the defendant, indeed, interposed objections, waiving any formal report for confirmation, but they were not passed upon by the circuit court independently of defendant's alleged cross bill and the petition of Mrs. Young in intervention, and these papers may all be considered together, as they were by the circuit court, and, so treated, they constituted in effect an independent suit brought by Young and his wife to set aside the sale and have the alleged mortgage of the wife declared the prior encumbrance and enforced, or for redemption.

The objections in respect of alleged irregularities in the conduct of the sale, or the invalidity of certain taxes and the requirement of their payment, need not be considered, as they are not sustained by the record, and mere informalities or irregularities in a judicial sale in Louisiana do not constitute a sufficient ground for setting it aside. *Stockmeyer* v. *Tobin*, 139 U. S. 176 [35: 123].

The principal objection to the sale was the insufficiency of the bid at which the property was disposed of, and that objection will be first examined.

*Under La. Code Prac. arts. 679, 683, 684, [**638**] when there exists a special conventional mortgage or privilege on the property put up for sale, the property is sold subject thereto, and the purchaser pays to the officer so much of the price as exceeds "the amount of the privileges and special mortgages to which such property is subject;" and, in case of sale on twelve months' credit, if there exist on the property any privileges or special mortgage, in favor of other persons than the judgment creditor, and who are preferred to him, the purchaser is entitled to retain in his hands out of the price the amount required to satisfy the privileged debts and special hypothecations to which the property sold was subject, but is bound to give his obligation for the surplus of the purchase money, if there be any, and subscribe his obligation at twelve months' credit, with security; but if the price offered is not sufficient to discharge the privileges and mortgages existing on the property, having a preference over the judgment creditor, there shall be no adjudication, and other property, if there be any, shall be seized.

If, therefore, the mortgage claimed by Mrs.

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Young was conventional or special, and had been properly recorded and not legally renounced, and it was prior to that of Nalle & Co., no sale of the mortgaged property could be made under the junior encumbrance of the latter, unless the price bid was sufficient to discharge the prior lien. But if the prior mortgage was legal or judicial, this requirement did not apply, and the property passed to the purchaser subject to the payment of the prior lien. *Alford* v. *Montejo*, 28 La. Ann. 593; *Godchaux* v. *Succession of Dicharry*, 34 La. Ann. 579.

The circuit court held that the mortgage asserted by Mrs. Young was a special mortgage, which took precedence over that of Nalle & Co.; that her renunciation was void, and, the price bid not being sufficient to discharge this prior special mortgage, that the sale could not be confirmed, and must be set aside.

By the Civil Code, the partnership or community of acquets and gains exists between husband and wife by operation of law, unless otherwise stipulated in the contract. The sepa-[639] rate *property of the wife is that which she "brings into the marriage, or acquires during the marriage by inheritance or by donation made to her particularly," and "is divided into dotal and extradotal. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry." *Fleitas* v. *Richardson* (No. 2), 147 U. S. 550, 553 [37: 276, 278]; La. Civ. Code, arts. 2332, 2399, 2334, 2335.

By article 2337 "by dowry is meant the effects which the wife brings to the husband to support the expenses of the marriage."

Article 2383 declares: "All property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of the marriage, is paraphernal."

Mrs. Young claimed an indebtedness on the part of her husband to her, arising from his having received the proceeds of a life insurance policy on the life of her father in her favor for $5,000, and the additional sum of $2,500, being an amount which came to her from her father's estate, and was received by him. This was paraphernal property. The wife has a legal mortgage on the property of her husband "for the restitution or reimbursement of her paraphernal property." Art. 3319. "Conventional mortgage is that which depends on covenants. Legal mortgage is that which is created by operation of law. Judicial mortgage is that which results from judgments." Art. 3287. A legal mortgage results by operation of law, and "no legal mortgage shall exist, except in the cases determined by the present Code." Arts. 3311, 3312.

Article 2376 declares that the wife has a legal mortgage on the property of her husband for the restitution of her dowry as well as for the replacement of her dotal effects; and by art. 2379 it is provided that, during the marriage, the husband may, with the consent of his wife, "be authorized by the judge, with the advice of five of the nearest relations of the wife, or friends, for want of relations, to mortgage, *specially for the preservation of his[640] wife's rights, the immovables which he shall designate; and then the surplus of his property shall be free from any legal mortgage in favor of his wife;" while art. 2390 is as follows: "The wife may alienate her paraphernal property with the authorization of her husband, or in case of refusal or absence of her husband, with the authorization of the judge; but should it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same. The husband may release the mass of his property from this legal mortgage, by executing a special mortgage in the manner required in the preceding sections, for dotal effects." Thus it appears that a legal mortgage on all the husband's property exists until a special mortgage is executed according to the foregoing provisions, and the law does not contemplate a legal and a special mortgage existing at the same time. And the legal mortgage of the wife to affect third persons must be recorded in the office of mortgages for the parish where the property lies. Arts. 3342-3349.

Mrs. Young must either stand upon her legal mortgage resulting from the receipt of her paraphernal property, and recognized by the judgment of July 9, 1881, decreeing a separation of property, or a judicial mortgage arising from that judgment, or on the contract between herself and Mrs. Metcalfe, by which Mrs. Metcalfe purported to transfer to her an indebtedness due by Wade R. Young, secured on the property in controversy. If her mortgage be legal or judicial, its existence would not be a bar to the confirmation of a sale for an amount insufficient to satisfy it; and, moreover, it could not rank the special conventional mortgage of Nalle & Co. because it was not recorded until subsequently.

It is, indeed, insisted that it was altogether invalid under art. 3428: "The separation of property, although decreed by a court of justice, is null, if it has not been executed by the paymentof the rights and claims of the wife, made to appear *by an authentic act, as[641] far as the estate of the husband can meet them, or at least by a bona fide noninterrupted suit to obtain payment." *Chafee* v. *Scheen*, 34 La. Ann. 690; *Nachman* v. *Le Blanc*, 28 La. Ann. 345, 346; *Bertie* v. *Walker*, 1 Rob. (La.) 431, 432. But this becomes immaterial, as, whatever rights, if any, might be claimed under it, it could have no effect as against Nalle & Co. for want of record.

According to articles 3345 and 3349, all mortgages, whether conventional, legal, or judicial, are required to be recorded as provided, and the preservation of the legal mortgage or privilege in favor of a married woman depends on the record of the evidence of her mortgage or privilege in the mortgage book of the parish where the property is situated; and that evidence, if not by written instrument, must consist of "a written statement, under oath, made by the married woman, or her husband, or any other person having knowledge of

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the facts, setting forth the amount due to the wife, and detailing all the facts and circumstances on which her claim is based." There was no such evidence as last named here, and no such inscription until after the mortgage to Nalle & Co. had been given and registered. *Lovell* v. *Cragin*, 136 U. S. 130, 149 [34: 372, 378].

The transaction between Mrs. Metcalfe, Young, and Mrs. Young appears to have been that Mrs. Metcalfe being indebted to Young, and Young indebted to Mrs. Metcalfe, the respective debts were discharged by agreement, and compensated each other, but that it was agreed that Young's indebtedness to Mrs. Metcalfe should be kept alive for the benefit of Mrs. Young, upon the consideration on Mrs. Young's part of the release of her paraphernal claims against her husband. Compensation had, however, taken place, and the two debts were reciprocally extinguished. Arts. 2130, 2207, 2208.

This was the necessary effect by operation of law, and when the principal obligation was discharged the mortgage fell with it and would not be revived though the indebtedness were reacknowledged in favor of another. *Smith* v. *McWaters*, 22 La. Ann. 432; *Davidson* v. *Carroll*, 20 La. Ann. 199; *Schinkel* v. *Hanewinkel*, 19 La. Ann. 260.

Again, contracts between husband and wife [642] are forbidden *in Louisiana except as specified. Contracts of sale between them "can take place only in the three following cases: 1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights. 2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated. 3. When the wife makes a transfer of property to her husband in payment of a sum promised to him as a dowry." Arts. 1790, 2446; *Carroll* v. *Cockerham*, 38 La. Ann. 813, 824.

This transaction was an attempt to extinguish the wife's general mortgage by the transfer of the special mortgage of a third party, satisfied by the act as between the immediate parties thereto, and if it could be done at all, it could only be when taking place in accordance with articles 2379 and 2390, and recorded as required by article 3345; and, as already seen, these articles were not complied with.

But were this otherwise, the judgment of 1881 did not recognize her alleged special mortgage, which recognition was evidently not prayed for, and recognized only her legal mortgage in complete disregard of her special mortgage if she had had any.

The rendition of judgment for all her paraphernal claims without any recognition of a special conventional mortgage to secure them would seem to have concluded the fact that none such then existed, or at least furnishes such persuasive proof thereof as must be controlling on this record. *Nicolson* v. *Citizens' Bank*, 27 La. Ann. 369.

Conceding, then, that the renunciation by Mrs. Young in favor of Nalle & Co. was ineffectual, her legal or judicial mortgage, if outstanding, was nevertheless subordinate to their mortgage and not entitled to precedence. In the jurisprudence of Louisiana, and under the statutes of that state, the right of redemption from a decree in foreclosure does not obtain. If a prior mortgage exists, the prior mortgagee is not a necessary party, and purchasers take subject to the prior lien. If there be a subsequent mortgage, the prior mortgage containing the *pact de non alienando* as Nalle & Co.'s mortgage *did, the mortgagee there- [643] in need not be made a party, but must take notice of the proceedings to enforce the prior mortgage at his peril. He may, however, apply to set aside the sale on proper grounds. *Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130 [22: 588]; *Watson* v. *Bondurant*, 88 U. S. 21 Wall. 123 [22: 509]; *Carile* v. *Trotot*, 105 U. S. 751 [26: 1223].

As heretofore noticed, Mrs. Young and her husband prayed for redemption, which is not, in any foreclosure case, allowable as such; while, so far as their pleadings are regarded as seeking the setting aside of the sale and for a resale, we find no adequate grounds for according that relief.

The decree of June 9, 1890, is reversed with costs; and the cause remanded to the circuit court with instructions to enter a decree overruling the objections to the sale of July 30, 1887, dissolving the injunction, adjudicating the property to Mrs. Mary Nalle, wife of Eustis F. Golson, and ordering the delivery of possession to her.

CHARLES A. GREGORY, *Appt.*,
v.
JOHN C. KEMP VAN EE.

(See S. C. Reporter's ed. 643-646.)

Finality of decree of circuit court of appeals—ancillary proceedings.

1. Where a decree of the circuit court of appeals is final in the main suit, under the judiciary act of March 3, 1891, § 6, decrees in accessory and subordinate proceedings are also final, and appeals therefrom to this court cannot be sustained.
2. Where the jurisdiction of the circuit court rested solely on the ground of diverse citizenship of the parties, a decree on ancillary or supplemental proceedings in the cause, although independent of the original controversy, partakes of the finality of the main decree of the circuit court of appeals, and cannot be brought to this court on appeal.

[No. 601.]

Submitted December 23, 1895. Decided January 27, 1896.

APPEAL from a decree of the United States Circuit Court of Appeals for the First Circuit modifying and affirming a decree of the Circuit Court in a suit by Charles A. Gregory,

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor,—see note to M'Donald v. Smalley, 7: 287.

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plaintiff, against John C. Kemp Van Ee, for the recovery of certain promissory notes. On motion to dismiss. *Dismissed.*

See same case below, 67 Fed. Rep. 837.

Statement by *Mr. Chief Justice* **Fuller:**

Gregory, a citizen of Illinois, filed his bill in the supreme judicial court of Massachusetts, 644] December 16, 1884, against *Frederick A. Pike, a citizen of Maine, and William C. N. Swift, a citizen of Massachusetts, to recover two certain non-negotiable promissory notes made by Swift, held by Pike, and alleged by Gregory to be his property. This suit was afterwards removed on Gregory's petition to the circuit court on the sole ground of the diverse citizenship of the parties. Pending the suit the notes were collected, and the proceeds transferred to the registry in the cause. On the petition of Swift and John C. Kemp Van Ee, who claimed to be interested in the notes, Van Ee was made a party defendant by order of court, against Gregory's objection, and filed a cross bill. Butterfield was made a defendant on the application of himself and Swift, and filed a cross bill, and Talbot, attorney for Pike and his estate, filed a petition for attorney's fees. Pike died, and his executrix, Mary H. Pike, was made a party. The circuit court dismissed the cross bill of Butterfield and decreed payments out of the fund in favor of Mrs. Pike and Van Ee. From this decree separate appeals were taken by Gregory as against Mrs. Pike, and as against Van Ee, by Talbot, and by Butterfield to the circuit court of appeals for the first circuit, and went to judgment there. The opinion of that court gives a clear idea of a somewhat confused record. 67 Fed. Rep. 837. The court of appeals concurred with the disposition of the case by the circuit court as to Mrs. Pike and Butterfield, but awarded relief to Talbot; and held that Van Ee was improperly made a party defendant, that his cross bill was unauthorized and should be dismissed, but that it could be properly treated as an intervening petition, and, so treating it, that he was entitled thereon to the relief accorded by the circuit court. The case was remanded to the circuit court with directions to enter a final decree, modifying the original decree in the particulars pointed out. From the decree of the circuit court of appeals separate appeals to this court were prayed by Gregory and allowed, as against Van Ee, Mary H. Pike, and Talbot, which appeals were separately docketed here as Nos. 601, 602, and 603. The appeals in Nos. 602 and 603, those against Mrs. Pike and Talbot, were dismissed November 25, and a motion to dismiss the appeal against Van Ee, No. 601, is now made.

Mr. **Russell Gray** for appellee, in favor of motion to dismiss.

Messrs. **F. A. Brooks** and **E. J. Phelps** for appellant, in opposition.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The jurisdiction of the circuit court in the suit of Gregory against Pike and Swift rested on the fact that the controversy therein was between citizens of different states, and this was the sole ground on which Gregory removed the cause from the state court to the circuit court. The fund was in the circuit court because realized out of and substituted for the subject of contention in that suit, and Van Ee recovered on his intervening petition what he claimed to be his share of that fund.

In *Rouse* v. *Letcher*, 156 U. S. 47 [39: 341], we held that if the decree of a circuit court of appeals is final under the 6th section of the judiciary act of March 3, 1891, a decree upon an intervention in the same suit must be regarded as equally so because the intervention is entertained in virtue of jurisdiction in the circuit court already subsisting. It was pointed out that where property is in the actual possession of the circuit court, this draws to it the right to decide upon conflicting claims for its ultimate possession and control, and that where assets are in the course of administration all persons entitled to participate may come in under the jurisdiction acquired between the original parties; by ancillary or supplemental proceedings, even though jurisdiction in the circuit court would be lacking if such proceedings had been independently prosecuted; that the exercise of the power of disposition by a circuit court of the United States over such an intervention is the exercise of power invoked at the institution of the main suit; and that it is to that point of time that the inquiry as to the jurisdiction of the circuit court must necessarily be referred. Therefore that, if the decree in the main suit were final, decrees in accessory and subordinate proceedings would be also final, and appeals therefrom could not be sustained.

*The circuit courts of the United States [646 have cognizance of suits as provided by the acts of Congress, and when their jurisdiction as Federal courts has attached, they possess and exercise all the powers of courts of superior general jurisdiction. Accordingly, they entertain and dispose of interventions and the like on familiar and recognized principles of general law and practice, but the ground on which their jurisdiction as courts of the United States rests is to be found in the statutes, and to that source must always be attributed.

Manifestly, the decree in the main suit cannot be revised through an appeal from a decree on ancillary or supplemental proceedings, thus accomplishing indirectly what could not be done directly. And even if the decree on such proceedings may be in itself independent of the controversy between the original parties, yet if the proceedings are entertained in the circuit court because of its possession of the subject of the ancillary or supplemental application, the disposition of the latter must partake of the finality of the main decree, and cannot be brought here on the theory that the circuit court exercised jurisdiction independently of the ground of jurisdiction which was originally invoked as giving cognizance to that court as a court of the United States.

Appeal dismissed.

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CHEMICAL NATIONAL BANK OF CHICAGO, *Plff. in Err.*, *v.* CITY BANK OF PORTAGE.

(See S. C. Reporter's ed. 646-654.)

Review of state judgment—Federal question.

1. Where the decision of the supreme court of the state rests upon a ground broad enough to sustain its judgment without deciding any Federal question, this court will not review its decision on the ground that a Federal question was also decided.

2. This court cannot review the decision of a state court that it had power to decide a controverted question of fact, for the purpose of excluding any other ground of decision than that which involves a Federal question, and thereby sustaining a writ of error. If the state court proceeded to judgment upon the facts, this court will accept its views as controlling.

[No. 736.]

Submitted January 7, 1896. Decided January 27, 1896.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Appellate Court for the First District of Illinois which affirmed the judgment of the Superior Court of Cook County, Illinois, in favor of plaintiff, the City Bank of Portage, against the Chemical National Bank of Chicago, defendant, for the amount of a note. *Dismissed.*

See same case below, 55 Ill. App. 251, 156 Ill. 149.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action of assumpsit brought by the City Bank of Portage against the Chemical National Bank of Chicago, in the superior court of Cook county, Illinois. The declaration contained a special count upon a note signed by C. E. Braden, which it was alleged was made by defendant in that name, and the common counts. The defendant pleaded the general issue and a plea denying the execution of the note described in the special count. A jury was waived and the cause submitted to the court for trial.

Under the practice act of Illinois where a trial is by the court, either party may "submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'Refused' or 'Held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court." Ill. Rev. Stat. chap. 110, § 42; 2 Starr & C. Stat. 1808.

Defendant requested the court to hold as law in the decision of the case the eight propositions given in the margin.† *Of these [648 the court refused to hold propositions numbered one, two, three, four, six, and eight, and also proposition numbered six "if it appears that the bank, its officers knowing the facts, used the money;" and defendant excepted. The court held propositions numbered five and seven. The issues were found in favor of plaintiff, and judgment entered on the finding, and, the case having been taken to the appellate court for the first district of Illinois, the judgment of the superior court was affirmed. 55 Ill. App. 251. And this judgment of the appellate court was affirmed by the supreme court of the state on appeal. 156 Ill. 149. Thereupon a writ of error from this court was sued out.

There was evidence tending to show that in 1893 the Chemical National Bank had taken some of its own stock in payment of a debt; that Hopkins, assistant cashier, had given to a firm of brokers his note, payable on call, secured by part of this stock as collateral; that the brokers procured the money on the note and paid it to the bank, the assistant cashier not getting any of it; and that after the note had run fifteen days the holders called it in and it was paid out of the moneys of the bank. It was then agreed between Curry, president, Braden, cashier, and Hopkins, assistant cashier, that the bank should raise $5,000 through a broker in Minneapolis, by giving a note in Braden's name, payable to the broker and with the stock as collateral, and that, as the bank was to have the money, the note should be the bank's obligation and be paid by it. In carrying out this arrangement the note in suit was given, being signed by Braden in his own name and not as cashier, and made payable to the Minneapolis broker, and fifty shares of the stock

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 27: 267.

†1. If the court finds from the evidence that some of the directors of the Chemical National Bank of Chicago were desirous of purchasing shares of the capital stock of said bank for themselves, individually; that in pursuance of such desire they instructed the president of said bank to purchase such an amount of said shares of stock not exceeding $100,000 par value as might be offered at par, stating to him that they would take the stock so purchased at different times as their money came in; that in pursuance of such instruction the president of said bank caused a broker to purchase fifty shares of said capital stock, and in payment for said stock one Hopkins, assistant cashier of said bank, gave to said broker his individual note for the purchase price of said stock, payable on demand; that thereafter, payment of said note being demanded of said Hopkins, the president and cashier of said bank paid said note out of the moneys of said bank, and thereupon it was arranged by and between the president, the cashier, and the assistant cashier, that the cashier, Braden, should execute his individual note for $5,000 to a broker; that fifty shares of said stock so purchased should be transferred upon the books of the bank to said Braden, and attached to said note to be given to said broker as collateral security; that said broker should procure said note to be discounted, and that the money realized by discounting said note should be paid into the moneys of the bank to replace the money of the bank used in paying the Hopkins' note; and that in pursuance of such arrangement said Braden gave the note in controversy, and the same was discounted and the

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held by the bank were issued in Braden's name and attached to the note as collateral. Braden did not own this stock; received none of the money and had no personal interest in the transaction. The note was sent to the broker at Minneapolis, who indorsed it without recourse, procured the money from the City Bank of Portage, and sent it to the Chemical National Bank. He advanced no money on the note either to Braden or the bank; did not owe Braden anything, and the note was given by Braden to him purely as a means of raising money for the bank. There was also evidence that the board of directors of the Chemical National Bank at a meeting thereof had authorized the president to buy stock of the bank when offered for sale at par up to $100,000, agreeing to take it as soon as they could, but that no entry of this authority was made on the bank's records; that the money obtained on the Hopkins note was used in making such a purchase; and that the stock which was annexed to the Hopkins note and to that in suit was a part of the stock purchased under these circumstances, and not part of that taken by the bank upon a debt; of all which the City Bank of Portage had no notice.

The defense was that the purchase by the bank of its own stock was illegal; that it was equally illegal for the bank to borrow money to replace money paid out in making such a purchase; that that was what this transaction amounted to; and that plaintiff could not recover because the money was obtained and used for a purpose forbidden by U. S. Rev. Stat. § 5201, which is as follows:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of *the association, according to § 5234." [651

The supreme court held that the plaintiff was entitled to recover under the common counts; that it was unimportant to consider whether the superior court ruled correctly on the propositions of law requested on behalf of defendant since they all related to the right of recovery on the note; and the court said:

"Curry, president of the Chemical National Bank, was called as a witness, and it may be inferred from his evidence, although he does not state the fact, that the bank stock procured by the bank was not taken in on a debt, but was purchased. Conceding that the Chemical National Bank purchased fifty shares of its own stock, contrary to the provisions of the national banking act, does that unlawful act so pollute the transaction between plaintiff and defendant, under which plaintiff loaned its money, that the defendant may keep the money and the plaintiff bear the loss? If the facts were as claimed by counsel, they would not defeat a recovery on the part of plaintiff. The purchase of the stock and the borrowing of the money from plaintiff were two distinct transactions. In the purchase of the stock the money used by the defendant in payment was raised on the note of Hopkins, assistant cashier. Afterwards the bank paid the Hopkins note with its own funds, and this ended the transaction so far as the purchase of stock was concerned. After this transaction was ended the bank applied to the plaintiff for a loan of money and obtained it, placing the bank stock previously obtained in the hands of plaintiff as collateral.

"The plaintiff did not know where, of whom, or in what manner the Chemical National Bank had acquired the bank stock turned over as collateral, nor did it know what use that bank would make of the money loaned. Moreover, this money was not loaned by plaintiff to pay for bank stock, and, so far as it appears, it was never used for that purpose. So

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proceeds were deposited with the moneys of the Chemical National Bank of Chicago,—then the court should find that said note was the individual note of said Braden, and not the note of the defendant, and should find the issues in favor of the defendant.

2. If the court believes the testimony given by J. O. Curry in this case to be true and to be a correct statement of the circumstances connected with the execution by Braden of the note sued on, then the court must find the issues joined in favor of the defendant.

3. Although the court may believe the testimony of Braden to be true, yet his testimony with all inferences that may be justifiably drawn therefrom in favor of the plaintiff does not justify a finding in favor of the plaintiff.

4. The fact that the money realized upon the note in suit was received by the Chemical National Bank of Chicago does not make said Chemical National Bank of Chicago liable upon said note; and this is true notwithstanding it was agreed by and between Curry, Braden, and Hopkins that the note should be treated as a note of the Chemical National Bank of Chicago and paid by it.

5. A national banking association is prohibited by law from purchasing shares of its own capital stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.

6. The purchase by officers of a national banking association of shares of its own capital stock, unless such purchase is necessary to prevent loss upon a debt previously contracted in good faith, cannot be regarded as a transaction of the association itself, unless expressly authorized by its board of directors, and a note executed by an officer in his own individual name for the purpose of borrowing money to make such a purchase cannot be regarded as the note of the association unless recognized as such by its board of directors, and unless the lender parted with his money upon the faith of the liability of the association.

7. There is no evidence in this case legally sufficient to justify a finding that the plaintiff at the time it accepted the note in controversy and advanced money on the same had any knowledge whatever that Braden was not the real principal or that it advanced any money on the note upon the faith of any supposed liability of the defendant upon said note.

8. Although a corporation may be held liable upon a contract that is *ultra vires*, or prohibited by law when such contract has been fully executed by the other party, yet where such contract has been entered into by an officer of the corporation in his own individual name, and the other party, at the time he performed the same on his part, had no knowledge that the same was for the benefit of the corporation, and did not part with any money or property on the faith or the liability of the corporation upon the contract, but, on the contrary, executed the contract on his part in reliance solely upon the individual liability of such officer,—such other party cannot enforce such contract against the corporation as an undisclosed principal.

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far as appears from the evidence there was nothing illegal in the transaction between plaintiff and defendant which resulted in the loan of $5,000."

Mr. **Hiram T. Gilbert** for plaintiff in error.

Messrs. **Daniel Kent Tenney** and **Samuel P. McConnell** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We are of opinion that the supreme court of Illinois in rendering judgment denied no title, right, privilege, or immunity specially set up or claimed by defendant under the laws of the United States, and that this writ of error cannot be maintained.

The contention of plaintiff in error is that the state court decided "either, *first*, that the cashier, Braden, by virtue of his office, had, under the laws of the United States regulating national banks, implied authority to borrow money in the name of the defendant and bind it to repayment thereof; or, *second*, that the transaction out of which the discounting of the Braden note arose, which transaction consisted of the original purchase of the fifty shares of the bank's stock, the giving of the Hopkins note, and the payment thereof out of the moneys of the bank, was one which, in law, could be regarded as a transaction of the bank." And that therefore the state court decided against an immunity from liability expressly set up or claimed by the Chemical National Bank under the laws of the United States.

The appellate court reviewed the judgment of the superior court for errors committed on the trial, and, finding none, affirmed it, and the supreme court affirmed the judgment of the appellate court; and if no such claims were set up in the trial court, the supreme court, in approving the affirmance of its judgment by the appellate court, could not be held to have decided against a claim with which the trial court had not been called upon to deal. It does not appear that the immunity from liability was expressly claimed by plaintiff in error in the trial court on the ground that the bank could retain the money because it was obtained by means in excess of the powers of its cashier or other officers.

653]*The propositions on which the trial court was asked to rule were manifestly directed to the right of recovery on the notes as such, under the special count, and certainly fell far short of a claim of the character suggested as a defense to a recovery under the common counts. Moreover, the question of liability, whatever the authority of these bank officers to borrow this money for the bank, depended upon general principles of law applicable under the particular facts. *Western Nat. Bank* v. *Armstrong*, 152 U. S. 346, 352, 353 [38: 470, 473].

Nor can we perceive that the supreme court denied any immunity from liability claimed as arising out of the purchase by the bank of its own stock other than to prevent loss on previous indebtedness. The decision of the supreme court rested on the fact that that purchase of stock and the loaning of the money from the City Bank of Portage were two distinct transactions, and this was a ground broad enough to sustain the judgment without deciding any Federal question at all.

It is said that the supreme court had no power to decide any controverted question of fact, but we cannot review the decision of that court in that respect, even if the position were well taken, but we do not understand that the supreme court did so decide. It is true that under §§ 87 and 89 of the practice act the supreme court of Illinois does not re-examine controverted questions of fact, but it nevertheless examines the evidence bearing upon the issues of fact determined to see what principles of law are involved in a controversy, and whether they are properly applied by the trial court. *Sexton* v. *Chicago*, 107 Ill. 323, 326; *Postal Teleg. Cable Co.* v. *Lathrop*, 131 Ill. 575, 580, 7 L. R. A. 474. In this case the supreme court recapitulated the evidence as being that on which the trial court rendered judgment in order to disclose the basis of the ruling that plaintiff was entitled to recover.

The affirmance by the appellate court of the judgment of the trial court without any recital of the facts found conclusively settles all controverted questions of fact necessary to support the judgment. *Wrought Iron Bridge Co.* v. *Utica & D. P. Highway Comrs.* 101 Ill. 518; *Bernstein* v. *Roth*, 145 Ill. 189. If the appellate court disposes of a cause on *a finding [654 of facts different from the finding of the trial court, it is its duty to recite in its final judgment the facts so found (Ill. Rev. Stat. chap. 110, § 87; 2 Starr & C. Stat. 1842); but there was no such finding of facts by the appellate court here, and it is to be presumed that that court found the facts in the same way as did the trial court. As the supreme court proceeded to judgment upon the facts as thus determined, we must accept its view as controlling.

Writ of error dismissed.

UNITED STATES, *Appt.*,
v.
ROBERT THORNTON.

(See S. C. Reporter's ed. 654-660.)

Soldier, when not entitled to commutation.

1. A soldier is not entitled to commutation for travel and subsistence to the place of his second enlistment, where his service was practically a continuous one, and his second discharge occurred at the place of his original enlistment.
2. Judicial notice is taken of the fact that a person could not possibly travel from Mare Island, California, to Washington, D. C., and back again, within four days.
3. A soldier who cannot possibly intend to incur the expense of transportation and subsistence from the place of his discharge to the place of his enlistment or who for some other reason is not within the spirit of U. S. Rev. Stat. § 1290, as amended by the act of February 27, 1877, provid-

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.

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ing allowances therefor, is not entitled to such allowance.

[No. 138.]

Submitted December 20, 1895. Decided January 6, 1896.

ON APPEAL from a judgment of the Court of Claims in favor of the claimant, Robert Thornton, against the United States for commutation for travel and subsistence as a private in the marine corps. *Reversed, with directions to dismiss.*

Statement by *Mr. Justice* **Brown:**

The petition in this case set forth that the petitioner enlisted as a private in the marine corps, November 10, 1886, at Mare Island, California, to serve five years, and was discharged March 13, 1889, at Washington, D. C., by order of the Secretary of the Navy; that, under the provisions of U. S. Rev. Stat. § 1290, he was entitled to receive transportation and subsistence or travel pay and commutation of subsistence from the place of his discharge to that of his enlistment; that he made written application for the same to the Treasury Department, and was informed that **655**]his claim was adjusted and *transmitted to the second comptroller, who declined to allow the case, on the ground that he was discharged at his own request before the expiration of his term of enlistment.

The case having been heard before the court of claims, that court upon the evidence found the following facts:

1. The claimant enlisted at the age of thirteen years, one month, and three days, in the marine corps of the United States, at Washington, D. C., on August 29, 1878, for a term of seven years, ten months, and twenty-seven days, and was then "bound to learn music" in said corps.

April 17, 1880, he was rated as a drummer.

November 6, 1886, he was discharged from the service at Mare Island, California, as a drummer.

November 10, 1886, he re-enlisted at Mare Island, California, as a private in said corps for a term of five years.

On March 13, 1889, before the expiration of the last-mentioned term of enlistment, Thornton, as a private in said corps, was, at his own request, and not by way of punishment for an offense, discharged from service at the Marine Barracks, Washington, D. C., by direction of the Secretary of the Navy.

The claimant was settled with in full for all pay and allowances except transportation and subsistence in kind, or, in lieu thereof, travel pay and commutation of subsistence, from Washington, D. C., the place of his discharge, to Mare Island, California, the place where he had re-enlisted. And when he was discharged, at the end of his term of enlistment, he received travel pay and commutation of subsistence computed at the rate of one day for every 20 miles of the distance from Mare Island, California, to Washington, D. C.

2. The travel pay and commutation of subsistence of a private in the marine corps when discharged in the third year of his second term of enlistment, and when he is allowed the same, are stated by the proper accounting officers of the Treasury Department to be one day's pay at 60 cents per day, and one ration commuted at 30 cents for each 20 miles of the distance from place of discharge to place of last enlistment; and in the settlement of accounts they adopt 3,136 miles as the distance from Washington, D. C., to Mare Island, California.

*According to this practice the travel [**656** pay and commutation of subsistence on such a discharge would be for—

157 days' pay, at 60 cents	$94 20
157 rations, at 30 cents	47 10
Total	$141 30

3. Under a long-standing construction by the accounting officers of the Treasury Department of the law embraced in U. S. Rev. Stat. § 1290, it has been the practice to refuse travel pay and commutation of subsistence to enlisted men from the place of their discharge to the place of enlistment, when they have been discharged at their own request prior to the expiration of their term of enlistment.

The only exception made under this practice is when an enlisted man is discharged at his own request after twenty years of faithful service. Army Regulations 1863, ¶ 163.

4. Before bringing suit here the claimant presented the claim set forth in his petition to the proper accounting officers of the Treasury Department, and it was disallowed in accordance with the practice mentioned in finding 3.

The court also found, as a conclusion of law, that the claimant was entitled to recover of the defendants the sum of $141.30, for which amount judgment was entered, and the government appealed.

Mr. **Joshua Eric Dodge,** Assistant Attorney General, for appellant.

Mr. **Robert Thornton,** appellee, for himself.

Mr. Justice **Brown** delivered the opinion of the court:

By U. S. Rev. Stat. § 1290, as amended by the act of February 27, 1877 (19 Stat. at L. 244), "when a soldier is discharged from the service, except by way of punishment for an offense, he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment,*enrolment,or[**657** original muster into the service. The government may furnish the same in kind, but in case it shall not do so, he shall be allowed travel pay and commutation of subsistence, according to his rank, for such time as may be sufficient for him to travel from the place of discharge to the place of his residence or original muster into service, computed at the rate of one day for every 20 miles."

The case was disposed of in the court below as one depending solely upon the question whether a soldier, who is discharged from the service by his own consent, shall, under the above section, be allowed the transportation and subsistence therein provided for.

We do not find it necessary to express an opinion upon this question, as there is another point apparently not called to the attention of the court of claims, upon which we think the

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case must be reversed. The transportation provided for is "from the place of his discharge to the place of his enlistment, enrolment, or original muster into the service." Claimant was originally enlisted at Washington in August, 1878, and was discharged at Mare Island, California, November 6, 1886, receiving, under the provisions of the above section, travel pay and commutation of subsistence from Mare Island to Washington. He did not return to Washington, however, but on the fourth day thereafter (November 10) re enlisted at Mare Island as a private, and in the course of his service was returned to Washington, where, at the expiration of two years and four months, he was discharged at his own request, and now claims transportation and commutation of subsistence from Washington to Mare Island as the place of his enlistment, amounting to $141.30. The result is that, notwithstanding his original enlistment and final discharge were both at Washington, he receives $282.60 for travel and subsistence twice across the continent without ever having, so far as it appears, expended a dollar or traveled a mile.

These allowances are both of them presumptively for expenses actually incurred, as is evident from the provision that they may be furnished *in kind*, and are designed to reimburse the soldier for all necessary outlays of returning to the place of his enlistment, which is treated as presumptively his home. Indeed, the law of 1812 originally provided (2 Stat. at L. 674) that the travel and subsistence should be allowed from the place of discharge to the place of residence of the claimant. By U S. Rev. Stat. § 1290, however, Congress substi-[658] tuted *for place of residence the expression "place of enlistment, enrolment, or original muster into the service," the purpose of which was, doubtless, to protect the government against the soldier choosing a distant place for his assumed residence and recovering a large mileage, to which he was not justly entitled. The presumption, however, that these allowances are for expenses actually incurred is not absolutely conclusive, and if it be shown that the soldier cannot possibly intend to incur the expense for which the allowance is made, or for some other reason he is not within the spirit of the act, he is not entitled to the allowance. His claim, therefore, should be based upon something more than a mere technicality. If, for example, petitioner's discharge and re-enlistment at Mare Island had been contemporaneous acts, he would clearly not have been entitled to travel and subsistence to Washington; and such we understand to have been the practice of the department. So, if such discharge and re-enlistment were so near together that they constituted, practically, a continuous service, we think the second enlistment may be treated as a re-enlistment, and if the soldier be returned to the place of his original enlistment and there discharged, he would not be entitled to an allowance for travel and subsistence.

In the case of *United States* v. *Alger*, 151 U. S. 363 [38: 192], 152 U. S. 384 [38: 488], where an officer resigned one day, and was appointed to a higher grade the next day, it was held *that, for* the purpose of computing longevity pay, he was to be considered as having been engaged in a continuous service. Bounties to private soldiers, in the form of increased pay after five years' service, are allowed by U. S. Rev. Stat. § 1282, and § 1284, to those who re-enlist within one month (since extended to three months, 28 Stat. at L. 216), after having been honorably discharged. This would seem to indicate an intention on the part of Congress to regard a re-enlistment within thirty days as practically a continuous service for the purpose of additional pay, though not necessarily so for the purpose of transportation and subsistence.

In this case we are able to take judicial notice of the fact *that claimant could not [659] possibly have traveled from Mare Island to Washington and back within the four days which elapsed between his discharge and his re-enlistment, and hence, if he intended to re-enlist, that he received there an allowance to which he was not justly entitled, and, as the second discharge is at the place of his original enlistment, he is not entitled to another mileage across the continent. It will, perhaps, not be just to say of the claimant that the interval which elapsed between his discharge as a drummer, and his re-enlistment as a private at Mare Island was for the purpose of drawing transportation and subsistence to Washington, but the case at least suggests that possibility. Nor do we undertake to say that the paymaster was not fully justified in paying the claimant his transportation and subsistence when originally discharged at Mare Island, since it was manifestly impossible for him to know whether the claimant intended to re-enlist or not; but under the circumstances we think the service should be treated as a continuous one. Indeed, it is somewhat doubtful whether this is not specially provided for by § 1290, which allows transportation and subsistence from the place of his discharge "to the place of his enlistment, enrolment, or *original muster* into the service." If the word "original" preceded the word "enlistment" this construction would be freer from doubt, but the section as it reads certainly lends support to the theory that the allowances were not intended as a mere bounty.

Whether the claimant should be recharged, after his re-enlistment, with the travel and subsistence allowed him on his first discharge, raises a question which is not presented by the record in this case, and upon which we do not feel warranted in expressing an opinion. Other considerations may have a bearing upon this question, which do not enter into the present controversy. If, for instance, the claimant did not intend to re-enlist when first discharged, but subsequently changed his mind, it does not necessarily follow that he should be recharged these allowances, if the government chose to re-enlist him. The question at issue concerns only the propriety of the second claim and not of the first allowance. The case *is a somewhat exceptional [660] one, and all that we decide is that, where the service is practically a continuous one, and the soldier's second discharge occurs at the place of his original enlistment, he is not entitled to his commutation for travel and subsistence to the place of his second enlistment.

The judgment of the court of claims is there-

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fore reversed, and the case remanded, with directions to dismiss the petition.

FIRST NATIONAL BANK OF GARNETT, KANSAS, *Plff. in Err.*,
v.
R. H. AYERS, Sheriff of Anderson County, Kansas, AND OTHERS.

(See S. C. Reporter's ed. 660-663.)

Construction of state statute—discrimination against national banks—judicial notice.

1. This court is bound by the interpretation given to a state statute by the supreme court of that state.
2. Whether a state statute discriminates against national banks in not allowing debts to be deducted from their shares in taxation cannot be determined without showing that the amount of moneyed capital in the state from which debts may be deducted, as compared with the moneyed capital invested in shares of such banks, is so large and substantial as to amount to an illegal discrimination against national bank shareholders, where the statute treats shares in national and state banks on an equality.
3. This court cannot take judicial notice of the relative proportions in which the moneyed capital of a state is invested in the various kinds of securities therein found.

[No. 446.]

Submitted January 7, 1896. Decided January 27, 1896.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court, affirming the judgment of the District Court of Anderson County in favor of defendants in an action brought by the First National Bank of Garnett, to restrain the defendants, R. H. Ayers, sheriff of that county, *et al.*, from levying upon the property of the bank on a warrant for the collection of taxes upon its stockholders. *Affirmed.*

See same case below, 53 Kan. 440, 463.

Statement by *Mr. Justice* **Peckham:**

This is a writ of error to the supreme court of Kansas to review a judgment of that court affirming the judgment of the district court of Anderson county, which was in favor of the defendants, and for costs against plaintiff. The action was brought to restrain the defendants from levying upon the property of the plaintiff in error for the purpose of collecting a warrant, issued for the collection of taxes upon the stockholders of the bank on the ground that certain deductions claimed on the part of some of the stockholders from the assessment upon their shares of stock were not allowed them, as they claimed they should have been, under the statutes of the United States.

The petition of the plaintiff in error stated the facts upon *which it was alleged the cause [661 of action arose, and the defendants voluntarily entered appearance in the cause, and thereupon an agreement was signed by the parties to the action setting forth the facts upon which the case was to be tried. The material portion of the agreement sets forth that the plaintiff is a corporation organized under the laws of the United States, with its office at the city of Garnett, Anderson county, Kansas. The defendant Ayers was sheriff of the county of Anderson during all the time mentioned in the complaint, and the defendant Hargrave during such time was treasurer of that county. The plaintiff is a national bank with a capital stock of $75,000, divided into 750 shares of the par value of $100 each; the actual value of such shares of stock was $100 per share on the first day of March, 1890. On the day last named certain stockholders, named in the statement, were jointly indebted and owed in good faith the several sums of money set opposite their respective names in plaintiff's petition. These debts were not owing to any person, company, or corporation as depositors in any bank or banking association, or any person or firm engaged in the business of banking in Kansas or elsewhere, nor were they debts owing on account of any of the things named in the Kansas statute hereinafter alluded to. The stockholders owing such debts duly complied with the statutes of Kansas in asking to be allowed to deduct from the value of their stock the amount of the debts which they were justly owing in good faith, as above stated. This was refused by the proper authorities, and an assessment was made against the named stockholders of the plaintiff without allowing any such deductions as claimed, and the taxes so levied on the stock held by the stockholders amounted to the sum of about $2,000. The debts of the stockholders were all of the kind and character that could be deducted from "credits" under the statutes of Kansas, and due and legal demand was made to have such debts deducted from the value of the stock, which was refused. The debts were justly due and owing on the first of March, 1890, and no part of them had been deducted from the "credits" at any time or place during that year. The plaintiff paid the taxes assessed against its stockholders who did not *claim [662 any deductions, and the only taxes remaining due were those assessed against the named stockholders who claimed deductions for their debts, as above stated. Other facts were agreed upon which it is not necessary to mention for the purpose of discussing the question involved in this case.

Several statutes of the state of Kansas are set forth, the first being the one which permits an action of this kind to be brought for the purpose of enjoining an illegal levy of any tax, charge, or assessment. Kan. Gen. Stat. § 6847 (to be found in vol. 2 of those laws), defines the different terms used in the chapter on taxation. In this section the term "credit" is defined as follows: "The term 'credit' when used in this act shall mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real es-

NOTE.—*That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,*—see note to Providence Bank v. Billings, 7: 999.

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tate." Section 6851 of the same General Statutes permits a deduction of debts from "credits." That part of the section bearing upon this subject is as follows:

"Debts owing in good faith by any person, company, or corporation may be deducted from the gross amount of credits belonging to such person, company, or corporation: *Provided*, Such debts are not owing to any person, company, or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this state or elsewhere; and the person, company, or corporation making out the statement of personal property to be given to the assessor, claiming deductions herein provided for, shall set forth both the amount and nature of the credits, and the amount and nature of his debts sought to be deducted; but no person, company, or corporation shall be entitled to any deduction on account of any bond, note, or obligation given to any mutual insurance company, or deferred payment, or loan for a policy of life insurance, nor on account of any unpaid subscription to any religious, literary, scientific, or benevolent institution or society: *Provided*, That in deducting debts from credits no debt shall be deducted where said debt was created by a loan on government bonds or other taxable securities."

663] *Kan. Sess. Laws 1891, chap. 84, § 1, provides for the taxation of bank stock, and is as follows:

"Sec. 1. That § 6868 of the General Statutes of 1889 be amended as follows: Sec. 6868. Stockholders in banks and banking associations and loan and investment companies, organized under the laws of this state or the United States, shall be assessed and taxed on the true value of their shares of stock in the city or township where such banks, banking associations, loan or investment companies are located; and the president, cashier, or other managing officers thereof shall, under oath, return to the assessor on demand a list of the names of the stockholders, and amount and value of stock held by each, together with the value of any undivided profit or surplus; and said banks, banking associations, loan or investment companies shall pay the tax assessed upon said stock and undivided profits or surplus, and shall have a lien thereon until the same is satisfied: *Provided*, That if from any causes the taxes levied upon the stock of any banking association, loan or investment company shall not be paid by said corporation, the property of the individual stockholders shall be held liable therefor: *Provided further*, That if any portion of the capital stock of any bank or banking association or loan or investment company shall be invested in real estate, and said corporation shall hold a title in fee simple thereto, the assessed value of said real estate shall be deducted from the original assessment of the paid-up capital stock of said corporation, and said real estate shall be assessed as other lands or lots: *And provided further*, That banking stock or loan and investment company stock or capital shall not be assessed at any higher rate than other property: *And provided further*, That the provisions of this act shall apply to all mutual fire and life insurance companies or associations having assets, accumulations, money, or credits, and doing business under the laws of this state: *And provided further*, That such assets, money, and credits, held and under the control of such mutual fire and life insurance companies or associations, shall be subject to assessment and taxation."

*These are the only sections of the Kan-[**664** sas statute that the plaintiff in error claims have any bearing upon this case, and counsel for plaintiff in error states that the only really important question herein is the right of stockholders of a national bank to treat their stock therein as a credit from which they may be allowed to deduct the debts which they are owing in good faith.

Upon the above agreed statement of facts the court, after due consideration, found generally for the defendants, and entered judgment in their favor for the costs of this action against the plaintiff, to which finding and judgment of the court plaintiff, at the time, duly excepted. The plaintiff also filed its motion for a new trial, which motion was by the court overruled, and duly excepted to by plaintiff. The summons in error issued from the supreme court of Kansas was duly served, and the record removed into that court for review, where, after argument, the judgment of the court below was affirmed, with costs. 53 Kan. 463, upon the opinion in *Dutton* v. *Citizens' Nat. Bank*, 53 Kan. 440. The plaintiff thereupon sued out a writ of error from this court, directed to the supreme court of Kansas, and the record is now here for review.

Mr. **J. W. Gleed** for plaintiff in error.

Messrs. **Abram Bergen** and *C. T. Richardson* for defendants in error.

Mr. Justice **Peckham** delivered the opinion of the court:

By the decision of the supreme court of Kansas, § 6847 of the General Statutes of that state, defining the word "credit" as used in the chapter providing for the assessment and collection of taxes, was held not to include shares of stock in a national or state bank, and the owners of such shares were held to have no right under that statute to deduct from the assessed value of their shares the amount of their debts. This court is bound by the interpretation given to the Kansas statute by the supreme court of that state (*New York* v. *Weaver*, *100 U. S. 539, 541 [25: 705, 706]), and [**665** the only question that remains to be decided by us is whether, under that construction, the statute is in conflict with U. S. Rev. Stat. § 5219, which provides as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located, but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking asso-

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ciation owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

The plaintiff in error claimed that an illegal discrimination was made against the holders of national bank stock, because the statute of the state of Kansas permits certain kinds of debts owing in good faith by any person, company, or corporation to be deducted from the gross amount of credits belonging to such person, company, or corporation in listing their property for taxation, while owners of shares of stock in national banks are not allowed to deduct their indebtedness from the value of their shares of stock, and for that reason the plaintiff says that the Kansas statute is in conflict with the above-cited section (5219) of the statutes of the United States. It will be seen that the term "credit," when used in the Kansas statute, is defined by that statute to mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by a lien on real estate; and it is only from such credits, so defined, that the class of debts named in the statute and owing in good faith by any person, com-[666] pany, or corporation may be *deducted. There is no proof in the case as to the proportion which credits from which such debts may be deducted bear to the whole amount of the credits owned in the state, nor is there any proof as to what proportion the entire credits owned in the state bear to other moneyed capital owned therein. Debts owing to any person, company, or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in Kansas or elsewhere, cannot be deducted; and no person, company, or corporation is entitled to any deduction on account of any bond, note, or obligation given to any mutual insurance company, or deferred payment or loan for a policy of life insurance; nor on account of any unpaid subscriptions to any religious, literary, scientific, or benevolent institution or society; nor can any debt be deducted from credits where the debt was created by a loan on government bonds or other taxable securities. Kan. Gen. Stat. § 6851.

It is thus seen that there is a very large and important class of what is termed moneyed capital from which no deductions are permitted on account of debts. The statute treats shares of stock in a national bank upon a perfect equality and in the same way as shares of stock in a state bank for the purpose of assessment and taxation.

In *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138 [30: 895], it was held that the main purpose of Congress in fixing limits to taxation on investments in shares of national banks was to render it impossible for a state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring state institutions or individuals carrying on a similar business and operations and investments of a like character. *Mr. Justice* Matthews, in delivering the opinion of the court in the above-cited case, gave an exhaustive review of the cases which had been decided in this court up to that time, under this section of the United States statute, and it is evident from the opinion and decision of the court in that case that the intent of the United States statute was to prevent an unjust discrimination against the moneyed capital invested in shares of national banks, by rendering it "impossible for the state *in levying a tax on such shares to create [667] and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character." *Mercantile Nat. Bank* v. *New York*, 121 U. S. 155 [30: 901].

From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take what counsel for plaintiff calls judicial notice of what is claimed to be a fact, *viz.*, that the amount of moneyed capital in the state of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. This we cannot do. There is no proof whatever upon the subject. The state court has itself determined from its own knowledge that the credits from which debts may be deducted do not constitute a large or even material part of the moneyed capital of the state, and, on the contrary, that court says that debts secured by liens on real estate, money invested in corporate stocks of all kinds and descriptions, including railroad, banking, insurance, loan, and trust companies, and all the multifarious forms of moneyed securities, moneys on deposit subject to call, and other forms of invested capital, constitute the great bulk of the moneyed capital in that state, and from all such moneyed capital no deduction for debts is allowed.

As the record appears there is no fact of which the court can take judicial notice. The relative proportions in which the moneyed capital of the state of Kansas is invested in the various kinds of securities to be therein found, this court cannot judicially know. When proof shall be made regarding that matter, it may then be determined intelligently whether, within the case of *Mercantile Nat. Bank* v. *New York*, *supra*, there has been a real discrimination against the holders of national bank shares and hence a violation of the above-cited act of Congress. The single fact that the statute of Kansas *permits [668] some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show such violation. *The judgment must be affirmed.*

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UNITED STATES, *Plff. in Err.*,
v.
GETTYSBURG ELECTRIC RAILWAY COMPANY.†

Same
v.
Same.

(See S. C. Reporter's ed. 668-686.)

Condemnation of land by the United States—act of Congress—battlefield of Gettysburg—appropriation—power—quantity of land.

1. The United States may condemn land whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution.
2. In examining an act of Congress every intendment will be made by the courts in favor of its constitutionality.
3. The preservation of the battlefield of Gettysburg, with the leading tactical positions properly marked with tablets, is a use which comes within the constitutional power of Congress to provide for by condemnation of land.
4. That Congress limited the amount to be appropriated for such purpose, and provided that no liability on the part of the government should be incurred, nor any expenditure made beyond the appropriations then made or to be made during that session, does not prevent the condemnation of lands for such use, when it does not appear that the appropriation has been exhausted.
5. Congress has power to take land devoted to one public use for another and different public use, upon making just compensation; the intention to take land of a railway company, in this case, appears from the recital in the joint resolution of June 6, 1894.
6. The quantity of land to be taken for a public use is a legislative and not a judicial question; the effect of taking a part upon the rest of the land remaining is a mere question of compensation.

[Nos. 599, 629.]

Argued January 8, 9, 1896. Decided January 27, 1896.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment of that court in each of the foregoing cases dismissing proceedings taken by the United States for the purpose of condemning for public use for the objects mentioned in acts of Congress certain lands on the battlefield of Gettysburg. *Reversed, and case remitted, with directions for a new trial.*

Statement by *Mr. Justice* **Peckham:**

These are two writs of error to the circuit court of the United States for the eastern district of Pennsylvania. They involve the same questions.

By the act of Congress, approved August 1, 1888 (chap. 728), entitled "An Act to Authorize Condemnation of Land for Sites of Public Buildings and for Other Purposes," it is provided "that in every case in which the Secretary of the Treasury, or any other officer of the government, has been or hereafter shall be authorized to procure real estate for the erection of a public building or for any other public uses, he shall be and hereby is authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so."

By the act of Congress, approved March 3, 1893, generally called the sundry civil appropriation act, it was provided, among other things, as follows: "Monuments and Tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pa., and for properly marking with tablets the positions occupied by the various commands of the Armies of the Potomac and of Northern Virginia on that field, and for the opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations, with reference to the study and correct understanding of the battle, and to mark the same *with suitable tablets, each bearing a [670 brief historical legend, compiled without praise and without censure, the sum of $25,000 to be expended under the direction of the Secretary of War."

Subsequently to the passage of that act and on the 6th of June, 1894, a joint resolution of Congress was approved by the President, which, after reciting the passage of the act of 1893, and the appropriation of the sum of $25,000 thereby, contained the further recital that the sum of $50,000 was then under consideration by Congress as an additional appropriation for the same purposes, and that it had been recently decided by the United States court, sitting in Pennsylvania, that authority had not been distinctly given for the acquisition of such land as may be necessary to enable the War Department to execute the purposes declared in the act of 1893, and that there was imminent danger that portions of the battlefield might be irreparably defaced by the construction of a railroad over the same, thereby making impracticable the execution of the provisions of the act of March 3, 1893. It was therefore "*Resolved*, By the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of War is authorized to acquire by purchase (or by condemnation) pursuant to the act of August 1, 1888, such lands, or interest in lands, upon or in the vicinity of said battlefield, as in the judgment of the Secretary of War may be necessary for the complete execution of the act of March 3, 1893: *Provided*, That no obligation or liability upon the part of the government shall be incurred under this resolution, nor any expenditure made except out of the appropriations already made and to be made during the present session of

†The title of the case in the docket and record is "United States v. A Certain Tract of Land in Cumberland Township, Adams County, Pa."

NOTE.—*As to payment for private property taken for public use,*—see note to Withers v. Buckley, 15: 816.

As to damages to easements, etc., by eminent domain,—see note to Osborne v. Missouri P. R. Co. 37: 156.

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this Congress." A further appropriation of $50,000 was made for this purpose by the act of August 18, 1894, the same session of Congress.

Acting under the authority of these various statutes and joint resolution, the United States district attorney for the eastern district of Pennsylvania, by direction of the Attorney 671]*General, filed a petition in the name of the United States for the purpose of condemning certain lands therein described, for the objects mentioned in the acts of Congress.

The petition in the first case recited the foregoing facts, and also stated the inability to agree with the owners upon the price of the land desired, and asked for the appointment of a jury, according to the law of the state of Pennsylvania in such case provided. The 2d section of the act of Congress, approved August 1, 1888, above mentioned, provides that the practice, pleadings, forms, and modes of proceedings are to conform so far as may be to those existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held. The Gettysburg Electric Railway Company answered this petition, and set up the fact that it was a corporation existing under the laws of Pennsylvania, and that by virtue of its charter it had the power to build its road along a certain portion of the Gettysburg borough limits, described in the answer; that it had acquired as a part of a route of one of the branches of its road, and for the purpose of using the same as a part of its right of way, the tract of land particularly mentioned and described in the petition, and which is the subject of the condemnation proceedings. It alleged that the effect of the condemnation of the strip of ground would be to cut off a particular branch railway or extension belonging to it, and destroy its continuity and prevent its construction and operation. The company further answered that the greater part of the appropriation of $25,000, under the act of March 3, 1893, had already been expended for the purposes stated therein, and that the balance remaining to the credit of the appropriation was less than $10,000. The electric railway company afterwards filed a further or amended answer and therein set forth that the entire balance remaining unexpended of the appropriation of $25,000, under the act of March 3, 1893, and of $50,000, which had been appropriated by the act approved August 18, 1894, were covered by contracts already made under the authority of the Secretary of War, and that there was not, in point of fact, at that time any part of either appropriation available for the 672]*purpose of paying any judgment which might be recovered by the company in these condemnation proceedings.

Evidence was given on the question of the value of the land to be taken, and on the 5th of November, 1884, the jury filed a report awarding the sum of $30,000 as the value of the land proposed to be taken in the first or main proceeding. The Gettysburg Electric Railway Company duly filed exceptions to the award, and on the same day appealed therefrom. The United States also appealed. The case was argued, and in April, 1895, an order was entered that the first and second exceptions filed by the defendant be sustained and that the petition of the United States be dismissed. Those two exceptions are as follows:

"1. The act of Congress approved August 1, 1888, provides for the acquisition of real estate by the United States by condemnation only for the erection of public buildings or for other public uses. It does not appear in the petition of Ellery P. Ingham, Esq., United States attorney, that the Secretary of War has been authorized to procure the tract of land mentioned in the 5th paragraph thereof, belonging to the Gettysburg Electric Railway Company, for the erection of a public building or for other public uses. The purposes named for the expenditure of the appropriation in the act of Congress of March 3, 1893, are not such public uses as authorize the condemnation by the United States of the real estate of private persons."

"11. The purpose specified in the 6th paragraph of the said petition, namely, 'of preserving the lines of battle,' 'properly marking with tablets the positions occupied,' and 'determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets,' are none of them public uses or purposes, authorizing the condemnation by the United States of private property."

The second proceeding was taken for the purpose of condemning a certain other portion of land containing a little over 2 acres. There was no trial in that matter, but the *case[673 was dismissed, under the motion made by the defendant to quash the proceedings, upon the same grounds stated in the main case.

The substance of the holding of the circuit judge was that the intended use of the land was not that kind of a public use for which the United States had the constitutional power to condemn land. The district judge dissented from that view and was of the opinion that the use was public, and that the United States had the power to condemn land for that purpose.

Messrs. **Judson Harmon,** Attorney General, and **Holmes Conrad,** Solicitor General, for plaintiff in error:

It was within the power of Congress to direct the appropriation of the land in question for the purposes named.

The general government possesses the power of eminent domain as incident to its sovereignty, although such power is not expressly given by the Constitution.

Kohl v. *United States*, 91 U. S. 367 (23: 449); *United States* v. *Jones*, 109 U. S. 513, 518 (27: 1015, 1017); *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 656 (34: 295, 302).

By the 5th Amendment to the Constitution, providing that private property shall not be taken for public use without just compensation, the existence of the power in the Federal government was recognized. The amendment was a mere limitation upon the power.

United States v. *Jones*, 109 U. S. 513 (27: 1015); *McCulloch* v. *Maryland*, 17 U. S. 4

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Wheat. 316, 407 (4: 579, 601); *Knox* v. *Lee* ("*Legal Tender Cases*") 79 U. S. 12 Wall. 533 (20: 306); *United States* v. *Maurice*, 2 Brock, 96; *Van Brocklin* v. *Anderson*, 117 U. S. 154 (29: 846); *Re Debs*, 158 U. S. 564 (39: 1092); *Cole* v. *LaGrange*, 113 U. S. 1 (28: 896); *Olcott* v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 678 (21: 382); *People* v. *Smith*, 21 N. Y. 595; *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 403 (25: 206); *Monongahela Nav. Co.* v. *United States*, 148 U. S. 327 (37: 468); *Kohl* v. *United States*, *supra*.

If the proposed taking of land by and for the government alone could have, or be fairly thought by Congress to have, any possible direct and immediate relation to any of the subjects of governmental action which are committed to Congress, it is not open to the courts to question the necessity or propriety of the appropriation.

Shoemaker v. *United States*, 147 U. S. 282 (37: 170).

Interest in preserving historic spots is naturally in the government, whose welfare is involved in the ideas and principles which have come to have there the local name and habitation so essential to their preservation and perpetuation. It is the natural idea and the principle of the indissolubility of the Union, which Gettysburg embodies.

United States v. *Lee*, 106 U. S. 196 (27: 171); *Walton* v. *Cotton*, 60 U. S. 19 How. 355 (15: 659); *Daggett* v. *Colgan*, 92 Cal. 35, 14 L. R. A. 474; *Hilbish* v. *Catherman*, 64 Pa. 154; *Dexter* v. *Raine*, 18 Ohio L. J. 61; *Booth* v. *Woodbury*, 32 Conn. 118.

Where the land is not to be acquired for the benefit of a particular state but solely for the preservation of a historic spot as a perpetual monument to those who there lost or risked their lives, to be directly controlled by the general government, and remain forever the property of the people of the whole country for their instruction and patriotic inspiration, the use is clearly public, and therefore an appropriate one for the exercise of the power of eminent domain.

Congress clearly delegated to the Secretary of War power to acquire this land.

Corporations hold their franchises subject to the right of eminent domain.

Richmond, F. & P. R. Co. v. *Louisa R. Co.* 54 U. S. 13 How. 83 (14: 60); *West River Bridge Co.* v. *Dix*, 47 U. S. 6 How. 507 (12: 535); *Re Brooklyn*, 143 N. Y. 596; *Lock Haven Bridge Co.* v. *Clinton County*, 157 Pa. 379.

The intention to grant such right may be inferred even in favor of bodies to which the power of eminent domain is merely delegated.

Springfield v. *Connecticut River R. Co.* 4 Cush. 63; *Kohl* v. *United States*, 91 U. S. 367 (23: 449).

If the taking of the land—the tangible property—destroys or impairs a franchise, this can only increase the damages.

Rahn Twp. v. *Tanaqua & L. Street R. Co.* 167 Pa. 84.

The act and joint resolution sufficiently provide for compensation.

Cherokee Nation v. *Southern Kansas R. Co.* 135 U. S. 659 (34: 303); *United States* v. *Manderson*, 8 U. S. App. 205; *Great Falls Mfg. Co.* v. *Garland*, 124 U. S. 599 (31: 583).

Mere selection of the land and the institution of proceedings to ascertain damages are not a taking which must be preceded by payment.

United States v. *Oregon R. & Nav. Co.* 16 Fed. Rep. 524; *Standish* v. *Liverpool*, 15 Eng. L. & Eq. 255; *Fox* v. *Western P. R. Co.* 31 Cal. 538; *Bloodgood* v. *Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 313.

A similar limitation of the amount to be expended was held not to invalidate condemnation proceedings in *Shoemaker* v. *United States*, 147 U. S. 282, 302 (37: 170, 186).

Messrs. **Thomas Hart**, *Jr.*, and *Charles Heebner*, for defendant in error:

The purposes named in the act of Congress of March 3, 1893, are not public uses, and the United States is not authorized to condemn private property for said purposes.

The right of the United States to take private property for certain public uses cannot be exercised within the limits of the states for any purpose which is not incident to some power delegated to the general government, and necessary or at least adapted to its execution.

1 Hare, Const. 346; *Kohl* v. *United States*, 91 U. S. 372 (23: 451); *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 642 (34: 297); *United States* v. *Fox*, 94 U. S. 315 (24: 192); *Van Brocklin* v. *Anderson*, 117 U. S. 154 (29: 846).

The question whether the purposes named in the act of 1893 have such a relation to the powers granted by the Constitution as to come within the above-stated rule is for the court.

Cherokee Nation v. *Southern Kansas R. Co.* 135 U. S. 657 (34: 302); Lewis, Em. Dom. § 158, *note* 1.

The question of the publicity of the use is not at all determined and concluded by the fact that the sovereign itself is the medium of the exercise of the power.

Varner v. *Martin*, 21 W. Va. 534; Lewis, Em. Dom. § 160, cases cited; *Willyard* v. *Hamilton*, 7 Ohio, Pt. II. 111, 30 Am. Dec. 195; Randolph, Em. Dom. § 51, p. 3.

The Constitution provides that private property shall not be taken for public uses without just compensation. These words are a limitation, the same in effect as: You shall not exercise this power except for public use.

Harvey v. *Thomas*, 10 Watts, 63, 36 Am. Dec. 141; *United States* v. *Jones*, 109 U. S. 518 (27: 1017); Lewis, Em. Dom. § 163; *Twelfth Street Market Co.* v. *Philadelphia & R. Terminal R. Co.* 142 Pa. 580; *Palairet's Appeal*, 67 Pa. 479; *Keeling* v. *Griffin*, 56 Pa. 307; *West River Bridge Co.* v. *Dix*, 47 U. S. 6 How. 507 (12: 535); 4 Kent, Com. 270; *Louisville, C. & C. R. Co.* v. *Chappell*, 1 Rice, L. 383; *Memphis* v. *Overton*, 3 Yerg. 387; *King* v. *Ward*, 4 Ad. & El. 384; Cooley, Const. Lim. 6th ed. 692, 654, 655; *Bloodgood* v. *Mohawk & H. R. R. Co.* 18 Wend. 60, 31 Am. Dec. 313; *Memphis Freight Co.* v. *Memphis*, 4 Coldw. 419; *Sholl* v. *German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379.

The condemnation of ground for a cemetery has only been sustained where the right of burial is vested in the public or in the public authorities.

Lewis, Em. Dom. § 176, and cases cited *note* 1; Mills, Em. Dom. § 19, and cases cited in notes; *Evergreen Cemetery Asso.* v. *Beecher*, 53 Conn. 551.

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The courts have refused to sustain a taking of private property *in invitum*, upon the ground that the object of the use was merely pleasure or ornament.

Randolph, Em. Dom. § 52; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; Grotius, De Jure B. & P. book 8, chap. 14, § 7; Puffendorf, De Jure Nat. et Gent. book 8, chap. 5., § 7; Bynkershoek, Quaest. Jur. Pub., book 2. chap. 15; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375.

The taking of lands by municipalities for public parks is recognized as a taking for public use.

Brooklyn Park Comrs. v. *Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Re New York*, 99 N. Y. 569.

The proceedings in the case of *Higginson* v. *Nahant*, 11 Allen, 530, and *Mount Washington Road Co's. Petition*, 35 N. H. 134, were justified on the ground that they were public highways in the ordinary sense, although primarily intended as pleasure drives.

Woodstock v. *Gallup*, 28 Vt. 587; *Farist Steel Co.* v. *Bridgeport*, 60 Conn. 278, 18 L. R. A. 590.

A great difference exists between the two classes of decisions,—that is, in national and state cases.

Cooley, Const. Lim. 6th ed. 645; *Kohl* v. *United States*, 91 U. S. 371 (23: 451); *United States* v. *Fox*, 94 U. S. 320 (24: 193); *Van Brocklin* v. *Anderson*, 117 U. S. 151 (29: 845); *Luxton* v. *North River Bridge Co.* 153 U. S. 525 (38: 808); *Burt* v. *Merchants' Ins. Co.* 106 Mass. 356, 8 Am. Rep. 339; *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645 (28: 846); *Re League Island*, 1 Brewst. 524; *Gilmer* v. *Lime Point*, 18 Cal. 229; *Reddall* v. *Ryan*, 14 Md. 444, 74 Am. Dec. 550; *Orr* v. *Quimby*, 54 N. H. 590; *United States* v. *Chicago*, 48 U. S. 7 How. 185 (12: 660); *Fort Learenworth R. Co.* v. *Lowe*, 114 U. S. 525 (29: 264).

Congress has power to provide only for those highways, whether roads, bridges, or railroads, which are intended as a means of communication between the states.

California v. *Central P. R. Co.* 127 U. S. 1 (32: 150), 2 Inters. Com. Rep. 153; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641 (34: 295); *Luxton* v. *North River Bridge Co.* 153 U. S. 525 (38: 808).

In all these cases the power of Congress to provide such highways was put upon the power to regulate commerce.

Monongahela Nav. Co. v. *United States*, 148 U. S. 312 (37: 463).

This necessarily excludes from Federal control all that commerce which is entirely carried on within the limits of a state and does not extend to or affect other states.

Daniel Ball v. *United States* ("*The Daniel Ball*") 77 U. S. 10 Wall. 557 (19: 999); *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); Hare, Am. Const. L. 246, 248; *Forepaugh* v. *Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508.

Congress is not empowered to tax for those purposes which are within the exclusive province of the states.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 199 (6: 71).

The power to lay and collect taxes is quite distinct from the right to take private property for public use; and it is not the power of taxation, but the right of eminent domain, which is here asserted.

1 Hare, Am. Const. L. 338; *Sharpless* v. *Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Weister* v. *Hade*, 52 Pa. 474; *Kelly* v. *Pittsburg*, 35 Pa. 179, 27 Am. Rep. 638.

The power to tax is the strongest, the most pervading, of all the powers of government.

Citizens Sav. & L. Asso. v. *Topeka*, 87 U. S. 20 Wall 655 (22: 455).

The power of eminent domain is expressly provided for by article 5 of the amendments to the Constitution: "Nor shall private property be taken for public use without just compensation." This is a limitation upon the exercise of this power by the government of the United States.

Barron v. *Baltimore*, 32 U. S. 7 Pet. 243 (8: 672).

It is by no means clear that the United States may condemn land in a state for the purpose of a national park.

Shoemaker v. *United States*, 147 U. S. 282 (37: 170).

There is a distinction between a taking by a state of the United States and a taking by a corporation under a delegation of power.

In the former case the giving of security is not necessary, but something in the way of a provision for compensation is.

The cases in which the resources of taxation to be employed in raising the amount have been held to afford a sufficient security were those in which the law contained some provision stating how payment was to be made. It was because sure and certain provision was made for obtaining compensation that it was held that the provision in the Constitution was satisfied.

Lewis, Em. Dom. § 457; *Keene* v. *Bristol*, 26 Pa. 46; *Talbot* v. *Hudson*, 16 Gray, 417; *Long* v. *Fuller*, 68 Pa. 170.

The taking of land from a citizen for the use of the United States cannot be constitutional without a provision being made for a tribunal for the ascertainment of compensation, and for a method by which payment can be enforced by such proper tribunal, or a pledge of public faith being made that a distinct fund should be held by the government for its payment.

2 Kent, Com. 12th ed. 339, *note f*; *Bloodgood* v. *Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *People* v. *Hayden*, 6 Hill, 361; *Loweree* v. *Newark*, 38 N. J. L. 151; *Connecticut River R. Co.* v. *Franklin County Comrs.* 127 Mass. 50, 34 Am. Rep. 338; *Callison* v. *Hedrick*, 15 Gratt. 244; *People* v. *Michigan S. R. Co.* 3 Mich. 496; *Ash* v. *Cummings*, 50 N. H. 591; *Jackson* v. *Winn*, 4 Litt. 323; *White* v. *Nashville & N. R. Co.* 7 Heisk. 518; *Brock* v. *Hishen*, 40 Wis. 674; *State* v. *Messenger*, 27 Minn. 119; *Com.* v. *Pittsburg & O. R. Co.* 53 Pa. 50; *Monongahela Nav. Co.* v. *Coons*, 6 Watts & S. 114; *Yost's Report*, 17 Pa. 524.

A corporation or individual must pay or secure the price of the property before it is taken, but the state must provide the means of payment at the passing of the act.

Re Sedgeley Ave. 88 Pa. 509; *Orr* v. *Quimby*, 54 N. H. 590; *Haverhill Bridge Proprs.* v. *Essex County Comrs.* 103 Mass. 120, 4 Am. Rep. 518;

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Talbot v. *Hudson*, 16 Gray, 417; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 659 (34: 303).

The extended litigation between the Great Falls Manufacturing Company and the United States government, reported in 25 Fed. Rep. 521, 112 U. S. 645 (28: 846), and 124 U. S. 581 (31: 527), is full of this subject.

Most of the cases upon this subject have been those of municipal corporations against which, upon the rendition of a judgment, process could issue for the collection thereof.

Re Sedgeley Ave. 88 Pa. 509.

The proviso to the resolution of June 6, 1894, renders the whole unconstitutional, nugatory, and void. The proviso in effect reads "that no obligation or liability on the part of the government shall be incurred or any expenditure made under this resolution."

United States v. *Manderson*, 3 U. S. App. 199.

An act of the state legislature, devesting one person of his property and vesting it in another at a fixed compensation, is unconstitutional and void.

Van Horne v. *Dorrance*, 2 U. S. 2 Dall. 304 (1: 391); *Com.* v. *Pittsburg & C. R. Co.* 58 Pa. 26; *Cunningham* v. *Campbell*, 33 Ga. 625; *Rich* v. *Chicago*, 59 Ill. 286.

The determination of what is "just compensation" for private property when taken for public use is a judicial act, which can properly be performed only by the judicial department of the government.

Pennsylvania R. Co. v. *Baltimore & O. R. Co.* 60 Md. 263; *Connecticut River R. Co.* v. *Franklin County Comrs.* 127 Mass. 50, 34 Am. Rep. 338; *Shoemaker* v. *United States*, 147 U. S. 282 (37: 170); *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.* 36 U. S. 11 Pet. 420 (9: 773).

General laws or general words will not authorize the condemnation of property already devoted to a public use.

Housatonic R. Co. v. *Lee & H. R. Co.* 118 Mass. 391; *Boston & M. Railroad* v. *Lowell & L. R. Co.* 124 Mass. 368; *Re Boston & A. R. Co.* 53 N. Y. 574; *Re Boston, H. T. & W. R. Co.* 79 N. Y. 64; *State* v. *Montclair R. Co.* 35 N. J. L. 328; *New Jersey S. R. Co.* v. *Long Branch Comrs.* 39 N. J. L. 28; *Milwaukee & St. P. R. Co.* v. *Faribault*, 23 Minn. 167; *Barber* v. *Andover*, 8 N. H. 398; *Armington* v. *Barnet*, 15 Vt. 745, 40 Am. Dec. 705; *Cake* v. *Philadelphia & E. R. Co.* 87 Pa. 307; *Pennsylvania R. Co's. Appeal*, 93 Pa. 150.

An implication of power does not arise out of the circumstances of each particular case subsequently arising or appearing, but the place where implied power is to be looked for is in the statute itself.

Pennsylvania R. Co's. Appeal, supra; Pennsylvania R. Co's. Appeal, 115 Pa. 514; *Pittsburg J. R. Co's. Appeal*, 122 Pa. 511; *Groff's Appeal*, 128 Pa. 621, 5 L. R. A. 661; *Philadelphia, G. & N. R. R. Co's. Appeal*, 1 Montg. Law Rep. 129.

Under the legislation in this matter a part only of a railway franchise cannot be condemned and taken.

Elizabethtown & P. R. Co. v. *Elizabethtown*, 12 Bush, 238; *Louisville & N. R. Co.* v. *Bate*, 12 Lea, 578; *Missouri River, Ft. S. & G. R. Co.* v. *Morris*, 7 Kan. 222; *Porter* v. *Rockford, R. I. & St. L. R. Co.* 76 Ill. 584; *Dubuque* v. *Chicago, D. & M. R. Co.* 47 Iowa, 202.

A railroad and its equipment must be regarded for most, if not all, purposes as a unit, or as constituting a single entire property.

Stein v. *Mobile*, 17 Ala. 240; *People* v. *Pond*, 18 Abb. N. C. 1; *People* v. *Barker*, 48 N. Y. 70; *People* v. *Fredericks*, 48 Barb. 173; *State* v. *Southwestern R. Co.* 70 Ga. 33; *Virginia & T. R. Co.* v. *Washington County*, 30 Gratt. 480; *Georgia* v. *Atlantic & G. R. Co.* 3 Wood, 438; *Law* v. *People*, 87 Ill. 412.

The property and franchises of a corporation cannot be sold piece-meal under executions.

Graham v. *P. & O. Canal Co.* 2 Pitts. L. J. N. S. 101; *Bayard's Appeal*, 72 Pa. 453; *Longstreth* v. *Philadelphia & R. R. Co.* 11 W. N. C. 309; *Com.* v. *Susquehanna & D. R. R. Co.* 122 Pa. 303, 1 L. R. A. 225.

Lands necessary for the enjoyment and exercise of a corporate franchise are parts of it, and cannot be levied on apart from it.

Plymouth R. Co. v. *Colwell*, 39 Pa. 337, 80 Am. Dec. 526; *Shamokin V. R. Co.* v. *Livermore*, 47 Pa. 465, 86 Am. Dec. 552; *Lehigh Coal & Nav. Co.* v. *Northampton County*, 8 Watts & S. 334; *Railroad* v. *Berks County*, 6 Pa. 70.

Mr. Justice **Peckham** delivered the opinion of the court:

The really important question to be determined in these proceedings is whether the use to which the petitioner desires to put the land described in the petitions is that kind of public use for which the government of the United States is authorized to condemn land.

It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution. *Kohl* v. *United States*, 91 U. S. 367 [23: 449]; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641–656 [34: 265–301]; *Chappell* v. *United States*, 160 U. S. 499 [*ante*, 510].

Is the proposed use to which this land is to be put a public use within this limitation?

The purpose of the use is stated in the first act of Congress, passed on the 3d day of March, 1893 (the appropriation act of 1893), and is quoted in the above statement of facts. The appropriation act of August 18, 1894, also contained the following: "For continuing the work of surveying, locating, and preserving the lines of battle at Gettysburg, Pa., and for purchasing, opening, constructing, and improving avenues along the portions occupied by the various commands of the Armies of the Potomac and Northern Virginia on that field, and for fencing the same; and for the purchase, at private sale or by condemnation, of such parcels of land as the *Secretary of War [680 may deem necessary for the sites of tablets, and for the construction of the said avenues; for determining the leading tactical positions and properly marking the same with tablets of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, each tablet bearing a brief historical legend, compiled without praise and without censure; $50,000 to be expended under the direction of the Secretary of War."

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In these acts of Congress and in the joint resolution the intended use of this land is plainly set forth. It is stated in the 2d volume of Judge Dillon's work on Municipal Corporations (4th ed.), § 600, that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.

As just compensation, which is the full value of the property taken, is to be paid, and the amount must be raised by taxation where the land is taken by the government itself, there is not much ground to fear any abuse of the power. The responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right. It is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case, the presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to use the land itself.

In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.

Upon the question whether the proposed use of this land is a public one, we think there can **681**] be no well-founded doubt. *And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall, in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 421 [4: 605], in these words: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

The end to be attained by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself and the perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned *from[**682** an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily, not only a public use, but one so closely connected with the welfare of the Republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great Republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the *public expense. The right to take land[**683** for cemeteries for the burial of the deceased soldiers of the country rests on the same footing and is connected with and springs from

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the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers and to see to it that their graves shall not remain unknown or unhonored.

No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land.

Second. It is objected that the appropriations made by the several acts of Congress had been exhausted when the amended answers were put in, and that the proviso attached to the joint resolution above mentioned, prohibiting any expenditure other than such as might be appropriated in that session of Congress, renders it impossible for the land owner to obtain payment with any certainty for his property that might be taken from him. Although it is set up in the answer of the electric company to the petition filed on the part of the United States, the fact that the fund appropriated has been exhausted does not appear by any evidence contained in either record. So far as this court can see from the record, there is an appropriation amounting to $75,000, for the purpose of obtaining land, a part of which has been found to be worth $30,000, and the other, and much smaller portion, is not valued. The proviso, therefore, would seem to be immaterial, as the appropriations were much larger than the value of the land to be taken. The mere fact that Congress limited the amount to be appropriated for the pur-[684]poses indicated does not *render the law providing for the taking of the land invalid. *Shoemaker* v. *United States*, 147 U. S. 282-302 [37: 170-186]. Mr. Justice Shiras in delivering the opinion of the court in the case cited, said: "The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or, in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain aggregate expenditure, cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to." If it appeared by proof that the appropriation for the purpose indicated had been exhausted before the proceedings had been commenced to take the land in controversy, or during the hearing, then the provision in the joint resolution directing that no obligation or liability upon the part of the government should be incurred, or any expenditure made, except out of the appropriations already made and to be made during the then session of Congress, would give rise to a very serious question. It is not now presented. Congress has the power, even now, to appropriate moneys for this purpose in addition to that which it appropriated in the two acts of 1893 and 1894. This court cannot, therefore, upon the record as it stands, give judgment for the land owner on the ground that the appropriation for the land has been exhausted in other ways, and that Congress prohibited the incurring of any obligation to a greater extent than the moneys then appropriated.

Third. Another objection taken in the court below, though *not decided by that court, [685] but which counsel for defendant in error now urges as an additional ground for the affirmance of the judgment, is that the land proposed to be taken in this proceeding was already devoted to another public use, to wit, that of the railroad company, and that it does not appear that it was the intention of Congress to take land which was devoted to another public use. The defendant in error concedes what is without doubt true, that this is a question of intention simply; the power of Congress to take land devoted to one public use for another and a different public use upon making just compensation cannot be disputed. Upon looking at the two acts of Congress and the joint resolution of June 6, 1894, above referred to, in the latter of which it is stated, "There is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of the act of March 3, 1893,"—we think it is plainly apparent that Congress did intend to take this very land, occupied and used by this company for its railroad.

Further elaboration is unnecessary. It is so plain to our minds that extended argument would be unprofitable.

Fourth. It is also objected that the exception below is valid, wherein it was stated that all of the land of the railroad company ought to be taken, if any were to be taken. The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question. *Shoemaker* v. *United States*, 147 U. S. 282-298 [37: 170-184]. As to the effect of the taking upon the land remaining, that is more a question of the amount of the compensation. If the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts might enter into the question of the amount of the compensation to be awarded.

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Monongahela Nav. Co. v. *United States*, 148 U. S. 312, 333, 334 [37:468, 470].

Fifth. It is also objected that the petition does not allege that the Secretary of War has decided it to be necessary to take this land. A perusal of the petition shows that the allegation 686] *therein contained upon this subject is not very clear. It might possibly be regarded as sufficiently alleged in an argumentative kind of way, but it certainly is not as plainly alleged as it ought to be. The petition, however, can be easily amended on application to the court below before further proceedings are taken.

This, we think, completes the review of the material questions presented by the record. The first and important question in regard to whether the proposed use is public or not having been determined in favor of the United States, we are not disposed to take any very technical view of the other questions which might be subject to amendment or to further proof upon the hearing below.

The judgment of the circuit court in each case must be reversed, and the record remitted to that court, with directions to grant a new trial in each.

SIOUX CITY & ST. PAUL RAILROAD COMPANY, *Appts.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 686, 687).

Rehearing denied.

A rehearing will not be granted where the principal matters presented in the petition have already been fully considered, and the only additional point on which the rehearing is asked is immaterial and cannot affect the result.

Submitted December 17, 1895. Denied January 13, 1896.

ON PETITION for rehearing. *Denied.*

See same case, 159 U. S. 349, 367 (*ante*, 177, 183).

Messrs. **J. H. Swan** and **Geo. B. Young** for appellants.

Mr. **J. M. Dickinson**, Assistant Attorney General, for appellee.

In the opinion of this court (159 U. S. 349, 367 [40: 177, 183]), it was said: "Upon examination of the certified list of lands, *based on the* 687] **diagram originally furnished by the railroad company to the Secretary of the Interior* and transmitted by the General Land Office to the local land office on the 26th of August, 1867, it is found that the actual area of the odd-numbered sections within the place limits of the Sioux City road, *excluding* odd-numbered sections within the conflicting place limits of the two roads, contained only 247,476.85 acres; and the actual area within the conflicting place limits of the two roads, *according to the same diagram*, was 70,705.29 acres." This was not strictly correct. The diagram referred to was prepared in the Department of the Interior, but it was based on the original survey made and furnished by the railroad company. Other sentences in the same connection are subject to the like criticism. But this inaccuracy of statement does not affect in any degree the grounds upon which the court reached the conclusion that the diagram of 1867 should not control, and that the measurement and diagram of 1887 should be taken as the basis for determining the area of the odd-numbered sections within place limits.

None of the other matters mentioned in the petition for a rehearing require special notice. The views therein presented were fully considered by the court before the original opinion was filed. The point now pressed by counsel as to errors in the matter of addition is immaterial, even if it be well taken; for, whatever the excess in the quantity of land received by the railroad company, the result, in the present case, will be the same as stated in the opinion, namely, that the railroad company is not entitled to any of the lands *here in dispute*, whatever may be the aggregate quantity of acres.

The application for rehearing is denied.

STATE OF MISSOURI, *Complainant*, [688 *v.* STATE OF IOWA.

(See S. C. Reporter's ed. 688-692).

Boundary line between two states.

This court appoints commissioners to find and redesignate with proper and durable monuments portions of a boundary line between two states, heretofore marked under a decree of this court, which have since become obliterated, and directs the expenses, including pay for the commissioners, to be paid by such states equally.

[No. 10, Original.]

Submitted December 17, 1895. Decided February 3, 1896.

ORIGINAL SUIT IN EQUITY by the State of Missouri, complainant, against the State of Iowa, defendant, to ascertain and establish the northern boundary line of the state of Missouri, it being the boundary line between the complainant and the defendant, and for further relief. *Relief granted.*

The following are the pleadings, etc., in this case:

Complaint.

In the Supreme Court of the United States of America, in Vacation, 1895.

THE STATE OF MISSOURI, *Complainant*, *v.* THE STATE OF IOWA, *Respondent*.

R. F. Walker, Attorney General of the state of Missouri, acting in accordance with the provisions of an act of the general assembly of said state approved March 16, 1895, and under the direction of the governor thereof,

NOTE.—*As to judicial settlement of state boundaries*, see note to Nebraska v. Iowa, 36: 798.

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respectfully states that heretofore, to wit, on the 19th day of July, A. D. 1820, the people living in the territory of Missouri, in pursuance of an act of the Congress of the United States of America, approved March 6, A. D. 1820, by their representatives in convention assembled, did organize, form, and establish a free and independent state by the name of the state of Missouri, and for the government thereof did adopt a Constitution in which are described the following boundaries of said state:

"Beginning in the middle of the Mississippi river, on the parallel of 36° of north latitude; thence west along the said parallel of latitude to the St. Francois river; thence up and following the course of that river in the middle of the main channel thereof to the parallel of latitude of 36° 30′; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas river, where the same empties into the Missouri river; thence from the point aforesaid north along the said meridian line to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making said line correspond with the Indian boundary line; thence east from the point of intersection last aforesaid along the said parallel of latitude to the middle of the channel of the main fork of the said river Des Moines; thence down along the middle of the main channel of the said river Des Moines to the mouth of the same, where it empties into the Mississippi river; thence due east to the middle of the main channel of the Missi sippi river; thence down and following the course of the Missi-sippi river in the middle of the main channel thereof to the place of beginning."

That said Constitution, with the foregoing description of the boundaries prescribing the territorial limits of the said state of Missouri, was submitted to the Congress of the United States of America and by a resolution of that body approved March 2, A. D. 1821; that the said state of Missouri, with the boundaries as above set forth, was admitted into the Federal Union as an independent sovereign state; and the President of the United States of America, by his proclamation dated August 10, A. D. 1821, in pursuance of the said resolution of the Congress of the United States of America, did announce the fact of such compliance, and thereupon the admission of the said state of Missouri into the Union as one of the sovereign states aforesaid became complete.

That by the action of the legislature of the state of Missouri in the manner prescribed by the Constitution thereof for altering or amending the same, and with the assent of the Congress of the United States of America as evidenced by an act of that body approved June 7, A. D. 1836, the boundaries of the state of Missouri were in that year so altered and extended as to include all the tract of land lying on the north side of the Missouri river and west of the original western boundary of the said state, so that the said addition to the state of Missouri is bounded on the west and south by the middle of the main channel of the Missouri river, and on the north by the original northern boundary line of said state when the same is continued in a right line due west to the middle of the main channel of the Missouri river.

And the said complainant states that by virtue of the Constitution of the state of Missouri aforesaid, the said resolution of Congress admitting the said state into the Union, the said amendment to said Constitution, and the said act of Congress of June 7, 1836, A. D., sanctioning and approving the said amendment, as well as that of each Constitution that has heretofore been adopted by the state of Missouri, including the organic law now in force in said state, to wit, the Constitution adopted in said state in 1875, the true and lawful boundary of the state of Missouri is the parallel of latitude which passes through the rapids of the river Des Moines, making the said parallel of latitude correspond with the "Indian boundary line" established, marked, and defined by a survey made by one John C. Sullivan in the year 1816 under the direction and authority of the United States government, which said Indian boundary line extends from the middle of the main channel of the Missouri river on the west to the middle of the channel of the main fork of the said river Des Moines; thence down along the middle of the main channel of the said river Des Moines to the mouth of the same, where it empties into the Mississippi river; thence due east to the middle of the main channel of the Mississippi river; that by virtue of said Constitution and laws, including the Constitution and laws now in force in the said state of Missouri, said state is entitled to the possession, jurisdiction, and sovereignty over all the territory included within the said boundary and south of said northern boundary as above described, and that said state of Missouri has of right all of the lawful power and authority to possess, enjoy, and exercise full jurisdiction and sovereignty within and over the said territory which an independent state could or can exercise while a member of the United States.

Complainant states that the said state of Missouri has constantly held possession of all said territory, and has exercised jurisdiction and sovereignty over the same until hindered and disturbed therein as hereinafter set forth.

Complainant states that some time in the year 1846 the people living within the territory lying north of the said state of Missouri and west of the Mississippi river organized a state government for themselves and assumed the name of the "state of Iowa," which state was afterwards by the Congress of the United States of America admitted into the Federal Union as a sovereign and independent state upon an equal footing with the original states and with certain territorial limits, the southern boundary of which was made identical with the northern boundary of the state of Missouri.

Complainant states that since the organization of the government of the state of Iowa and the admission of the said state into the Union as aforesaid, said state has claimed to have jurisdiction and sovereignty, and is attempting to exercise the same over a part of the territory lying south of the northern boundary of the state of Missouri as above set forth; that the said state of Iowa has taken

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actual possession of a part of the territory of the state of Missouri lying in the county of Mercer, in the state of Missouri, and south of the northern boundary line of said state between the said county of Mercer, in the state of Missouri, and the county of Decatur, in the state of Iowa, and the said state of Iowa is attempting through her officials to administer her laws in the said county of Mercer, in the state of Missouri, and is claiming, asserting, and attempting to exercise sovereignty over that portion of the said county of Mercer lying south of the said state line and between the 50th and 55th mile posts heretofore legally established along said northern boundary line; that said state of Iowa has obstructed and hindered, and is still obstructing and hindering, the officers of the state of Missouri and the courts thereof, from executing and administering the laws of the said state of Missouri within said territory and south of said northern boundary line of the said state of Missouri and between the points before mentioned; that the said state of Iowa in so wrongfully claiming and asserting jurisdiction over a part of said territory lying south of the northern boundary line of the said state of Missouri is hindering said state of Missouri in the administration of her laws.

Complainant states that by a proceeding instituted in the Supreme Court of the United States at its January term, 1849, by the state of Missouri against the state of Iowa, and a like proceeding instituted at the same time in the same court by the state of Iowa against the state of Missouri to settle a controversy that had then arisen between the two said states respecting the true location of the line dividing them, it was agreed by said court, after an examination of all the facts, that said boundary line was and should be identical with the line known as the "Indian boundary line," which had, as aforesaid, been run, established, and defined by the survey made under the authority of the United States government by said John C. Sullivan in the year 1816; that under the provisions of said decree H. B. Hendershot and R. W. Wells were by said court named as commissioners to find and remark said boundary line between said states as established by said John C. Sullivan; that said R. W. Wells subsequently resigned, and one W. G. Minor was appointed in his stead; that said commissioners proceeded upon their appointment to find and remark with permanent and durable monuments said boundary line between said states as established by said Sullivan as aforesaid, and at the December term, 1850, of said court, formally reported their finding in regard thereto; that thereupon the said Supreme Court of the United States decreed that said Sullivan's line so surveyed and remarked by said commissioners was and should constitute the true boundary line between the said states of Missouri and Iowa; that said boundary line so marked out by said Sullivan, remarked by said commissioners, and decreed to be the boundary line between said states by the said Supreme Court is the line now asserted and held to be the boundary line between said states by the said state of Missouri; that the jurisdiction and sovereignty of the said state of Missouri have been exercised over all of said territory lying south of said boundary line except when hindered and prevented by said state of Iowa and her citizens.

Complainant states that it is highly important to the states of Iowa and Missouri that the question of boundary should be speedily and finally settled; that heretofore the peace of the people of the states of Missouri and Iowa, especially in the county of Mercer, in the former, and the county of Decatur, in the latter, have been seriously disturbed in consequence of frequent conflicts of jurisdiction arising from differences of opinion as to the location of the said state line between said counties.

Complainant further states that the state of Missouri has no adequate relief at law, and, as the controversy herein involves questions of jurisdiction and sovereignty, it is respectfully prayed that the state of Iowa may be made a defendant in this proceeding, and that she may be permitted to answer the matters and things herein set forth, and upon a final hearing that the northern boundary line of the state of Missouri, it being the boundary line between the complainant and defendant, be by the order and decree of this court ascertained and established; that the rights of possession, jurisdiction, and sovereignty of the state of Missouri to all the territory south of the line heretofore marked and run out by said J. C. Sullivan in 1816, remarked by the commissioners heretofore named in 1850, and approved by the decree of the Supreme Court of the United States, rendered aforesaid, be restored to said state of Missouri, and that said state of Missouri be quieted in her title thereto, and the defendant, the state of Iowa, be forever enjoined and restrained from disturbing the said state of Missouri, her officers and her citizens, in the full enjoyment and possession of the territory lying south of said line, and that such other and further relief may be granted as the nature of the case may require.

Mr. R. F. WALKER,
Attorney General of Missouri,
for Complainant.

Answer of Respondent.

Comes now the state of Iowa, by Milton Remley, its attorney general, and, answering the bill of complainant herein, respectfully states that the respondent admits all the allegations of said bill with reference to the boundary of the state of Missouri, complainant as aforesaid, so far as the same is material to the controversy set forth in said bill, and especially admits that the state of Iowa lies adjacent to and immediately north of the said state of Missouri, complainant herein, and the north line of said complainant is the south line of the state of Iowa.

The said respondent avers, however, that the southern boundary line of the state of Iowa as fixed and determined by its Constitution is the northern boundary line of the state of Missouri, complainant herein, as established by the Constitution of the said state of Missouri adopted June 12, 1820.

The said respondent further admits that in a suit brought by the state of Missouri against the state of Iowa in this court a decree was entered determining and establishing the true

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boundary line between the said complainant and the said respondent states as therein set forth, adopting and approving and decreeing to be the true line, the line retraced, surveyed, and marked by the commissioners of this court, H. B. Hendershot and W. G. Minor.

Said respondent denies that it has, by its officers or in any manner whatsoever, exercised jurisdiction and sovereignty, or attempted so to do, over any part of the territory of the state of Missouri, but has claimed jurisdiction and sovereignty over the territory lying north of said line thus surveyed, marked, determined, and established by the commissioners of this court and the decree of this court in said case.

Said respondent admits that between the 50th and 55th mile post a controversy has arisen as to the exact location of the true line thus found and established, and, further, it is desirable that the question of the true line should be speedily and finally settled, and that the peace of the people of Decatur county, in the state of Iowa, and Mercer county, in the state of Missouri, has been seriously disturbed in consequence of the conflict of jurisdiction arising from the difference of opinion as to the true location of the state line, but respondent avers that the state of Missouri attempts to exercise jurisdiction north of the true line and within the jurisdiction of the state of Iowa, as hereinbefore stated.

Respondent further avers that the 52d mile post, set as a mark of the true line between said states by the said commissioners, has been destroyed, but the bearing trees still exist, and the location of said post may easily be determined. The 53d is not to be found nor the bearing trees thereof, and the differences arising between the two states and the people thereof is because of that fact, but any uncertainty or dispute in regard to the true line extends no further than 2 miles in each direction east and west of said 52d mile post.

Said respondent, with the view to have an ultimate and final decision of the controversy, prays that this answer may also be treated as a cross bill, and joins in the prayer of said complainant that the said boundary line between said complainant and respondent be by the order and decree of this court ascertained and established, and to that end that a commission be appointed, in such manner as to this court shall be deemed proper, to retrace the line traced and marked by the commission of this court in 1850 and as set forth in the decree of this court in the case of the State of Missouri *v.* the State of Iowa, as aforesaid, and that such retracing of such line thus found be by such commissioners marked with fixed and enduring monuments, that the title to the state of Iowa in and to all land or territory north of the line thus found and marked be forever quieted in the said respondent, and for such other and further relief as equity and good conscience may require. MR. MILTON REMLEY,

Attorney General of Iowa,
for Respondent.

Replication.

Complainant, for his reply to respondent's answer herein, states that it is true, as heretofore alleged in complainant's petition heretofore filed in this cause, that the officers of the state of Iowa are exercising jurisdiction over territory lying south of the boundary line between the states of Missouri and Iowa.

Complainant, for further reply to respondent's answer herein, states that it is necessary, in order that conflicts of jurisdiction should be avoided between said states, that the true boundary line, as heretofore established under a decree of this court by Hendershot and Minor, in 1850, should be re-established and relocated, and to this end it is asked that the court may enter a decree relocating and re-establishing said line, and that such other and further orders may be made herein as are necessary to effect the same.

R. F. WALKER,
Attorney General of Missouri,
for Complainant.

Stipulation.

It is hereby agreed that the above-entitled cause may be submitted to the court on the petition, answer, and reply of the parties hereto, and, if to the court it seems proper, that a commission of two civil engineers or surveyors may be appointed to retrace the line established and decreed by the Supreme Court of the United States in the case of the State of Missouri *v.* the State of Iowa, one of such commissioners to be appointed by the state of Missouri and one by the state of Iowa, and, if the parties are unable to agree, that they may appoint a third; that such commission shall proceed without unnecessary delay and retrace the line as run and located by Hendershot and Minor in 1850, between the 50th and 55th mile posts on said line, beginning and ending the survey at such points as may be necessary to ascertain the true original line between said mile posts, and, having found said true line, to mark the same by plain and enduring monuments and make report of their said retracing and survey of said line to this court.

Witness our hands this 16th day of December, 1895. R. F. WALKER,
Attorney General of the State of Missouri.
MILTON REMLEY,
Attorney General of the State of Iowa.

Mr. **R. F. Walker,** Attorney General of Missouri, for complainant.

Mr. **Milton Remley,** Attorney General of Iowa, for respondent.

The following decree was ordered:

*This cause coming on to be heard on [691 the original bill filed herein by the state of Missouri against the state of Iowa, the answer thereto by the state of Iowa, and the reply to said answer by the state of Missouri, and the pleadings and stipulations filed herein by counsel for the respective parties having been duly considered, and the decrees heretofore rendered by this court on February 13, 1849, and on January 3, 1851, with the report of commissioners forming part thereof, in a cause then pending before this court between the said states of Missouri and Iowa in regard to the same boundary line now in controversy having been examined:

It is thereupon, this 3d day of February, A. D. 1896, ordered, adjudged, and decreed, that the true and proper northern boundary line of the state of Missouri and the true and proper southern boundary line of the state of Iowa is

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the line run, located, marked, and defined by Hendershott and Minor, commissioners of this court, under the order and decree of this court, as set forth in their report annexed to said decree of January 8, 1851. And it appearing further to the court that the proper boundary line between said states, run, located, and established by Hendershott and Minor, as aforesaid, has, between the 50th and 55th mile posts on the same, become obliterated, and that the monuments originally placed thereon have been destroyed: therefore it is further ordered, adjudged, and decreed that James Harding of the state of Missouri, Peter Dey of the state of Iowa, and Dwight C. Morgan of the state of Illinois, be and they are hereby appointed commissioners to find and remark with proper and durable monuments such portions of said line so run, marked, and located by Hendershott and Minor as have become obliterated, especially between the 50th and 55th mile posts on the same, and that they begin and end such survey at such points along said line as will enable them to definitely relocate and redesignate the same.

It is further ordered that the clerk of this court at once forward to the chief magistrate of each of said states and to each of the commissioners designated by this decree a copy of said decree duly authenticated, and that said commissioners *request the co-operation and [692 assistance of the state authorities in the performance of the duties imposed upon them by this decree, and proceed with all convenient speed to discharge their duty in relocating and remarking such portions of said line as have become obliterated, as herein directed, and make their report thereof and of their proceedings in the premises to this court on or before the 1st day of May, 1896, together with a complete bill of costs and charges annexed.

And it is further ordered that, should either of said commissioners die or refuse to act or be unable to perform the duties required by this decree, while the court is not in session, the Chief Justice is hereby authorized and empowered to appoint another commissioner to supply the vacancy, and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all costs of this proceeding, including not exceeding $10 per day for each commissioner, and the other costs incident to the marking and establishment of this line, shall be paid by the states of Missouri and Iowa equally.

END OF REPORTED CASES IN VOL. 160.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1895.

Vol. 161.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1895.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

CHEMICAL NATIONAL BANK of Chicago, *Plff. in Errr.*,
v.
HARTFORD DEPOSIT COMPANY.

(See S. C. Reporter's ed. 1-10.)

Receiver for national bank—corporate existence—Federal question.

1. The appointment of a receiver for a national bank does not, in itself, put an end to the corporate existence of the bank so as to prevent the rendition of a judgment against it.
2. A national bank survives for the purpose of the discharge of its liabilities and the distribution of its assets after its insolvency is declared.
3. The decision of a state court that a claim against a national bank was an existing demand at the time it suspended does not involve a Federal question.

[No. 735.]

Submitted January 7, 1896. Decided February 3, 1896.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Appellate Court for the First District of Illinois which affirmed the judgment of the Superior Court of Cook County as to the receiver, but reversed it as to the Chemical National Bank, and entered judgment for the sum of $9,000, in an action against the bank and its receiver to recover damages for a failure to pay rent. *Affirmed.*

See same case below, 58 Ill. App. 256, 156 Ill. 522.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action of assumpsit brought by the Hartford Deposit Company against the Chemical National Bank of Chicago and the receiver of the bank in the superior court of Cook county to recover damages for a failure to pay rent *alleged to be due, under a written [2 lease, from August 1, 1893, to April 30, 1894. The cause was submitted to the court for trial on a stipulation as to the facts, of which the lease formed a part; the issues were found in favor of defendants and judgment was rendered accordingly. Plaintiff took the case to the appellate court for the first district of Illinois, which affirmed the judgment as to the receiver, but reversed it as to the Chemical National Bank, and entered judgment for the sum of $9,000. 58 Ill. App. 256. An appeal was prosecuted to the supreme court of Illinois and the judgment of the appellate court affirmed. 156 Ill. 522. This writ of error was thereupon brought.

The facts were thus stated by the supreme court:

"The Chemical National Bank of Chicago entered into a lease, dated November 18, 1892, with the Hartford Deposit Company, of a banking office of a certain building owned by the said Hartford Deposit Company. In accordance with its terms the bank paid $2,500 on the delivery of said lease. The term was for a period of five years, from May 1, 1893, at an annual rental of $12,000, payable in equal monthly instalments of $1,000, in advance, exclusive of and in addition to said first payment of $2,500. The bank entered into and took possession of said premises on May 1, 1893, the first day of said term, and the first instalment of rent fell due and was payable on that day. This instalment was not paid when due, nor had it, or any part of it, been paid when,

NOTE.—*As to liability of banks for collection; failure of collecting banks; liability of receiver or assignee of bank; altered check or draft,*—see note to Commercial Nat. Bank v. Armstrong, 37: 363.

As to powers and duties of receivers, see note to Davis v. Gray, 21: 447.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37: 267.

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on May 9, 1893, the bank became insolvent and a national bank examiner took possession of its assets and of said premises. On July 21 a receiver was duly appointed, and on July 27 he notified the Hartford Deposit Company of his election to terminate said lease after July 31, 1893, so far as he, as receiver, was concerned. On the same day,—namely, July 27, —said receiver paid to the Hartford Deposit Company the sum of $2,709.68, which was, as agreed, the ratable amount of rent due for the period to July 31, inclusive. No other or further rent was paid under said lease by any other person or at any other time. The premises remained vacant until May 1, 1894, when they were relet at a reduced rental."

Mr. **Hiram T. Gilbert,** for plaintiff in error:

The appointment of a receiver of a national banking association by the comptroller of the currency on account of its insolvency amounts, for all practical purposes, to the dissolution of such association.

Fidelity S. D. & T. Co. v. *Armstrong*, 35 Fed. Rep. 567; *First Nat. Bank* v. *National Pahquioque Bank*, 81 U. S. 14 Wall. 383 (20: 840); *United States* v. *Knox*, 111 U. S. 784 (28: 603); U. S. Rev. Stat. §§ 5141, 5151, 5191, 5195, 5201, 5205, 5234, 5235, 5236, 5239; Act of June 30, 1876 (19 Stat. at L. 63, chap. 156, § 1).

A claim, to be entitled to be proved up and paid by dividends out of the assets of a national banking association in the hands of a receiver, must be one which, at the date of the suspension of the association, was a then existing demand, and the claim for rent under this lease is not such a demand.

Riggin v. *Maguire*, 82 U. S. 15 Wall. 549 (21: 232); *French* v. *Morse*, 2 Gray, 111, 115; *Savory* v. *Stocking*, 4 Cush. 607; *Deane* v. *Caldwell*, 127 Mass. 242; *Chemical Nat. Bank* v. *Armstrong*, 59 Fed. Rep. 372, 16 U. S. App. 465, 28 L. R. A. 231.

After the appointment by the comptroller of the currency of a receiver of a national banking association, judgment cannot be rendered against such association, or its receiver, for any claim which, at the date of the bank's suspension, was not an existing demand.

First Nat. Bank v. *National Pahquioque Bank*, 81 U. S. 14 Wall. 383 (20: 840); *United States* v. *Knox*, 111 U. S. 784 (28: 603); U. S. Rev. Stat. §§ 5235, 5236.

Mr. **Charles H. Baldwin,** for defendant in error:

A lessee who during the term renders the performance of his part of the contract impossible, whether by his insolvency or otherwise, is not thereby discharged from his obligations incurred under the express covenants of the lease.

Re Orne, 12 Fed. Rep. 779; *Martin* v. *Black*, 9 Paige, 641, 38 Am. Dec. 574; *Re Washburn*, 11 Nat. Bankr. Reg. 63; *Beale* v. *Thompson*, 3 Bos. & P. 420; *Paradine* v. *Jane*, Aleyn, 26; *Mills* v. *Auriol*, 1 H. Bl. 433, 4 T. R. 94, Smith, Lead. Cas. (8th ed.) 1255; *Boot* v. *Wilson*, 8 East, 318; *Marks* v. *Upton*, 7 T. R. 305; *Fisher* v. *Milliken*, 8 Pa. 120, 49 Am. Dec. 497; *Wall* v. *Hinds*, 4 Gray, 256, 64 Am. Dec. 64; *Thursby* v. *Plant*, 1 Saund. 240.

The insolvency of a national bank and appointment of a receiver by the comptroller of the currency do not dissolve the corporation. It remains liable on all its obligations legally entered into before insolvency.

Central Nat. Bank v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54 (26: 693); *First Nat. Bank* v. *National Pahquioque Bank*, 81 U. S. 14 Wall. 388 (20: 840); *New York Security Bank* v. *Commonwealth Nat. Bank*, 2 Hun, 287; *Chemical Nat. Bank* v. *Bailey*, 12 Blatchf. 480; *Jones* v. *Bank of Leadville*, 10 Colo. 464; *Ordway* v. *Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455; *United States* v. *Knox*, 111 U. S. 787 (28: 604).

There is no language in the national bank act which, directly or by implication, can relieve an insolvent national bank from its obligations incurred under an unexpired lease entered into before insolvency.

Irons v. *Manufacturers' Nat. Bank*, 6 Biss. 301; *Richmond* v. *Irons*, 121 U. S. 48 (30: 871); *Ex parte Houghton*, 1 Low. Dec. 554; U. S. Rev. Stat. §§ 5136, 5151, 5220–5222, 5228, 5234, 5236; U. S. Rev. Stat. Supp. chap. 156, §§ 1, 3; Act. of June 30, 1876 (19 Stat. at L. 63, chap. 156).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is not claimed that the express covenant to pay rent was released by the insolvency of the lessee merely; nor that the election of the receiver not to accept the lease had any effect on the contract between the lessor and the lessee; nor that the lessor had done anything itself to terminate its rights under the lease. But it is argued that no judgment could be rendered *against the bank because the appointment [4 of a receiver amounted to its dissolution, and because the rent in question was not a demand existing at the date of the bank's suspension and therefore not a claim entitled to be proved up and paid out of the assets of the bank, or carried into judgment. The state courts ruled both branches of this contention adversely to plaintiff in error.

Granting that, in the absence of statutory provision to the contrary, suits cannot be maintained and judgments rendered against corporations whose chartered existence has terminated, it is not pretended in this case that that event had taken place by lapse of time, by judicial proceedings, or otherwise, unless, as is insisted, the appointment of a receiver in itself put an end to the bank as a corporate entity.

The general rule is that the legal existence of a corporation cannot be cut short in this way, and we can find nothing in the statutes in relation to insolvent national banks which gives that effect to such an appointment or justifies any distinction in that regard as between them and other insolvent corporations.

By U. S. Rev. Stat. § 5136, it is provided that every national bank, duly incorporated, shall have succession for the period of twenty years from its organization "unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two thirds of its stock, or unless its franchise becomes forfeited by some violation of law."

A receiver may be appointed upon the co-

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currence of the particular defaults enumerated in §§ 5141, 5151, 5191, 5195, 5201, and 5205, not in question here.

Section 5151 provides: "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Sections 5220 and 5221 provide for the voluntary dissolution of these associations, and §§ 5] 5226 and 5227 for the protest *of their circulating notes on failure to redeem and the appointment of a special agent to ascertain the fact.

Sections 5228, 5234, 5236, and 5239 are as follows:—

"Sec. 5228. After a default on the part of an association to pay any of its circulating notes has been ascertained by the comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits."

"Sec. 5234. On becoming satisfied, as specified in §§ 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

"Sec. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall 6] make further dividends *on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

On June 30, 1876 (19 Stat. at L. 63, chap. 156), Congress passed an act, the 1st section of which provides: "That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes."

By the 3d section, whenever any association is placed in the hands of a receiver and the creditors and expenses have been paid and the redemption of the circulating notes of such association *provided for, the shareholders may [7 elect an agent to whom, on filing bond, the remaining assets of the association shall be transferred, and "such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands."

It thus appears that by the terms of the statutes the corporation continues, notwithstanding the appointment of a receiver, if its corporate life has not been extinguished by lapse of time, by any provision of its articles, by any action of its stockholders, or by any judgment of forfeiture. The receiver is indeed appointed to close up the association, that is to say, to wind up its business, get in its assets and pay its debts, and, if need be, to enforce the personal liability of its shareholders for all its "contracts, debts, and engagements;" but the corporation lingers while this is being done, and on occasion when the receiver has discharged his duty with the satisfactory results enumerated, and assets remain, an agent

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may be chosen, who may sue and be sued in the name of the association in the conduct of the final liquidation. Of course, when insolvency is declared, the corporation is incapacitated from doing any new business. It has ceased to be a going concern, but it still survives for the purpose of the discharge of its liabilities and the final distribution of its remaining assets when that has been accomplished. No refinement of construction leads to any other result, and numerous decisions preclude further discussion.

In *National Pahquioque Bank* v. *First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80, a national bank having failed and a receiver been appointed, the supreme court of errors of Connecticut, in a well-considered opinion, held that the winding up of the corporation as provided did not put an end to its existence so as to af-8] fect *the rights of creditors to enforce their claims or determine their validity by suit or otherwise; that there was nothing in the national banking act which justified the claim that the franchise was transferred to the receiver in the authority conferred on him to take possession of the assets; and that the court was unable to discover "by what mode of operation known in the law the proceedings in question can produce that absolute and technical dissolution of a corporation which is produced by a judgment for forfeiture or by a legislative repeal, and bars a suit by a creditor." Judgment was given against the insolvent bank and that judgment affirmed by this court in *First Nat. Bank* v. *National Pahquioque Bank*, 81 U. S. 14 Wall. 383 [20: 840], where it was said: "None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered, and the balance, if any, is paid to the owners of the stock or their legal representatives."

In *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54 [26: 693], it was held that a national bank in voluntary liquidation is not thereby dissolved as a corporation, but may sue and be sued by name for the purpose of winding up its business; and *Mr. Justice* Matthews, delivering the opinion of the court, said: "It is to be observed that the sections under which the proceedings took place which, it is claimed, put an end to the corporate existence of the bank, do not refer, in terms, to a dissolution of the corporation, and there is nothing in the language which suggests it, in the technical sense in which it is used here as a defense. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs, and, in order to do so completely and effectually, to notify its creditors to present their claims for payment. And the redemption of its bonds given to secure the payment of its circulating notes, by the required deposit of money in the treasury, is limited in its effect to a discharge of the association and its shareholders from all liability upon its circulating notes. The very purpose of the liquidation provided for is to pay the debts of 9]the corporation, that the *remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution cannot take place, with any show of justice and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist as a person in law capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common-law consequences, but rather that of the dissolution of a copartnership, which, nevertheless, continues to subsist for the purpose of liquidation and winding up of its business."

And in *Rosenblatt* v. *Johnston*, 104 U. S. 462, 463 [26: 832, 833], *Mr. Chief Justice* Waite speaking for the court, referring to the assets and property of an insolvent national bank, remarked: "Such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed."

It is further urged that the claim was not an existing demand at the time of the suspension of the bank and could not be proved up for participation in the distribution of the assets. What effect, if any, this might have on the mere recovery of judgment, and the questions often arising in respect of discharges in bankruptcy or insolvency, or of proceedings against insolvent decedent's estates as to the postponement of belated claims to subsequently discovered assets, the state courts did not find it necessary to consider, as they were of opinion that the liability was an existing demand.

The appellate court said: *"The lease in[10 question was a lawful contract and engagement for the bank to make. The first monthly instalment of rent was due under it nine days before the bank suspended. By its terms the default that was made by the bank in the nonpayment of rent on May 1st gave the right to the appellant to re-enter and terminate the lease. The damages were then matured and could have been at once sued for, or appellant could defer its suit, as it did, until, by a reletting of the premises, the extent of damages had been made certain. That they were unliquidated did not render them contingent. The contingency, default in payment of rent, had happened. After that the damages were a mere matter of calculation." And a similar view was thus expressed by the supreme court: "The money was not paid, and there was then a breach of the contract for which an action might have been maintained, and this occurred nine days before insolvency. There is therefore no foundation for the position of counsel that the claim of appellee was not an existing demand at the time the bank suspended. The amount of damages may not have been as large

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on the first day of May, 1893, as at a later period, but on that date there was a breach of the contract and a right of action for such breach."

Clearly the conclusion thus reached involved no denial of a title, right, privilege, or immunity specially set up or claimed under the laws of the United States, and, as already seen, the only Federal question arising was rightly decided.

Judgment affirmed.

GEORGE E. BELKNAP ET AL., *Appts.*,
v.
GEORGE F. SCHILD.

(See S. C. Reporter's ed. 10-29).

Infringement of patent—officers of the United States—injunction—equity suit.

1. Officers or agents of the United States, although acting under its order, are personally liable to be sued for their own infringement of a patent.
2. Officers and agents of the United States are not exempt from liability for their own infringement of a patent by the fact that it was not used by them for their own benefit, but for the benefit of the United States in a navy yard.
3. An injunction against infringement of a patent by the use of a caisson gate which is a part of a dry dock in a navy yard, put in place by, and the property of, the United States, and used for the public benefit, cannot be granted in an action against officers and agents of the government, as they have no individual interest in the controversy, but the relief is in fact asked against the United States.
4. A recovery of profits for the infringement of a patent cannot be had in a suit in equity against officers and agents of the United States, when the defendants made no profits from the use of plaintiff's invention, but the only profits from the use thereof accrued to the United States. The proper remedy of plaintiff against defendants is an action at law for the damages.

[No. 22.]

Argued January 21, 22, 1895. Decided February 3, 1896.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California in favor of the plaintiff, George F. Schild, against the defendants, George E. Belknap *et al.*, in a suit in equity for infringement of letters patent granted by the United States to the plaintiff for an improvement in caisson gates. *Reversed, and case remanded with directions to dismiss without prejudice, etc.*

Statement by *Mr. Justice* **Gray**:

This was a bill in equity, filed January 20, 1887, in the circuit court of the United States for the northern district of California, by George Schild against George E. Belknap, Joseph Feaster, Christopher C. Wolcott, and Jesse Diamond, for an infringement of letters patent granted by the United States to the plaintiff on October 23, 1883, for an improvement in caisson gates.

The bill alleged that the defendants, with full knowledge and in violation of the plaintiff's exclusive right, manufactured and used, and intended to continue to use, such caisson gates in the state of California; and that he had brought an action in the same court against the Union Iron Works of San Francisco, and on the trial of that action, and after he had waived other than nominal damages, recovered a verdict in the sum of $1, in August, 1886, and the validity of his patent and the fact of infringement were thereby established.

The bill prayed that the defendants be decreed to account for and pay over to the plaintiff all such gains and profits as *had or [12 might have accrued to them from purchasing or making or using such improved caisson gates; that any further damages sustained by the plaintiff by reason of the defendants' infringement be assessed and ordered to be paid; that the defendants be restrained by injunction from making or using caisson gates containing the patented improvement; that the caisson gates containing that improvement and so manufactured or purchased or in any manner obtained by the defendants, and now in their possession, be destroyed or delivered up to the plaintiff; and for further relief.

The defendants filed a plea to the whole bill (called in the record a "plea in abatement"), alleging that the court "ought not to take cognisance of or sustain the aforesaid action," for that the defendant Belknap was a commodore in the United States Navy, and commandant of the United States Navy Yard at Mare Island, California; that the defendants Wolcott, Feaster, and Diamond were, respectively, a

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NOTE.—*For what patents are granted; when declared void,*—see note to Evans v. Eaton, 4:433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29:76; and Corning v. Burden, 14:683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7:827.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,—see note to Corning v. Burden, 14:683.

As to including process and product in same patent; separate patents therefor,—see note to Evans v. Eaton, 4:433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14:601.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms,—see note to Gayler v. Wilder, 13:504.

As to when assignee may sue for infringement; when patentee must; when they must join,—see note to Wilson v. Rousseau, 11:1141.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13:894.

As to anticipation of patents; prior patents and publications; application and issue; claims and specifications,—see note to Leggett v. Standard Oil Co. 37:787.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37:606.

As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent,—see note to Royer v. Coupe, 36:1073.

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civil engineer in the Navy, an assistant naval constructor in the Navy, and an employee of the United States at Mare Island; that the only caisson gate which either of the defendants had any relation with, control over, or use of, within the state of California, was one constructed, manufactured, and used by the government of the United States and for their use and benefit at the navy yard at Mare Island, and was there built by the Union Iron Works, in pursuance of plans and specifications furnished by the Bureau of Yards and Docks,—a board in the naval service of the United States, —and was delivered by the Union Iron Works to the United States, and used by the United States in the dry dock of that navy yard; and that neither the defendants, nor either of them, made or constructed the caisson gate in question, or used it for their own use and benefit, or ever had, or pretended to have, any interest in or claim upon it; but that they only operated and used it as the officers, servants, and employees of the United States, as a part of the navy yard, and for public uses of the United States, in the exercise of their sovereign and constitutional powers.

The Attorney General of the United States, appearing for this purpose only, filed a suggestion (called in the record a *"plea to the jurisdiction") in which he stated that the caisson gate in question was planned and constructed by the United States, and ever since its construction had been in the possession, control, and use of the United States at the navy yard at Mare Island, and was operated at the dry dock in the navy yard for naval purposes and the public defense, in the building and repairing of ships for the Navy of the United States; that the United States, through their officers and agents, charged with the possession, control, and operation of that navy yard, had at all times been in possession, control, and operation of the caisson gate as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers; and that the defendants, and each of them, never had anything to do with the construction, use, or operation of the gate, or made any claim of right, title, possession, control, or use of it, other than as officers and agents of the United States, and in obedience to orders of the naval department of the government; and therefore, "without submitting the rights of the United States to the jurisdiction of the court, but insisting that the court has no jurisdiction of the controversy, for that the said caisson gate and its use now is and at all times has been the property of the United States," moved that the bill be dismissed, and all proceedings stayed and set aside. [13]

The case having been submitted to the court upon the plea of the defendants, and the suggestion of the Attorney General, both were overruled.

The defendants, Belknap, Feaster, Wolcott, and Diamond, then filed an answer, admitting the grant of the letters patent, denying the infringement, setting forth affirmatively the matters stated in their former plea, and alleging that neither these defendants nor the United States were parties to the action brought by the plaintiff against the Union Iron works, or estopped by the judgment therein.

A general replication was filed, and evidence was taken by which it appeared that the validity of the plaintiff's patent, and its infringement by the defendants, were subjects of conflicting testimony; that Mare Island and the works and dock *thereon, including the [14] caisson gate, belonged to the United States, and were held and occupied for them by their officers and employees; that the defendants respectively held the positions stated in their former plea and had no interest in the caisson gate, and nothing to do with it beyond operating it under the direction of the United States; that the gate was built in 1884, without any agreement or license of the plaintiff, by the Union Iron Works under its contract with the United States, and according to plans and specifications furnished by the Bureau of Yards and Docks, and Wolcott simply inspected the materials and workmanship, as the work progressed, to see if they were according to the contract; and that the gate had since been used by the United States as part of the dock in the navy yard aforesaid.

After a hearing upon pleadings and proofs, the court made an interlocutory decree adjudging that the patent was valid and had been infringed by the defendants; referring the case to a master to take an account of the number of caisson gates made or used by the defendants, or either of them, in violation of the patent, and also of the gains, profits, and advantages arising or accruing to the defendants or either of them, and of the damages sustained by the plaintiff; and ordering a perpetual injunction against the defendants and each of them, "and their and each of their agents, servants, clerks, and workmen, and all persons claiming or holding under or through them or either of them."

The master reported that one caisson gate to the dock in the navy yard at Mare Island, for the making and using of which the defendants had been adjudged to have infringed the plaintiff's patent, had been made upon plans furnished by the plaintiff and modified by the government officials, and put in use in 1884; that the cost of this gate was $60,000, and the cost of the cheapest practicable gate, constructed on any other plan known to the defendants, would be at least $100,000, and therefore the gains, profits, and advantages, which had arisen and accrued to the defendants from infringing the plaintiff's patent, amounted to $40,000; and that no damages, in addition to such gains, profits, and advantages, had been proved.

*The court overruled exceptions taken [15] by the defendants to the master's report, confirmed his report, and entered a final decree for the plaintiff for the sum of $40,000, with interest and costs. The defendants appealed to this court.

Mr. **Holmes Conrad**, Assistant Attorney General, for appellants.

Messrs. **J. H. Miller** and *L. T. Michener* for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

A recapitulation of the principles heretofore affirmed by this court, touching the liability of

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the United States and of their officers and agents to suit in the judicial tribunals, will go far towards disposing of this case.

It should be premised that our law differs from that of England as to the right of the government to use, without compensation, an invention for which it has granted letters patent.

In England, the grant of a patent for an invention is considered as simply an exercise of the royal prerogative, and not to be construed as precluding the Crown from using the invention at its pleasure; and therefore a petition of right cannot be maintained against the Crown for using a patented invention; although a private person or corporation that has contracted to supply the government with articles embodying the invention may be sued for infringement of the patent. *Feather* v. *Queen*, 6 Best & S. 257; *Dixon* v. *London Small Arms Co.* L. R. 10 Q. B. 130, and L. R. 1 App. Cas. 632.

But, in this country, letters patent for inventions are not granted in the exercise of prerogative, or as a matter of favor, but under U. S. Const. art. 1, § 8, which gives Congress power "to promote the progress of science and useful arts, by securing, for limited terms, to authors and inventors the exclusive right to their respective writings and discoveries." The [16]patent act provides that *every patent shall contain a grant to the patentee, his heirs and assigns, for a certain term of years, of "the exclusive right to make, use, and vend the invention or discovery throughout the United States." U. S. Rev. Stat. § 4884. And this court has repeatedly and uniformly declared that the United States have no more right than any private person to use a patented invention without license of the patentee or making compensation to him. *United States* v. *Burns*, 79 U. S. 12 Wall. 246, 252 [20: 388, 389]; *Cammeyer* v. *Newton*, 94 U. S. 225, 235 [24: 72, 75]; *James* v. *Campbell*, 104 U. S. 356, 358 [26: 786, 787]; *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59, 67 [28: 901, 903]; *United States* v. *Palmer*, 128 U. S. 262, 270-272 [32: 442, 444, 445].

The United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued. This doctrine has been affirmed by this court in cases too numerous to be cited; and was clearly stated by Mr. Justice Field, delivering judgment in the case of *The Siren*, as follows: "It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy,—the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is therefore without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*, 33 U. S. 8 Pet. 444 [8: 1004]. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits *against its prop- [17 erty." *The Siren* v. *United States* ("*The Siren*"), 74 U. S. 7 Wall. 152-154 [19: 129, 130]. So much of this statement as regards suits against the United States or against their property was repeated by the present Chief Justice in the recent case of *Stanley* v. *Schwalby*, 147 U. S. 508, 512 [37: 259, 261].

It necessarily follows that, unless expressly permitted by act of Congress, no injunction can be granted against the United States. *United States* v. *McLemore*, 45 U. S. 4 How. 286 [11: 977]; *Hill* v. *United States*, 50 U. S. 9 How. 386 [13: 185]; *Case* v. *Terrell*, 78 U. S. 11 Wall. 199 [20: 134].

The United States, by successive acts of Congress, have consented to be sued upon their contracts, either in the court of claims, or in a circuit or district court of the United States. Acts of February 24, 1855 (10 Stat. at L. 612, chap. 122, § 1); March 3, 1863 (12 Stat. at L. 765, chap. 92, § 2; Rev. Stat. § 1059); Act of March 3, 1887 (24 Stat. at L. 505, chap. 359, §§ 1, 2); *United States* v. *Jones*, 131 U. S. 1, 15, 16 [33: 90, 91]. The United States may accordingly be sued by a patentee for their use of his invention under a contract made with him by the United States or by their authorized officers. *United States* v. *Burns*, 79 U. S. 12 Wall. 246 [20: 388]; *United States* v. *Palmer*, 128 U. S. 262 [32: 442]; *United States* v *Berdan Firearms Mfg. Co.* 156 U. S. 552 [39: 530].

But the United States have not consented to be liable to suits, founded in tort, for wrongs done by their officers, though in the discharge of their official duties. *Gibbons* v. *United States*, 75 U. S. 8 Wall. 269 [19: 453]; *Morgan* v. *United States*, 81 U. S. 14 Wall. 531, 534 [20: 738, 739]; *Langford* v. *United States*, 101 U. S. 341 [25: 1010]; *United States* v. *Jones*, 131 U. S. 1, 16, 18 [33: 90, 91]; *German Bank of Memphis* v. *United States*, 148 U. S. 573, 579, 580 [37: 564, 568, 569]; *Hill* v. *United States*, 149 U. S. 593 [37: 862]. The United States, therefore, are not liable to a suit for an infringement of a patent, that being an action sounding in tort. *Schillinger* v. *United States*, 155 U. S. 163 [39: 108]; *United States* v. *Berdan Firearms Mfg. Co.* 156 U. S. 552 [39: 530].

A public officer is not personally liable on a contract, although under his own hand and seal, made by him in the line of his duty, by legal authority, and on account of the government, and enuring to its benefit, and not to his own. *Hodgson* v. *Dexter*, 5 U. S. 1 Cranch, 345 [2: 130]. See also *Macbeath* v. *Haldimand*, 1 T. R. 172; *Unwin* v. *Wolseley*, 1 T. R. 674; *Palmer* v. *Hutchinson*, L. R. 6 App. Cas. 619.

*But the exemption of the United States[18 from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured,

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even by authority of the United States. *Little Barreme*, 6 U. S. 2 Cranch, 170 [2: 243]; *Bates* v. *Clark*, 95 U. S. 204 [24: 471]. Such officer, or agents, although acting under order of the United States, are therefore personally liable to be sued for their own infringement of a patent. *Cammeyer* v. *Newton*, 94 U. S. 225, 235 [24: 72, 75]. See also *Feather* v. *Queen*, 6 Best & S. 257, 297; *Vavasseur* v. *Krupp*, L. R. 9 Ch. Div. 351, 355, 358.

The extent to which officers or agents of the government may be restrained by injunction from doing unlawful acts to the prejudice of private rights is illustrated by the decisions of this court regarding injunctions from the courts of the United States to officers and agents of a state, which, by the Constitution of the United States, is as exempt as the United States are from private suit. *Hans* v. *Louisiana*, 134 U. S. 1 [33: 842].

In a suit to which the state is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion and in violation of the Constitution or laws of the United States. *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 868, 871 [6: 204, 235, 236]; *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531, 541 [23: 628, 628]; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311 [29: 200]; *Pennoyer* v. *McConnaughy*, 140 U. S. 1 [35: 363].

But no injunction can be issued against officers of a state, to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party. *Louisiana* v. *Jumel*, and *Elliott* v. *Wilts*, 107 U. S. 711, 720-728 [27: 448, 451-454]; *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446, 454-457 [27: 992, 995, 19] 996]; *Hagood* v. *Southern*, 117 U. S. 52, 70 [29: 805, 811]; *Re Ayers*, 123 U. S. 443 [31: 216]; *North Carolina* v. *Temple*, 134 U. S. 22 [33: 849]; *McGahey* v. *Virginia*, 135 U. S. 662, 684 [34: 304, 312].

In support of the decree below much reliance was placed upon *United States* v. *Lee*, 106 U. S. 196 [27: 171]; *Stanley* v. *Schwalby*, 147 U. S. 508 [37: 259]; and *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*"), 114 U. S. 270 [29: 185].

In *United States* v. *Lee* the decision of the court, speaking by *Mr. Justice* Miller, was that the owner of land held and occupied by the United States for public uses, but under a defective title, might maintain against the officers in possession of the land under authority of the United States, an action of ejectment, notwithstanding the interposition of the Attorney General in behalf of the United States.

A year afterwards, *Mr. Justice* Miller, again delivering the opinion of the court, after mentioning a different class of cases, said: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts his authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." After citing several cases to this point he added: "To this class belongs also the recent case of *United States* v. *Lee*, 106 U. S. 196 [27: 171], for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession." *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446, 452 [27: 922, 994].

This statement of the decision in *United States* v. *Lee*, *supra*, was *repeated in *Stan-* [20
ley v. *Schwalby*, 147 U. S. 508 [37: 259], in which the point decided was that the statute of limitations or adverse possession might be pleaded in defense of an action of trespass to try title against officers of the United States. 147 U. S. 508, 518 [37: 259, 263].

In *Cunningham* v. *Macon & B. R. Co.*, above cited, a bill in equity to foreclose a second mortgage of a railroad, and to set aside as invalid a sale and conveyance of the road to the state of Georgia under a foreclosure of the first mortgage, was filed by holders of bonds secured by the second mortgage against the governor and the treasurer of the state, as well as against the railroad company and its directors; and was ordered to be dismissed for want of jurisdiction, because, as was said in the opinion, "it may be accepted as a point of departure unquestioned, that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that court by the Constitution. This principle is conceded in all the cases, and whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. . . . In the case now under consideration the state of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked. No foreclosure suit can be sustained without the state, because she has the legal title to the property, and a purchaser under a foreclosure decree would get no title in the absence of the state. The state is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to plaintiff in this suit is the interest of

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the state of Georgia in the property, of which she has both the title and possession." 109 U. S. 451, 457 [27: 994, 996].

In the cases cited by the appellee, reported under the head of *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*"), 114 U. S. 270 [29: 185], where a collector of taxes due to the state 21] of Virginia refused to receive *coupons of the state tendered in payment of such a tax, because forbidden to do so by a statute of the state, which was unconstitutional and void as impairing the obligation of the contract made by the state with the holders of such coupons in the statute under which they were issued, the court, speaking by *Mr. Justice* Matthews, held that the court was liable to an action of detinue or of trespass, for distraining personal property for nonpayment of the tax; or, where the remedy at law was inadequate, might be restrained by injunction from making the distraint. *Poindexter* v. *Greehow* ("*Virginia Coupon Cases*"), *supra*; *Chaffin* v. *Taylor*, 114 U. S. 309 [29: 198]; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311 [29: 200].

But where the circuit court of the United States, at the suit of one who has tendered such coupons in payment of his taxes, issued an injunction against the Attorney General and other attorneys of the state of Virginia to restrain them from bringing any action in behalf of the state to recover such taxes, and, upon their bringing such actions, committed them for contempt in disobeying the injunction, they were discharged by this court on writs of habeas corpus. *Mr. Justice* Matthews, again delivering its opinion, and fully reviewing the previous cases, said that from the decision in *Cunningham* v. *Macon & B. R. Co.*, above cited, "the inference is, that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction;" and added that actions had been sustained against officers acting in behalf of a state "only in those instances where the act complained of, considered apart from the official authority alleged as to its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character;" and that the 11th Amendment of the Constitution, declaring that "the judicial power of the 22] United *States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," must be held "to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates;" and therefore concluded that the suit in which the injunction was granted was in substance and in law a suit against the state of Virginia, and consequently the circuit court was without jurisdiction to entertain it, the order of injunction and the commitments for contempt were null and void, and the imprisonment of the officers was without authority of law. *Re Ayers*, 123 U. S. 443, 489, 502, 506, 507 [31: 216, 224, 228, 230].

When the matter of the Virginia coupons was last brought before this court, *Mr. Justice* Bradley, delivering its unanimous opinion, summed up, as the result of the previous decisions, so far as concerns the subject now under consideration, "that no proceedings can be instituted by any holder of said bonds or coupons against the commonwealth of Virginia, either directly by suit against the commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the state;" but that any holder "who tenders such coupons in payment of taxes, debts, dues, and demands due from him to the state, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues, or demands, and may vindicate such right in all lawful modes of redress,—by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defense to a suit brought against him for his taxes or the other claims standing against him." *McGahey* v. *Virginia*, 132 U. S. 662, 684 [34: 304, 312]. And this summary was repeated and approved in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 15 [35: 363, 367].

*It only remains to apply the principles [23 established by the former decisions to this suit under the patent act of the United States.

That act not only provides that "damages for the infringement of any patent may be recovered by action on the case," but also provides that "the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same, or cause the same to be assessed under its direction." U. S. Rev. Stat. §§ 4919, 4921.

This bill in equity was filed by the owner of letters patent for an improvement in caisson gates, and alleged that the defendants infringed the patent by manufacturing and using such gates. The defendant filed a plea to the whole bill, and the Attorney General, in behalf of the United States, filed a suggestion, the single ground of each of which was that the only caisson gate that the defendants had any relation with was not made by them, and was not used by them for their own benefit but was made and used by the United States in a dry dock at a navy yard, and the defendants only operated and used it as officers, servants,

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and employees of the United States. The fact so pleaded and suggested could not, consistently with the previous decisions, above cited, prevent the defendants from being held liable to the patentee for their own infringement of his patent. There was no error, therefore, in overruling the plea of the defendants and the suggestion of the Attorney-General.

But the circuit court erred in awarding an injunction against the defendants.

As this court, when deciding that things manufactured under letters patent of the United States were subject to be taxed by a state like other property, said: "The right of 24]*property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself." *Patterson* v. *Kentucky*, 97 U. S. 501, 506 [24: 1115, 1117]. Title in the thing manufactured does not give the right to use the patented invention; no more does the patent right in the invention give title in the thing made in violation of the patent.

In an English case quite analogous to the case at bar, where shells, bought and owned by a foreign sovereign, were brought to England to be put on board his ships of war, the court of appeals held that his agents, if they used the shells in England in infringement of an English patent, might be liable in damages to the patentee, but that the court could not restrain the delivery of the shells to the sovereign to whom they belonged. Lord Justice Brett said: "The patent law has nothing to do with property;" and Lord Justice Cotton expressed the same idea more fully as follows: "The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer, if he would otherwise have the property in them. The court, in a suit to restrain the infringement of a patent, does not proceed on the footing that the defendant proved to have infringed has no property in the articles; but, assuming the property to be in him, it prevents the use of those articles, either by removing that which constitutes the infringement, or by ordering, if necessary, a destruction of the articles so as to prevent them from being used in derogation of the plaintiff's rights, and does this as the most effectual mode of protecting the plaintiff's rights—not on the footing that there is no property in the defendant. The court cannot proceed to give that relief, and interfere with the articles, unless it has before it the person entitled to the articles in question, and has as against this person power to adjudicate that the articles are made or used in infringement of the plaintiff's rights." *Varasseur* v. *Krupp*, L. R. 9 Ch. Div. 351, 358, 360.

In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property 25] of the *United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited.

There was also error in the final decree awarding profits to the plaintiff as against the defendants.

In a suit in equity for the infringement of a patent, the ground upon which profits are recovered is that they are the benefits which have accrued to the defendants from their wrongful use of the plaintiff's invention, and for which they are liable, *ex æquo et bono*, to the like extent as a trustee would be who had used the trust property for his own advantage. The defendants in any such suit, are therefore liable to account for such profits only as have accrued to themselves from the use of the invention, and not for those *which have ac-[26 crued to another, and in which they have no participation. *Elizabeth* v. *American Nicholson Pav. Co.* 97 U. S. 126, 138-140 [24: 1000, 1005, 1006]; *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189 [26: 975]; *Tilghman* v. *Proctor*, 125 U. S. 136, 144-148 [31: 664, 666-668]; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 147 [38: 103, 105]; *Coupe* v. *Royer*, 155 U. S. 565, 583 [39: 263, 270].

In the leading case of *Elizabeth* v. *American Nicholson Pav. Co.* a suit in equity for the infringement of a patent for an improvement in wooden pavements was brought against a city, as well as against the contractor who had laid down the pavements. It being shown that the city had made no profits from the use of the invention, but that the contractor had, this court held that profits could be recovered against the contractor only, and not against the city. *Mr. Justice* Bradley, in delivering judgment, said: "One thing may be affirmed with reasonable confidence: that if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits; the patentee, in such case, is left to his remedy for damages." 97 U. S. 138 [24: 1005].

In the case at bar there was no evidence that the defendants themselves had made any profits whatever from the use of the plaintiff's invention; but the only gains, profits, and

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advantages, upon which the report of the master and the decree of the court were based, were those which had accrued to the United States from the saving in the cost of the gate; and the master found that no damages, in addition to such gains, profits, and advantages, had been proved.

The necessary result is that, even if the validity of the patent and its infringement by the defendants are assumed, the plaintiff, upon this record, is not entitled to an injunction, to profits, or to damages.

The finding of the master, that no damages, in addition to profits, had been proved, does not indeed necessarily imply that the plaintiff had not sustained damages, independent of any profits. But no ground for equitable relief, by injunction, by account of profits, or otherwise, being shown, the proper remedy of the plaintiff against the defendants for such damages is by action at law. *Elizabeth* v. *American Nicholson Pav. Co.* and *Root* v. *Lake Shore & M. S. R. Co.* above cited.

27] *The question whether the United States might be liable, in a suit against them in the court of claims or other court of concurrent jurisdiction, as upon a contract, for their use of the caisson gate, if an infringement of the plaintiff's patent, does not arise, and cannot be decided, in this case.

In order that the rights of all parties interested in the controversy may be preserved, the entry in this case will be—

Decree of the circuit court reversed, and case remanded to that court with directions to dismiss the bill, without prejudice to an action at law against the defendants, or to a suit against the United States.

Mr. Justice **Peckham**, not having been a member of the court when this case was argued, took no part in the decision.

Mr. Justice **Harlan** dissenting:

I am unable to concur in the disposition which has been made of this case.

As stated in the opinion of the majority, this court has frequently held that the United States has no more right than any private person to use a patented invention without license of the patentee or without making or securing compensation to him. It is not claimed that the defendants used the plaintiff's patent under a license from him, or that compensation or provision for compensation has been made. The government is therefore under an implied obligation to compensate the plaintiff. That obligation arises from the Constitution, which declares that private property shall not be taken for public use without just compensation. Upon this point the court, in *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 657 [28: 846, 850], said: "Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions founded 'upon any contract, expressed or implied, with the government of the United States.'" The same principle was recognized in *Great Falls Mfg. Co.* v. *Garland*, 124 U. S. 581, 597 [31: 527, 532]; *United States* v. *Alexander*, 148 U. S. 186, 191 [37: 415, 417]; and *Schillinger* v. *United States*, 155 U. [28 S. 163, 174, 175 [39: 108, 112]. In this view,—the defendants being public officers who derive no personal advantage from the use by the government of the plaintiff's invention,—the prayer for an injunction might well have been denied upon the ground that there was an adequate and complete remedy by a suit against the United States as upon implied contract. But the court does not proceed distinctly on that ground.

If the plaintiff cannot sue the United States to recover compensation for the use of his invention, actually appropriated by the government for public use, then the only adequate remedy for him would be an injunction against the individual officers, who are proceeding without his license, and without any provision having been made for his being compensated. This must be so, unless the court is prepared to hold that there is no remedy, under the Constitution, for the protection of private rights against illegal invasion by officers of the government. In *United States* v. *Lee*, 106 U. S. 196 [27: 171], this court said that when the citizen, "in one of the courts of competent jurisdiction, has established his right of property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right;" that "no man in this country is so high that he is above the law; no officer of the law may set that law at defiance with impunity; all the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." If the United States may appropriate to public use the invention of a patentee, without his consent, and without liability to suit, as upon implied contract, for the value of the use of such invention; if, as the court holds, a public officer acting only in the interest of the public is not individually liable for gains, profits, and advantages that may accrue to the United States from such use; and if the officer who thus violates the rights of the patentee cannot be restrained by injunction,—then the government may well be regarded as organized robbery so far as the rights of patentees are concerned.

*Instead of leaving open the question [29 whether the United States was liable to suit, as upon implied contract, the prayer for injunction, if denied, should have been denied upon the ground, and only upon the ground, that the plaintiff had a complete and adequate remedy by a suit against the government.

Mr. Justice **Field** also dissented.

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LEW ROSEN, *Plf. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 29-51.)

Indictment for mailing obscene paper—sufficiency of—bill of particulars—knowledge—decoy letter—submitting case to jury.

1. A charge in an indictment that defendant unlawfully, wilfully, and knowingly deposited in the postoffice a certain obscene, lewd, and lascivious paper, describing it, is an allegation of knowledge by him of its character, which is sufficient after verdict.
2. The constitutional right of the defendant to be informed of the accusation against him is not infringed by the omission from the indictment of indecent and obscene matter alleged as not proper to be spread on the records of the court, provided the crime charged is so described as reasonably to inform him of the nature of the charge sought to be established against him.
3. One charged with the offense of depositing in the postoffice an obscene paper may apply to the court before trial for a bill of particulars showing what parts of the paper will be relied on as being obscene; and if he fails to so apply or object to the sufficiency of the indictment, judgment will not be arrested, although some parts of the paper are not obscene, if he knew from the indictment what paper would be offered in evidence.
4. Knowledge of the contents of an obscene paper by one who deposits it in the mail is sufficient to make him guilty of an offense under U. S. Rev. Stat. § 3893, although he did not regard the paper as one that the statute forbade to be carried in the mails.
5. That an obscene paper was mailed in response to a decoy letter is no defense to an indictment for mailing it.
6. Submitting to the jury the question whether the paper in question was obscene is not ground of reversal, where no injury was done to defendant by so doing, as the jury were properly instructed and their conclusion correct.

[No. 424.]

Argued October 29, 1895. Decided January 27, 1896.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment convicting the defendant, Lew Rosen, of the crime of mailing an obscene paper, under U. S. Rev. Stat. § 3893. *Affirmed.*

The facts are stated in the opinion.

Mr. **William N. Cohen** for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error was indicted under U. S. Rev. Stat. § 3893, providing that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, . . . and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, . . . are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating, or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than $100 nor more than $5,000, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The defendant pleaded not guilty, and the trial was entered *upon without objection [31 in any form to the indictment as not sufficiently informing the defendant of the nature of the charge against him.

A verdict of guilty having been returned, the accused moved for a new trial upon the ground, among others, that the indictment was fatally defective in matters of substance. That motion was denied.

The defendant thereupon moved in arrest of judgment upon the ground that the indictment did not charge that he *knew*, at the time, what were the contents of the paper deposited in the mail and alleged to be lewd, obscene, and lascivious. This motion was also denied, and the accused was sentenced to imprisonment at hard labor during a period of thirteen months, and to pay a fine of $1.

The paper, "Broadway," referred to in the indictment, was produced in evidence, first by the United States, and afterwards by the accused. The copy read in evidence by the government was the one which, it was admitted at the trial, the defendant had caused to be deposited in the mail. The pictures of females appearing in that copy were, by direction of the defendant, partially covered with lamp black that could be easily erased with a piece of bread. The object of sending them out in that condition was, of course, to excite a curiosity to know what was thus concealed. The accused read in evidence a copy that he characterized as a "clean" one, and in which the pictures of females, in different attitudes of indecency, were not obscured by lampblack.

The defendant having indicated his purpose to bring the case here for review, the court below ordered these papers to be sent to the clerk of this court with the transcript of the proceedings below.

1. The first contention of the plaintiff in error is, that the indictment was fatally defective in not alleging that the paper in question was deposited in the mail with knowledge on his part that it was obscene, lewd, and lascivious.

The indictment charged that the accused, on the 24th day of April, 1893, within the southern district of New York, "did unlaw-

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fully, wilfully, and knowingly deposit and 32] cause *to be deposited in the postoffice of the city of New York, for mailing and delivery by the postoffice establishment of the United States, a certain obscene, lewd, and lascivious paper, which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, Broadway,' and on the same page were printed the words and figures following, —that is to say: 'Volume II. number 27; trademark, 1892; by Lew Rosen; New York. Saturday, April 15, 1893; ten cents a copy, $4.00 a year, in advance;' and thereupon, on the same page, is the picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word 'tenderloineuse,' and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand, eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows,—that is to say, 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.,'—against the peace of the United States and their dignity, and contrary to the statute of the United States in such case made and provided."

Undoubtedly the mere depositing in the mail of a writing, paper, or other publication of an obscene, lewd, or lascivious character, is not an offense under the statute if the person making the deposit was, at the time and in good faith, without knowledge, information, or notice of its contents. The indictment would have been in better form if it had more distinctly charged that the accused was aware of its character. But this defect should be regarded, after verdict and under the circumstances attending the trial, as one of form, under U. S. Rev. Stat. § 1025, providing that the proceedings on an indictment found by a grand jury in any district, circuit, or other court of the United States, shall not be affected "by reason of any defect or imperfection in the matter of form only, which shall not tend to the prejudice of the defendant." *United States* v. *Chase*, 27 Fed. Rep. 807; *United States* v. *Clark*, 37 Fed. Rep. 106.

33]*The indictment on its face implies that the defendant owned or managed the paper "Broadway." He admitted at the trial that he owned and controlled it. He did not pretend that he was ignorant at the time of the contents of the particular number that he caused to be put in the postoffice at New York. The general charge that he "unlawfully, wilfully, and knowingly deposited and caused to be deposited in the postoffice . . . a certain obscene, lewd, and lascivious paper"—describing it by its name, volume, number, date of trademark, date of issue, and as having on it the name of Lew Rosen, proprietor, the same name borne by the defendant,—may not unreasonably be construed as meaning that the defendant was, and must have been, aware of the nature of its contents at the time he caused it to be put into the postoffice for transmission and delivery. Of course he did not understand the government as claiming that the mere depositing in the postoffice of an obscene, lewd, and lascivious paper was an offense under the statute, if the person so depositing it had neither knowledge nor notice, at the time, of its character or contents. He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited.

In their ordinary acceptation, the words "unlawfully, wilfully, and knowingly" when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it. The case is therefore, not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused.

2. The defendant also contends that the indictment was *fatally defective, in that it [34 did not set out with reasonable particularity those parts of the paper relied on to support the charge in the indictment. He insists that the omission from the indictment of a description of the pictures of female figures found in the paper was in violation of the constitutional guaranty that the defendant in a criminal case shall be informed of the nature and cause of the accusation against him. U. S. Const. amend. 6.

A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime. Does the indictment in this case meet these requirements? It describes the paper alleged to be obscene, lewd, and lascivious with such minuteness as to leave no possible doubt as to its identity. If the defendant did not have in his possession or could not procure a duplicate of such paper, he could have applied to the court for an order that he be furnished with a bill of particulars to the end that he might properly defend himself at the trial. *United States* v. *Bennett*, 16 Blatchf. 338, 351; *Rex* v. *Hodgson*, 8 Car. & P. 422; Whart. Crim. Pl. & Pr. § 702. He made no such application, but went to trial without suggesting that he was not sufficiently informed by the indictment of the nature and cause of the accusation against him. When the paper in question was produced in evidence he made no objection to it as not being sufficiently described in the indictment, but at the conclusion of the evidence on the part of the prosecution moved to dismiss on the ground that the paper was not obscene. This motion having been overruled he testified in his own behalf, offering in evidence a duplicate of the same paper, admitting that lampblack—capable of being easily removed so as

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to bring each offensive picture in full view of any person receiving or inspecting the paper—had by his direction been put on the entire edition of April 15, 1893. He now insists that the indictment was fatally defective, because it did not disclose in detail the contents of the twelve pages that were charged to constitute an 35] obscene, lewd, and lascivious paper. *If it be said that he did not know what part of the twelve pages were considered by the grand jury as obscene, lewd, and lascivious, the answer is that he was not entitled to know what passed in the conferences of grand jurors. He was not entitled to show, as matter of defense, that the grand jury proceeded on insufficient grounds. He had to meet only the case made by the indictment and by the evidence adduced by the government. And if he wished to be informed, before entering upon the trial, what particular parts of the paper would be relied on as bringing the case within the statute, he could, as already suggested, have applied for a bill of particulars, which the court, in the exercise of a sound legal discretion, might have granted or refused as the ends of justice required.

The principal authority relied on in support of the defendant's contention is the case in England of an indictment for publishing an obscene libel, namely, "a certain indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals, etc." The jury found that the book was obscene, and a motion in arrest of judgment was made by the accused. The motion was denied. Cockburn, Ch. J., Mellor, J., concurring, held: "If the omission is in the indictment,—if that be the objection, and it be a valid one,—it is an objection that ought to have been taken by demurrer, and therefore I cannot help thinking that, upon the balance of convenience we shall act more wisely in saying that the judgment pronounced on this indictment ought not to be set aside by making the motion absolute to arrest the judgment; but if there be any valid foundation for the contention the defendants have raised upon the indictment, it should be taken by demurrer." *Queen* v. *Bradlaugh*, L. R. 2 Q. B. Div. 569, 573. The judgment was reversed in the court of appeal, which held that in an indictment for publishing an obscene book described only by its title, the words alleged to be obscene must be set out, and their omission would not be cured by a verdict of guilty. In his opinion in that case, Lord Justice Brett considered what kind of omissions would be cured by verdict, and declared, as the 36] result of *the authorities, that "in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment." But he also said: "I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and obscene pictures. The publication of obscene prints and obscene pictures may be in one sense libelous, but they are not words, and therefore they do not seem to me to fall within the rules as to criminal pleadings which we are considering here to-day." *Bradlaugh* v. *Queen*, L. R. 8 Q. B. Div. 607, 634.

Looking at the cases in the American courts, we find that in *Com.* v. *Sharpless* (1815) 2 Serg. & R. 91, 102, 7 Am. Dec. 632, which was an indictment for exhibiting an obscene picture, it was objected, after verdict and on motion in arrest of judgment, that the picture was not sufficiently described. Chief Justice Tilghman said: "We do not know that the picture had any name, and therefore it might be impossible to designate it by name. What, then, is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted. Whether the picture was really indecent, the jury might judge from the *evidence*, or if necessary, from *inspection*. The witnesses could identify it. I am of opinion that the description is sufficient."

The question was considered in Massachusetts in 1821, in *Com.* v. *Holmes*, 17 Mass. 336. That was an indictment for publishing a lewd and obscene print contained in a certain book entitled "Memoirs of a Woman of Pleasure," and for publishing the same book. Two of the counts alleged that the printed book was so lewd, wicked, and obscene "that the same would be offensive to the court here, and improper to be placed upon the records thereof." Chief Justice Parker, speaking for the court, held these counts to be good, saying: "It can never be required that an obscene book and picture should be displayed upon the records of the court; which must be done if the description in these counts is insufficient. This would *be to require that the public itself should [37 give permanency and notoriety to indecency in order to punish it." Subsequently, in *Com.* v. *Tarbox*, 1 Cush. 66, 72, which was an indictment under a state enactment for printing, publishing, and distributing an obscene paper, the court said: "In indictments for offenses of this description, it is not always necessary that the contents of the publication should be inserted; but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record, and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of *Com.* v. *Holmes*, 17 Mass. 336, furnishes both an authority and a precedent for this form of pleading." In *Com.* v. *McCance*, 164 Mass. 162, 29 L. R. A. 61, an indictment charging the defendant with selling a certain book containing, among other things, obscene language, was held to be insufficient. The court distinguished the case before it from previous cases, and said that while the principle announced in *Com.* v. *Holmes* must be regarded as an exception to the general rule relating to libelous publications, the weight of authority in this country was in favor of that decision.

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So, in *People* v. *Girardin*, 1 Mich. 90, 91, which was an indictment for printing and publishing a certain paper described by its title, and characterized as wicked, obscene, etc., the court said: "There is another rule, as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters. To do [38] this would be to require a court *of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule. To convict the defendant, he must be shown to have published the libel; if he is the publisher he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. The indictment in this cause corresponds with the precedents to be found in books of the highest merit."

In *State* v. *Brown*, 27 Vt. 619, in which the indictment stated that the grand jurors omitted from the indictment the lewd and obscene paper alleged to have been sold, because it would be offensive to the court and improper to be placed on records of the court, Chief Justice Redfield said: "Ordinarily the indictment in a case like the present should set forth the book or publication *in hæc verba*, the same as in indictments for libel or forgery. This seems to be an acknowledged principle in the books. But even in indictments for forgery, it may be excused, as, if the forged instrument is in the possession of the opposite party. So, also, in a case like the present, if the publication be of so gross a character that speading it upon the record will be an offense against decency, it may be excused, as all the English precedents show. Some of the precedents are much like the present, describing the obscene character of the publication in general terms. But more generally the nature of the publication is more specifically described. But in both cases the principle of the case is the same. If the paper is of a character to offend decency and outrage modesty, it need not be so spread upon the record as to produce that effect. And if it is alleged, in such case, to be a publication within the general terms in which the offense is defined by the statute, it is sufficient; which seems to be done in the present case. The degree of particularity with which the paper could be described without exposing its grossness would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the former case it could not be more particularly described than it here is without offending decency."

[39] *In *McNair* v. *People*, 89 Ill. 441, 443, the question was whether the indictment for printing, having in possession, and giving away an obscene and indecent picture was sufficient under a provision of the Illinois Criminal Code, declaring that an indictment should be deemed sufficiently technical and correct, which stated the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense could be easily understood. The court, speaking by Mr. Justice Walker, said that "it was necessary to set out the supposed obscene matter in the indictment, unless the obscene publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment, as an excuse for failing to set out the obscene matter; that whether obscene or not is a question of law, and not of fact; that the question is for the court to determine, and not for the jury." To the same effect are *Fuller* v. *People*, 92 Ill. 182, 184; *State* v. *Smith*, 17 R. I. 371, 374, 375.

The earlier cases were fully examined by Mr. Justice Blatchford, when he was a judge of the circuit court, in *United States* v. *Bennett*, 16 Blatchf. 338, 351, in which was charged that the defendant "did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain obscene, lewd, and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene, and lascivious, that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore the jurors aforesaid do not set forth the same in this indictment." Speaking for himself and Judges Benedict and Choate, Mr. Justice Blatchford said: "In the present indictment, the defendant had information given to him as to the offense charged, by the date of the mailing, by the title of the book, and by the address on the wrapper. The indictment states the reason for not setting forth the book to be that it is too obscene and indecent to be set forth. A copy of the book, with a designation of the obscene passages relied on, *could have been [40] obtained before the trial, by asking for a bill of particulars. The defendant was not deprived of the right 'to be informed of the nature and cause of the accusation.' The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment."

The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal dis-

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cretion, may find necessary to the ends of justice.

The refusal of the court to arrest the judgment was not erroneous. The defendant knew from the indictment itself what paper or publication would be offered by the government in evidence, and that the prosecution would insist that the pictures of females displayed in that paper were obscene, lewd, and lascivious. It is said that some of the printed matter and pictures in the paper could not possibly be regarded as of that class. That fact is not disclosed by the indictment. Besides, the failure to set out such matters and pictures could not have prejudiced the accused. The paper being offered in evidence, if it appeared that some of the printed matter or some of the pictures were not obscene, lewd, or lascivious, 41] the *jury could have been instructed upon that subject at the instance of either party. But, as we have already said, the defendant did not ask for a bill of particulars nor object to the indictment as insufficient, but made his defense upon the broad ground that the paper that he caused to be deposited in the postoffice was not obscene, lewd, or lascivious.

We are of opinion that the indictment sufficiently informed the accused of the nature and cause of the accusation against him, and that there was no legal ground for an arrest of the judgment.

3. At the trial below, the defendant, by his counsel, asked the court to instruct the jury that he should be acquitted if they entertained a reasonable doubt whether he knew that the paper or publication referred to in the indictment was obscene. This request was refused, and an exception was taken to the ruling of the court.

This request for instructions was intended to announce the proposition that no one could be convicted of the offense of having unlawfully, wilfully, and knowingly used the mails for the transmission and delivery of an obscene, lewd, and lascivious publication,—although he may have had at the time actual knowledge or notice of its contents,—unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious. The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recog-42]nized as the test for *determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, chastity in social life, and what must be deemed obscene, lewd, and lascivious.

4. Another contention of the accused is that the paper alleged to have been mailed was sent in response to a decoy letter, and, for that reason, no crime was committed. It is only necessary to say that that question has been disposed of adversely to the defendant's contention by *Grimm* v. *United States*, 156 U. S. 604, 611 [39: 550, 553]. In that case it was said: "The law was actually violated by the defendant: he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names, and received his letters, was a government detective, in no manner detracts from his guilt." That doctrine was again announced in *Goode* v. *United States*, 159 U. S. 663 [*ante*, 297], in which case it was said that the fact that "certain prohibited pictures were drawn out of the defendant by a decoy letter written by a government detective was no defense to an indictment for mailing such prohibited publications."

5. It is also assigned for error that the court left it to the jury to say whether the paper in question was obscene, when it was for the court, as a matter of law, to determine that question. If the court had instructed the jury as matter of law that the paper described in the indictment was obscene, lewd, and lascivious, no error would have been committed; for the paper itself was in evidence; it was of the class excluded from the mails; and there was no dispute as to its contents. It has long been the settled doctrine of this court that the evidence before the jury, if clear and uncontradicted upon any issue made by the parties, presented a question of law, in respect of which the court could, without usurping the functions *of the jury, instruct them as to the [43 principles applicable to the case made by such evidence. *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 116, 121 [22: 780, 782]; *Montclair Twp.* v. *Dana*, 107 U. S. 162 [27: 436]; *Marshall* v. *Hubbard*, 117 U. S. 415, 419 [29: 919, 920]; *Sparf* v. *United States*, 156 U. S. 51, 99, 100 [39: 343, 360]. Even if we should hold that the court ought to have instructed the jury, as matter of law, that the paper was, within the meaning of the statute, obscene, lewd, and lascivious, it would not follow that the judgment should, for that reason, be reversed, because it is clear that no injury came to the defendant by submitting the question of the character of the paper to the jury. But it is proper to add that it was competent for the court below, in its discretion, and even if it had been inclined to regard the paper as obscene, lewd, and lascivious, to submit to the jury the general question of the nature of the paper, accompanied by instructions indicating the principles or rules by which they should be guided in determining what was an obscene, lewd, or lascivious paper within the contemplation of the statute under which the indictment was framed. That was what the court did when it charged the jury that "the test of obscenity is whether the tendency of the mat-

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ter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall." "Would it," the court said, "suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?" In view of the character of the paper, as an inspection of it will instantly disclose, the test prescribed for the jury was quite as liberal as the defendant had any right to demand.

Other questions are discussed in the elaborate brief filed for the defendant. Some of them do not require notice; others were not sufficiently saved by exceptions, at the proper time, and will not, therefore, be considered or determined.

We find no error of law in the record, and the judgment is affirmed.

Mr. Justice **White**, with whom concurs *Mr. Justice* **Shiras**, dissenting:

44] **Mr. Justice* Shiras and myself are unable to concur in the opinion and judgment of the court. Thinking, as we do, that the consequence of the affirmance of the judgment is to deprive the accused of rights guaranteed to him under the Constitution of the United States, we are impelled to state the reasons for our dissent.

It was claimed at the bar of this court that the indictment was absolutely void because it failed to set forth an offense against the law of the United States. This contention rested on two propositions: First, that the indictment did not on its face contain a statement of the obscene matter charged to have been illegally mailed; second, because, even if the failure to so state was excused by the allegation in the indictment that the matter was too obscene and offensive to be repeated, the indictment was none the less absolutely void because it failed to give an identifying reference to that which the grand jury found to be obscene.

If these objections be well founded, they are necessarily apparent on the face of the record. They go to the jurisdiction of the court *ratione materiæ*. They consequently demanded consideration whether or not they were presented to the court below, or have been regularly assigned for error here. *Montana R. Co.* v. *Warren*, 137 U. S. 348, 351 [34: 681, 682]. The questions, then, are:

First. Was it necessary to spread the matter alleged to be obscene in full in the indictment, and was the failure to do so excused by the allegation in the indictment that it was too offensive to be put on the record?

It is unquestioned that the English rule requires, where obscene words are relied upon, that the obscene matter should be set out explicitly in the indictment, and that the averment that it is too obscene to be so stated is insufficient to excuse the omission. *Bradlaugh* v. *Queen*, L. R. 3 Q. B. Div. 621. But this is not the doctrine of the American courts. At the time *Bradlaugh* v. *Queen* was decided the contrary rule had been announced in several leading cases in this country, and the court in the *Bradlaugh Case* said: "In support of this contention for the Crown some American cases **45**] were cited. *Decisions in the courts of the United States are not binding authorities, and although they may be expressly in point, yet, if they are contrary to our law, they must be disregarded." The cases thus referred to have since been followed by many other American authorities, so that the question may be considered in this country as determined adversely to the English rule. *Com.* v. *Holmes*, 17 Mass. 336; *Com.* v. *Tarbox*, 1 Cush. 66; *People* v. *Girardin*, 1 Mich. 90; *State* v. *Pennington*, 5 Lea, 506; *McNair* v. *People*, 89 Ill. 441; *Fuller* v. *People*, 92 Ill. 182; *State* v. *Brown*, 27 Vt. 619; *State* v. *Griffin*, 43 Tex. 538; *State* v. *Smith*, 17 R. I. 871; *Com.* v. *Dejardin*, 126 Mass. 46, 30 Am. Rep. 652; *Com.* v. *Wright*, 139 Mass. 382; *Com.* v. *McCance*, 164 Mass. 162, 29 L. R. A. 61; *United States* v. *Bennett*, 16 Blatchf. 338. It was with reference to this well-settled view that in *Grimm* v. *United States*, 156 U. S. 604 [39: 550], in speaking of sending obscene matter through the mails, the court said (p. 608 [552]): "The charge is not of sending obscene matter through the mails, in which case some description might be necessary, both for identification of the offense, and to enable the court to determine whether the matter was obscene, and therefore nonmailable. Even in such cases it is held that it is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned."

Second. Where the obscene matter is not spread upon the face of the indictment, and is excused under the averment that it would be offensive to morality to do so, is the indictment valid where it gives no specific reference identifying the matter found by the grand jury to be obscene, thus rendering it impossible to determine upon what the grand jury based its presentment?

In considering this question it must be borne in mind that imprisonment at hard labor in the penitentiary is the penalty which may be imposed for sending obscene matter through the mails; hence the offense is an infamous one. *Mackin* v. *United States*, 117 U. S. 348 [29: 909]; *Ex parte Wilson*, 114 U. S. 417 [29: 89]; *Re Claasen*, 140 U. S. 200 [35: 409]. It must also be considered that, being an infamous offense, the prosecution can, under the 5th *Amendment to the Constitution, only be [**46** by indictment. The necessity for identifying references in the indictment to the obscene matter upon which the grand jury makes its findings is an essential part of the rule dispensing with the obligation of stating the obscene matter, in so many words, in the indictment. The reason upon which the English rule rests is that spreading in full the obscene matter is essential to protect the accused in his rights, to enable him to move to quash or in arrest of judgment, or to present on review by error the validity or invalidity of the indictment. The American rule is based upon the reason that such spreading upon the record is not essential to protect the rights of the accused, because the obscene matter passed on by the grand jury can be so identified by a reference to it in the indictment as to enable it to be, by bill of particulars or otherwise, readily supplied for all the purposes of defense; hence the omission deprives the accused of no substantial right, whilst subserving the ends of public morality and decency.

The authorities make this clear. Thus in

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Grimm v. *United States*, 156 U. S. 604 [39: 550], the court said: "It is enough to so far describe it [obscene matter] that its obnoxious character may be discerned." And the reason which exacted this reference was declared to be "both for identification of the offense and to enable the court to determine whether the matter was obscene and therefore nonmailable." In *Com.* v. *McCance*, 164 Mass. 162, 29 L. R. A. 61, the indictment charged the accused with "selling a certain book then and there called 'The Decameron of Boccaccio,' and which said book upon the title page thereof was then and there of the tenor following (describing the title page), . . . which said book then and there contained among other things certain obscene, indecent, and impure language, . . . which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court and improper to be placed upon the records thereof." The court, whilst fully recognizing the rule which renders it unnecessary to spread obscene matter in the indictment, also applied the principle which holds that where such matter is not put upon the record there must be an identifying reference in the indictment so that it may be 47] *determined from the face thereof what was the particular matter upon which the grand jury acted. In consequence of so holding, the judgment was reversed and the verdict set aside. See also *Babcock* v. *United States*, 34 Fed. Rep. 873.

Indeed, the correctness of the ruling in *Com.* v. *McCance*, we think, results from the very nature of things. It being unquestionable that a grand jury must find an indictment in order that the prosecution be valid, how can it be said that there has been such a presentment when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to be obscene? To say that it can be supplied by a bill of particulars or otherwise is a misconception, for it becomes impossible to supply that which does not legally exist. The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor any one else has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safeguards. The general rule requires an indictment to be specific. *Stephens* v. *State*, Wright (Ohio) 73; *Com.* v. *Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Com.* v. *Stow*, 1 Mass. 54; *Com.* v. *Bailey*, 1 Mass. 62, 2 Am. Dec. 3; *Com.* v. *Sweeney*, 10 Serg. & R. 173; *Com.* v. *Wright*, 1 Cush. 46; *Com.* v. *Tarbox*, 1 Cush. 66; *Com.* v. *Houghton*, 8 Mass. 107; *King* v. *Beere*, 12 Mod. 219; *State* v. *Parker*, 1 D. Chip. (Vt.) 298, 11 Am. Dec. 735. See also *Com.* v. *Stevens*, 1 Mass. 203. To this rule there has been evolved an exception. This exception, as we have said, is that where the publication or mailing of obscene matter is charged by a grand jury, such matter need not be stated in the indictment, provided in that instrument it be referred to and identified. Under the ruling now announced, it seems to us that the exception is made to destroy the rule, and that an indictment is held to be valid even although it makes no reference whatever to the matter relied on to show guilt. Thus the qualification as to the identifying reference by which alone the exception is justified disappears, and the result *logically leads to the recognition of [48 the right of a grand jury to present without stating or referring to the facts upon which its presentment is made, and also concedes the power of a prosecuting officer to supply matter in an indictment, and thus make that which is absolutely void a valid instrument. The wisdom of the rule announced in *Com.* v. *McCance* was well illustrated by the indictment presented in that case, as it is by the alleged indictment under consideration here. Will it be said that an indictment which charged that an accused published obscene matter contained in twenty volumes of books called the "Encyclopædia Britannica or Americana," giving the title page and followed by the statement that a more minute description would be offensive to morality, would be adequate? And yet what difference would exist, except in degree, between such an indictment and the one here held to be valid? Nor is it logical to say that as an accused has no right to know the secrets of a grand jury room, therefore he is not entitled to be informed as to the matter upon which the grand jury bases its presentment. The Constitution forbids in a certain class of cases prosecution except by indictment, and therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is entitled, under the Constitution, to know the secrets of the grand jury room.

If these views as to the necessity of an identifying reference, supported, as we think they are, by the statement of the court in *Grimm* v. *United States*, 156 U. S. 604 [39: 550], and the ruling of the supreme court of Massachusetts in *Com.* v. *McCance*, *ubi supra*, be sound, their application to this case is clear.

The language of the indictment, whilst it identifies the paper as an entirety, fails in any degree to designate what matter therein, whether words or picture, was found to be obscene by the grand jury, and upon which their presentment was made. It is impossible from the mere description of the title page of the paper, and the averment that it contains twelve pages and was published on a particular day, to in any way ascertain what part, whether pictures or print, contained in the twelve pages, was acted on by the grand *jury. [49 In other words, using the identification of the paper given by the indictment, the mind looks in vain for any reference to the particular things found in the paper which were considered as within the statute.

Nor can it be correctly said that the alleged indictment under consideration charged that each and every part of the newspaper was obscene, and therefore the grand jury found the whole paper was of that character, thus identifying the whole. It will be seen from an examination of the indictment, that its language expressly charges that only portions of the publication to which it refers are obscene. The paper to which the indictment relates is twelve pages of the ordinary size of illustrated papers, with a title page as described in the indictment. Three of its pages are devoted to advertisements; all the other pages, except the

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sixth and seventh, contained pictures and printed matter. The excepted pages contain only pictures which are blackened over in part so as seemingly to conceal them, and yet leaving enough unblackened to suggest the subject which they depict. The eighth page has similar pictures along with the printed matter. After describing the title page of the paper and the picture thereon, the indictment says: "and the said paper consists of twelve pages, minute descriptions of which with the pictures therein and thereon would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters." This is not an allegation that the entire contents of the publication were obscene, because if that was intended there would be no necessity of referring to a "minute description" of the paper as essential to disclose the obscene matter. It can, reasonably, only bear the construction that the publication was claimed to be obscene because of "obscene, lewd, and indecent matters" appearing somewhere in the publication. It is evident, therefore, that particular matter contained in the twelve pages was contemplated, and that the indictment furnishes no means for ascertaining in what this matter consists, by reference or otherwise.

It is clear that the defenses here advanced, if [50]they be well founded, assert, *not that the indictment is formally defective, but that it fails on its face to state an offense. The defect is therefore not one of form under Rev. Stat. § 1025. On both principle and authority such error goes to the existence of the indictment, and consequently is essentially one of substance. *Ex parte Bain*, 121 U. S. 1 [30: 849]. This is especially applicable to a case where, by the Constitution, the accused cannot be prosecuted except on presentment by a grand jury. That the mere silence or acquiescence of the accused cannot deprive him of his constitutional right is obvious. In *Hopt* v. *Utah*, 110 U. S. 574 [28: 262], speaking through *Mr. Justice* Harlan, the court said (p. 579 [265]):

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirements as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot be legally disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 144. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the *trial, that is, at every [51 stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

Doubtless it was like reasoning which caused the court in *Com.* v. *Mahar*, 16 Pick. 120, to refuse, in a capital case, to allow an amendment as to a matter of substance, even with the consent of the prisoner, and which also made the court in *Com.* v. *McCance*, 164 Mass. 162, 29 L. R. A. 61, set aside the verdict against the accused. In accord with this view is the doctrine which denies the power, even by statute, to authorize amendments which substantially change an indictment. The result of the authorities to this effect is thus stated by Bishop: "If, in a case where the Constitution gives the defendant the right to be tried by an indictment, the legislature should undertake to authorize such amendments as leave the indictment no longer the finding of the grand jury, an amendment under it would oust the jurisdiction of the court, and the cause must stop. Such is the substance of the authorities, though the doctrine is not always stated in these words." 1 Bish. New Crim. Proc. § 97, p. 55, and authorities there cited; Whart. Crim. Pl. & Pr. § 90, subs. 2, and authorities there cited. The legislative authority not being competent to authorize an amendment so as to convert a void into a valid indictment, surely a prosecuting officer can have no such power.

The indictment being, as we think, fatally defective in failing to state an offense, which defect could not be supplied in the court below, and cannot be so supplied here without converting an absolutely void into a valid indictment, and thus violate the Constitution, which secures the accused an immunity from prosecution except upon presentment by a grand jury, the verdict and judgment should be reversed.

Re GEORGE F. EMBLEN, *Petitioner*. [52

(See S. C. Reporter's ed. 52-57.)

Writ of mandamus, when not issued—claimant of public land.

1. A writ of mandamus will not be issued in favor of a claimant of land, to compel the Secretary of

NOTE.—*As to when mandamus will issue*, see note to M'Cluny v. Silliman, 4: 263.

As to pre-emption rights, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsay, 5: 423.

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the Interior to proceed with the hearing of a contest in which he has suspended the proceedings, where a patent for the land has been issued to the other claimant pursuant to an act of Congress confirming his entry and directing that the patent issue, even if that act was unconstitutional.

2. The only remedy of a claimant of public land where a patent has been actually issued to a rival claimant is by bill in equity to charge the latter with a trust in his favor.

[No. 9, Original.]

Argued December 16, 1895. Decided March 2, 1896.

PETITION for writ of mandamus to the Secretary of the Interior to hear and decide a contest between George F. Emblen and George F. Weed, as to a quarter-section of land in Colorado. *Mandamus denied.*

Statement by *Mr. Justice* **Gray:**

This was a petition of George F. Emblen for a writ of mandamus to the Secretary of the Interior to hear and decide a contest between Emblen and George F. Weed as to a quarter-section of land in Colorado. The petition alleged the following facts:

In February, 1885, and long before, the land in question, situated in the Denver land district, Colorado, was a part of the unappropriated public domain, suitable for agricultural purposes, and subject to entry and purchase under the pre-emption and homestead laws. On February 26, 1885, Weed filed in the land office of that district a declaratory statement under oath, as required by the pre-emption laws, alleging his settlement upon the land and his purpose to occupy and cultivate it, and to acquire title to it under those laws. On September 19, 1885, the register and receiver of the district received from Weed final proofs of settlement, improvement, and other essential facts, and the government price, and issued to him a cash entry certificate of purchase, entitling him in due course to a patent for the land.

On October 4, 1888, before any patent had been issued, Emblen filed a protest in that office against the issue of a patent to Weed for the land in question, alleging fraud, misrepresentation, and perjury on Weed's part touching his settlement, occupation, and purpose, and demanding a hearing thereon, and asking to be allowed all the rights of a contestant under the act of May 14, 1880, chap. 89. 21 Stat. at L. 140. On May 21, 1889, the register and receiver, **53**] after hearing evidence and *arguments, dismissed the protest and contest. Emblen appealed to the Commissioner of the General Land Office, who, on February 20, 1890, reversed the decision, and held Weed's entry for cancelation. Meanwhile the town of Yuma had been built upon the land, and Weed and the board of trustees of Yuma petitioned for a rehearing, which was granted by the Commissioner.

Shortly afterwards a new land district was created, with offices at Akron, Colorado. The land being in this district, the rehearing was transferred to the register and receiver thereof. Emblen protested on the ground that the receiver was interested personally in the result of the contest, because he claimed ownership of a portion of the land by a conveyance from Weed. The protest was overruled, and Emblen refusing to appear before the register, or to submit to his jurisdiction, an *ex parte* hearing was had, and a decision was rendered on November 4, 1890, in favor of Weed, dismissing the contest, and was affirmed on successive appeals to the Commissioner of the General Land Office and to the Secretary of the Interior. On August 25, 1893, the Secretary of the Interior granted a petition of Emblen for a rehearing upon newly discovered evidence, and expressed the opinion that the proceedings before the register and receiver at Akron were invalid.

Before such rehearing was had, Congress passed the act of December 29, 1894, chap. 15, confirming Weed's entry, and directing that a patent issue to him for the land. 28 Stat. at L. 599. In February, 1895, a patent was accordingly issued to Weed; and the Secretary of the Interior, solely by reason of the passage of this act, suspended all proceedings in the contest, and declined to authorize or direct any further hearing, trial, or consideration thereof.

The petitioner further alleged that in good faith and in reliance upon the acts of Congress and the regulations of the land department, he had spent in this contest years of labor and large sums of money; that he desired that the contest proceed to final adjudication and disposition; and that, should he succeed therein, it was his purpose to claim and to exercise his preference, *right of entry, and purchase of the land, [**54** as by law authorized and provided.

The prayer of the petition was that the act of Congress be declared unconstitutional and void; that the patent to Weed be likewise declared void, because issued without warrant or authority in law; and "that a writ of mandamus issue, directed to the Secretary of the Interior, requiring him to proceed to the final adjudication and disposition of said contest, in accordance with the general acts of Congress and the rules and regulations of the land department, in that behalf made and provided."

Mr. **Henry B. O'Reilly,** for petitioner:

At the time of the passage of this act the land in question had been segregated from the mass of the public domain; it was no longer any part of the territory or property of the United States; it was in fact and in law private property.

Wilcox v. *Jackson*, 38 U. S. 13 Pet. 498 (10: 264); *United States* v. *Turner*, 54 Fed. Rep. 228; *Reichert* v. *Felps*, 73 U. S. 6 Wall. 160 (18: 849); *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 (28: 1122); *United States* v. *Southern P. R. Co.* 146 U. S. 570 (36: 1191); *Bardon* v. *Northern P. R. Co.* 145 U. S. 535 (36: 806).

The act is void as an unprecedented and unwarranted interference with the judicial proceedings of a tribunal lawfully established while actually engaged, within the sphere of its lawful authority, in the determination of a controversy touching the respective rights of individuals to certain property.

Fletcher v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *Astiazaran* v. *Santa Rita Land & Min. Co.* 148 U. S. 80 (37: 376); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 (27: 226); *Germania Iron Co.* v. *United States*, 58 Fed.

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Rep. 334; *Marquez* v. *Frisbie*, 101 U. S. 473 (25: 800); *Casey* v. *Vassor*, 50 Fed. Rep. 258.

The act is void as an unprecedented and unlawful attempt, by special act, to deprive petitioner of a very valuable right and exclusive privilege secured to him and to his heirs, by general laws then and still in full force, upon the faith of which he had expended, as by law required, much time and money. It was an endeavor to abrogate a contractual, if not a vested, right secured to petitioner upon compliance with, and in pursuance of, lawful acts of Congress.

Shepley v. *Cowan*, 91 U. S. 330 (23: 424); *Reichert* v. *Felps*, 73 U. S. 6 Wall. 160 (18: 849); *Stoddard* v. *Chambers*, 43 U. S. 2 How. 284 (11: 269).

If the act be void, the patent issued thereunder upon the sole authority thereof must necessarily be void.

Earl of Leicester v. *Heydon*, Plowd. 384.

If the act of Congress be void it is within the power of the proper court, in this proceeding, so to declare.

McPherson v. *Blacker*, 146 U. S. 1 (36: 869); *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 541 (23: 628); *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 859 (6: 204, 233); *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 270 (29: 185); *Norton* v. *Shelby County*, 118 U. S. 425 (30: 178); *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253).

If the act be void, and the secretary declines to proceed with this contest solely on account thereof, mandamus is the proper remedy to require him to reinstate said cause and to proceed with the judicial disposition thereof in due course.

Re Hohorst, 150 U. S. 653 (37: 1211); *McPherson* v. *Blacker*, 146 U. S. 1 (36: 869); *New York L. & F. Ins. Co.* v. *Wilson*, 33 U. S. 8 Pet. 291 (8: 949); *Ex parte Morgan*, 114 U. S. 174 (29: 136); *Livingston* v. *Dorgenois*, 11 U. S. 7 Cranch, 577 (3: 444).

As the proper disposition of this land contest requires the exercise of judicial consideration and judgment; as from such judgment there is no relief by appeal, error, certiorari, or other remedy; and as this court is vested with a supervisory authority over inferior tribunals, it may, in the exercise of its original jurisdiction, grant the relief prayed for herein.

Ex parte Crane, 30 U. S. 5 Pet. 190 (8: 92); *Ex parte Morgan*, *supra*.

Mr. **Edward B. Whitney**, Assistant Attorney General, for respondent:

This being an original application for a writ of mandamus against an officer of the executive department of the government, this court is without jurisdiction.

Re Green, 141 U. S. 325 (35: 765); *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 (2: 60); *M'Cluny* v. *Silliman*, 15 U. S. 2 Wheat. 369 (4: 268); *Ex parte Crane*, 30 U. S. 5 Pet. 190 (8: 92); *Ex parte Bradley*, 74 U. S. 7 Wall. 364 (19: 214); *Ex parte Newman*, 81 U. S. 14 Wall. 152 (20: 877); *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 313 (25: 667).

The act which the Secretary of the Interior is asked to perform is not a mere ministerial act within the meaning of the authorities, and therefore mandamus is not a proper remedy.

Kendall v. *United States*, 37 U. S. 12 Pet. 524 (9: 1181); *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 497 (10: 559); *United States* v. *Schurz*, 102 U. S. 378 (26: 167); *Butterworth* v. *United States*, 112 U. S. 50 (28: 656); *Holloway* v. *Whitely*, 71 U. S. 4 Wall. 522 (18: 335); *United States* v. *Black*, 128 U. S. 40 (32: 354).

In a mandamus proceeding against an executive officer, it is a complete defense that the performance of the duty involves the exercise of discretion, either in construction of an ambiguous law (*Brashear* v. *Mason*, 47 U. S. 6 How. 92, 102 (12: 357, 361); *Reeside* v. *Walker*, 52 U. S. 11 How. 272, 289 (13: 693, 700); *United States* v. *Guthrie*, 58 U. S. 17 How. 284, 304, (15: 102, 106); *United States* v. *Lamar*, 116 U. S. 423 (29: 677); *United States* v. *Lynch*, 137 U. S. 280, 286 (34: 700, 703); *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 (19: 62)), or in examinations of parol evidence or affidavits. *United States* v. *Seaman*, 58 U. S. 17 How. 225 (15: 226); *United States* v. *Edwards*, 72 U. S. 5 Wall. 563 (18: 692); *Cox* v. *United States*, 76 U. S. 9 Wall. 298 (19: 579).

Even where the act is purely ministerial it will not be directed in a case of doubtful right.

United States v. *Windom*, 137 U. S. 636 (34: 811).

In the appellate jurisdiction over inferior courts, court officers, etc., there is no rule confining mandamus to ministerial acts; it is commonly used to compel the performance of duties involving discretion, exercise of discretion being directed, but not controlled.

Ex parte Taylor, 55 U. S. 14 How. 3 (14: 302); *Ex parte Flippin*, 94 U. S. 348 (24: 194); *Ex parte Burtis*, 103 U. S. 238 (26: 392).

But executive discretion can be neither directed nor controlled.

United States v. *Windom*, *supra*; *United States* v. *Blaine*, 139 U. S. 306 (35: 183).

Petitioner cannot have a writ of mandamus because, if his rights have been violated, he has another remedy. Mandamus issues only when there is no other legal remedy.

Cox v. *United States*, 76 U. S. 9 Wall. 298 (19: 579); *Boyard* v. *United States*, 127 U. S. 246 (32: 116); *Ex parte Pennsylvania Co.* 137 U. S. 451 (34: 738); *United States* v. *Windom*, 137 U. S. 636 (34: 811); *Morrison* v. *United States Dist. Ct.* 147 U. S. 14 (37: 60); *Hudson* v. *Parker*, 156 U. S. 277 (39: 424).

Petitioner has no vested rights.

Frisbie v. *Whitney*, 76 U. S. 9 Wall. 187 (19: 668); *Hutchings* v. *Low* ("*Yosemite Valley Case*) 82 U. S. 15 Wall. 77 (21: 82); *Shepley* v. *Cowan*, 91 U. S. 330 (23: 424); *Hosmer* v. *Wallace*, 97 U. S. 575 (24: 1130); *Buxton* v. *Traver*, 130 U. S. 232 (32: 920); *Campbell* v. *Wade*, 132 U. S. 34 (33: 240).

The power of Congress over the public lands is unbounded so long as the claims of private persons thereto remain inchoate.

Frisbie v. *Whitney*, *supra*; *United States* v. *Vallejo*, 66 U. S. 1 Black, 541 (17: 232).

Mandamus is a writ directed against respondent as an individual, not in his official capacity.

United States v. *Boutwell*, 84 U. S. 17 Wall. 604 (21: 721); *United States* v. *Schurz*, 102 U. S. 378 (26: 167).

Messrs. **S. M. Stockslager** and *George C. Heard* for the Lincoln Land Company (by special leave).

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Mr. Justice **Gray** delivered the opinion of the court:

This is an attempt to use a writ of mandamus to the Secretary of the Interior as a writ of error to review his acts, and to draw into the jurisdiction of the courts matters which are within the exclusive cognizance of the land department.

By U. S. Rev. Stat. § 2273: "When two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provision of the law; and **56**]all *questions as to the right of pre emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of the district officers, in cases of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

By the act of May 14, 1880, chap. 89, § 2: "In all cases where any person has contested, paid the land-office fees, and procured the cancelation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancelation, and shall be allowed thirty days from date of such notice to enter said lands." 21 Stat. at L. 141.

The contest between Emblen and Weed was conducted in accordance with these statutes. After the last decision of the register and receiver, affirmed by the commissioner of the General Land Office and by the Secretary of the Interior, in favor of Weed, and after the Secretary of the Interior had granted a petition of Emblen for a rehearing, and before the rehearing had been had, Congress passed an act confirming Weed's entry, and directing that a patent issue to him for the land in controversy. The Secretary of the Interior thereupon suspended the pending proceedings, and declined to authorize any further hearing of the contest; and a patent was actually issued to Weed before this petition for a writ of mandamus was filed.

Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentees, and can-**57**] not be revoked or set *aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies. *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485]; *Moore* v. *Robbins*, 96 U. S. 530 [24: 848]; *Marquez* v. *Frisbie*, 101 U. S. 473 [25: 800]; *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636 [26: 875]; *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 [27: 226]; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47 [37: 72]; *Turner* v. *Sawyer*, 150 U. S. 578, 586 [37: 1189, 1191].

Writ of mandamus denied.

CHARLES C. HARRISON ET AL., *Plfs. in Err.*,
v.
HERMANN FORTLAGE ET AL.

(See S. C. Reporter's ed. 57-65.)

Sale of goods to be shipped—transhipment—insurable interest.

1. A contract for goods "to be shipped" by a specified vessel at a price per pound "*ex* ship," with a provision for a fair allowance if "sea-damaged," and saying "no arrival, no sale,"—does not make the arrival of the goods on the vessel named a condition precedent, where a portion of them are transhipped at an intermediate port because of a disaster to the vessel.
2. By the maritime law as understood in England, the master, from the necessity of the case, has the right, and by our law the duty, in case of disaster to his ship, to tranship the goods and send them on by another vessel, if one can be had.
3. The purchaser of the goods under such contract had an insurable interest in them by reason of the title which would accrue to him upon arrival and delivery, and of the injury which he might suffer by a previous loss of the goods.

[No. 14.]

Argued November 13, 1894. Decided March 2, 1896.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of Hermann Fortlage *et al.*, plaintiffs, against Charles C. Harrison *et al.*, for breach of contract for refusing to receive goods sold, and for damages. *Affirmed.*

Statement by *Mr. Justice* **Gray**:

This was an action of assumpsit brought April 22, 1890, in the circuit court of the United States for the eastern district of Pennsylvania, by Hermann Fortlage and others, aliens, partners under the name of A. Tesdorpf & Company, against Charles C. Harrison and others, citizens of Pennsylvania, partners under the name of "Harrison, Frazier, & Company," upon a contract in writing for the purchase of 2,500 tons of sugar. The facts admitted or proved at the trial were as follows:

*The plaintiffs' agent signed and the de-[**58**

NOTE.—*As to liability of carrier by water for loss or damage to goods*, see note to Raymond v. Tyson, 15: 47.

As to lien of the contract of affreightment on the vessel and for damages to goods, see note to The Freeman v. Buckingham, 15: 341.

As to damages for marine torts, see notes to The Amiable Nancy, 4: 456; and United States v. The Nuestra Senora de Regla, 27: 662.

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fendants accepted a contract in writing in the following terms:

New York, June 22, 1889.

Messrs. Harrison, Frazier, & Co., Philadelphia.

Dear Sirs: I have this day sold you, for account of Mess. A. Tesdorpf & Co., of London, about 2,500 tons superior Iloilo sugars, usual assortment (⅛ No. 1, ¼ No. 2, and ⅝ No. 3), shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer Empress of India, at 5⅝ c. per pound *ex* ship, net landed weights, 2 per cent tare, cash, less 2½ per cent, in ten days from average date of discharge.

Sea damaged, if any, to be taken at a fair allowance.

No arrival, no sale.

Should the steamer, through any unforeseen circumstance, such as accidents of the seas, stress of weather, etc., be unable to load these sugars within the time specified, and the sellers cannot secure other steam tonnage to load in June, this contract is to be void.

The words "*ex* ship," as used in this contract, were understood in the trade to mean that the buyer receives the goods at the tackle of the ship, the seller paying the freight and duty, and the buyer paying all charges of landing after the goods leave the ship's tackle.

The plaintiffs were merchants, and the defendants, as the plaintiffs knew, were refiners of sugar, and bought this sugar for use in their regular business.

The sugar was shipped at the Philippine islands in bags, in the amount, quality, and assortment, and within the time, specified in the contract, on the steamer Empress of India, which was then seaworthy and fit in every particular for her voyage, and which sailed for Philadelphia, *via* the Suez canal, June 23, 1889. The usual length of the voyage was three months, unless prolonged by accident or by perils of the sea.

On August 21, 1889, the Empress of India, while at anchor at Port Said, was, without her fault, run into by another steamer and so much damaged as to be obliged to land her cargo 59] *and to go to Alexandria to be repaired. After being repaired and reloading her cargo, she sailed from Port Said, November 30, 1889, and in crossing the Atlantic met with extraordinarily rough weather, and was forced to put into Bermuda, January 5, 1890, and there, upon the recommendation of surveyors, and in order to enable her to proceed on her voyage with safety, discharged 700 tons of the sugar.

On February 11, 1890, she arrived at Philadelphia, with the remaining 1,800 tons of the sugar on board. The 700 tons were forwarded from Bermuda by another steamer, which arrived at Philadelphia, March 3, 1890.

The plaintiffs tendered all the sugar to the defendants, and they refused to receive any of it, upon the sole ground that the contract required the sugar to be brought to Philadelphia in the Empress of India, and therefore the plaintiffs had not performed the contract.

The sugar was sold, by agreement of the parties, and for whom it might concern, for less than the contract price; and it was admitted that, if the plaintiffs were entitled to recover at all, the measure of damages was the sum of $63,098, the difference between the contract price and the proceeds of the sale.

The circuit court instructed the jury that the plaintiffs were not required by the contract to do more than they had done, and that the defendants were not warranted in declining to receive the sugar; and the jury, by direction of the court, returned a verdict for the plaintiffs for the sum claimed and interest, upon which judgment was rendered. The defendants excepted to the instruction and direction of the court, and sued out this writ of error.

Mr. **John G. Johnson,** for plaintiffs in error:

An arrival by the Empress of India was a condition precedent.

Johnson v. *Macdonald*, 9 Mees. & W. 603; *Neldon* v. *Smith*, 36 N. J. L. 154; *Stockdale* v. *Dunlop*, 6 Mees. & W. 233; *Idle* v. *Thornton*, 3 Campb. 274.

Arrival extends to both vessel and cargo, where there is a named vessel.

Bowes v. *Shand*, L. R. 2 App. Cas. 455.

Intentionally to divert the goods would be a fraud on the contract, if the seller's object was to avoid his obligation to deliver.

Hawes v. *Humble*, 2 Campb. 327.

If arrival by the ship is the condition, the seller is discharged altogether by the misfortune to that ship.

Idle v. *Thornton*, *supra*; *Lovatt* v. *Hamilton*, 5 Mees. & W. 639; *Hale* v. *Rawson*, 4 C. B. N. S. 85; *Shields* v. *Pettie*, 4 N. Y. 122; *Johnson* v. *Macdonald*, 9 Mees. & W. 600.

Unless the ship has the goods on board there is no sale.

Stockdale v. *Dunlop*, 6 Mees. & W. 226; *Lovatt* v. *Hamilton*, 5 Mees. & W. 639.

The delivery by the Trinidad was not a delivery by the Empress of India for the purposes of this contract.

Flanders, Shipping, § 240; *Griswold* v. *New York Ins. Co.* 3 Johns. 327, 3 Am. Dec. 490.

If the parties stipulate for delivery by a certain vessel, there can be no other delivery substituted for it.

Cleveland Rolling Mill Co. v. *Rhodes*, 121 U. S. 255 (30: 920); *Coddington* v. *Paleologo*, L. R. 2 Exch. 197.

The contract required the shipment to be on this vessel; hence, any performance consistent with the duty of the owner of that vessel under the charter was a performance for the purchaser as well as for the seller.

Ritchie v. *Atkinson*, 10 East, 303; *Christy* v. *Row*, 1 Taunt. 300.

A master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. The concerned are the persons having an ownership in the goods or entitled to carry them and earn freight, or an insurer.

Gaudet v. *Brown* ("*The Argos*") L. R. 5 P. C. 164; *Australasian Steam Nav. Co.* v. *Morse*, L. R. 4 P. C. 222.

The master in this case was not an agent of the purchasers.

Notara v. *Henderson*, L. R. 7 Q. B. 225; *Shipton* v. *Thornton*, 9 Ad. & El. 314.

After abandonment of the ship the contract to tranship is not made as agent for the un-

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derwriter on the ship, for that has ceased to exist; it is on behalf of his owners to enable them to earn the agreed freight.

Hickie v. *Rodocanachi*, 4 Hurlst. & N. 455; *Matthews* v. *Gibbs*, 7 Jur. N. S. 186.

The master is the agent, first, of the owner of the goods, and, second, of the owners of the ship; certainly not of the person entitled to buy them if they arrive.

Vlierboom v. *Chapman*, 13 Mees. & W. 230; *The Industrie* [1894] Prob. Div. 69; *The Soblomsten*, L. R. 1 A. & E. 293; Chitty, Carr. 160, 201, 202.

The right to tranship is now frequently inserted in contracts to arrive, thus showing the sellers here had no such right under this contract.

Heyworth v. *Hutchinson*, 2 Q. B. 446; *Neill* v. *Whitworth*, L. R. 1 C. P. 684–686.

If the arrival of the goods is the one condition, the mode of getting them there is immaterial. If the mode constituted a part of the condition the legitimacy of a substituted mode has nothing to do with it.

Plantamour v. *Staples*, 1 T. R. 611, *note*.

Mutuality is the only consideration for the obligation to deliver.

Vernede v. *Weber*, 1 Hurlst. & N. 311; *Searle* v. *Scovell*, 4 Johns. Ch. 224; *Iasigi* v. *Rosenstein*, 65 Hun, 591; 3 Kent, Com. 212.

Messrs. **William Allen Butler** and *Wilhelmus Mynderse*, for defendants in error:

Where a contract contains all the terms of purchase and sale binding upon the parties respectively, and is free from any ambiguity, its construction is for the court.

Bowes v. *Shand*, L. R. 2 App. Cas. 455; *Seitz* v. *Brewers' Refrigerating Mach. Co.* 141 U. S. 510 (35: 837).

The words "*ex* ship," when connected with the stipulated price of a commodity sold, indicate, in their commercial use, merely that all expenses incurred up to the time the goods leave the ship's tackle are to be borne by the seller, and that all expenses incurred after that time are to be borne by the buyer.

Johnson v. *Macdonald*, 9 Mees. & W. 600; *Neill* v. *Whitworth*, 18 C. B. N. S. 435.

The purchaser has a right to insist on performance by the seller of the contract terms relating to the shipment, as condition precedent of the seller's right to enforce the contract, and where time is the essence of the contract, and delivery delayed by the breach as to shipment, such consequent delay in delivery is a material fact.

Norrington v. *Wright*, 115 U. S. 188 (29: 366); *Cleveland Rolling Mill Co.* v. *Rhodes*, 121 U. S. 255 (30: 920); *Hoare* v. *Rennie*, 5 Hurlst. & N. 19; *Bowes* v. *Shand*, L. R. 2 App. Cas. 445; *Reuter* v. *Sala*, L. R. 4 C. P. Div. 239; *Welsh* v. *Gossler*, 89 N. Y. 540.

The same principle is applied where the contract by its terms calls for delivery or successive deliveries at a specified time.

Coddington v. *Paleologo*, L. R. 2 Exch. 193; *King Philip Mills* v. *Slater*, 12 R. I. 82, 34 Am. Rep. 603; *Tyers* v. *Rosedale & F. Iron Co.* L. R. 10 Exch. 195.

In the case at bar there is no question of the performance by the sellers of the terms of the contract of sale as to shipment within the designated time.

The plaintiffs below having fully performed the contract in respect to the shipment, the defendants below were bound by the contract to accept delivery of the sugars on their arrival at Philadelphia and as they arrived, notwithstanding that they did not all arrive by the Empress of India, but that a part arrived by the Trinidad.

Neill v. *Whitworth*, 18 C. B. N. S. 435, L. R. 1 C. P. 684.

The entirety of the contract was not destroyed by the circumstance that the subject of the sale was of such a character as to be divisible.

Mansfield v. *Trigg*, 113 Mass. 350.

There is no question here of successive deliveries under a contract calling for such deliveries at stipulated times.

Norrington v. *Wright*, 115 U. S. 188 (29: 366); *Bowes* v. *Shand*, L. R. 2 App. Cas. 455; *Cunningham* v. *Judson*, 100 N. Y. 179.

In the construction of commercial contracts effect must be given to the entire contract, according to the intent of the parties as expressed in the language used by them according to its ordinary meaning, and it cannot be contradicted, varied, or enlarged by interpretation.

Robbins v. *Clark*, 127 U. S. 622 (32: 293); *Coddington* v. *Paleologo*, L. R 2 Exch. 167; *Hoare* v. *Rennie*, 5 Hurlst. & N. 19.

Mr. Justice **Gray** delivered the opinion of the court:

The single question is whether the contract between the parties required all the sugar to be brought to Philadelphia in the Empress of India, upon which it was originally shipped. This depends upon the meaning of the terms of the writing in which the parties must be assumed to have embodied and expressed their whole intention, and to have defined all the conditions of the contract. The court is not at liberty, either to disregard words used by the parties, descriptive of the subject-matter, or of any material incident, or to insert words which the parties have not made use of. *Norrington* v. *Wright*, 115 U. S. 188 [29: 366]; *Filley* v. *Pope*, 115 U. S. 213 [29: 372]; *Watts* v. *Camors*, 115 U. S. 353 [29: 406]; *Cleveland Rolling Mill Co.* v. *Rhodes*, 121 U. S. 255 [30: 920]; *Seitz* v. *Brewers' Refrigerating Mach. Co.* 141 U. S. 510 [35: 837]; *Bowes* v. *Shand*, L. R. 2 App. Cas. 455; *Welsh* v. *Gossler*, 89 N. Y. 540; *Cunningham* v. *Judson*, 100 N. Y. 179; *Iasigi* v. *Rosenstein*, 141 N. Y. 414.

This contract was made in June, 1889, for the sale of sugar described as "shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer Empress of India." A contract "to ship by" a certain vessel for a particular voyage ordinarily means simply "to put on board," not including the subsequent carriage; and there is nothing in this contract to show that a different meaning was in the contemplation of the parties.

*The words "*ex* ship" are not restricted [64 to any particular ship, and by the usage of merchants, as shown in this case, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing. They do not constitute a condition of the contract, but are inserted for the benefit

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of the seller. See *Neill* v. *Whitworth*, 18 C. B. N. S. 485, and L. R. 1 C. P. 684.

The clause "sea-damaged, if any, to be taken at a fair allowance," contemplates the risk of damage to the goods by perils of the sea, and does not restrict to any particular ship the subsequent transportation of such goods to their destination.

In the clause "no arrival, no sale," the word "arrival" evidently refers, as the word "sale" must necessarily refer, to the goods which are the subject of the contract, and not to the particular vessel on which they are shipped; and the whole effect of the clause is that, if the goods never arrive at their destination, the buyers acquire no property in them, and do not become liable to the sellers for the price.

The remaining clause, which provides that if the Empress of India, by unforeseen accident, is unable to load in June, and the sellers cannot secure another steamer during that month, the contract is to be void, touches the matter of loading only. The contract fixes no limitation of time in any other respect.

The contract nowhere requires that the sugar shall arrive at Philadelphia by the Empress of India, and essentially differs in this respect from the cases cited at the bar, of contracts for the sale of goods "to arrive" by, or "on the arrival" of, a ship named, as in *Lovatt* v. *Hamilton*, 5 Mees. & W. 639; *Johnson* v. *Macdonald*, 9 Mees. & W. 600; and *Hale* v. *Rawson*, 4 C. B. N. S. 85. A particular ship being designated as to the putting on board only, and not as to the arrival, it is not to be inferred that the goods must be carried to their destination in the same ship.

The sugar in question having been put on board the Empress of India, and the conditions of the contract thus satisfied, so far as that ship was concerned, the subsequent transportation and delivery of the goods were to be governed 65]by the *general rules of the maritime law. By that law, as understood in England, the master, from the necessity of the case, had the right, and, by our law, the duty, in case of disaster to his ship, to tranship the goods and send them on by another vessel, if one could be had. *The Maggie Hammond* v. *Morland*, 76 U.S. 9 Wall. 435, 458 [19: 772, 780]; 3 Kent, Com. 212.

In the able argument for the plaintiffs in error it was admitted that the rule that the master in case of necessity is the agent of all concerned applied to the seller, who was the owner, and to the insurer, and to any one having an insurable interest in the goods; but it was contended that the plaintiffs in error, before the arrival of the goods, had no insurable interest therein, and *Stockdale* v. *Dunlop*, 6 Mees. & W. 224, was relied on as decisive of this. But that case was decided upon the single ground that there the contract for the sale of goods was oral, and therefore incapable of being enforced. It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself. In the present case, the plaintiffs in error, under a valid contract in writing, had an insurable interest, by reason of the title which would accrue to them upon arrival and delivery, and of the injury which they might suffer by a previous loss of the goods. *Howard F. Ins. Co.* v. *Chase*, 72 U. S. 5 Wall. 509, 513 [18: 524, 526]; *Filley* v. *Pope*, 115 U. S. 213, 220 [29: 372, 373]; *Wilson* v. *Jones*, L. R. 2 Exch. 131, 151; 3 Kent, Com. 276.

Judgment affirmed.

AMANDA W. FRANCE, *Plff. in Err.*,
v.
JOHN W. CONNOR ET AL.

(See S. C. Reporter's ed. 65-72.)

Territorial law as to dower.

The abolition of dower by the Wyoming territorial statute of December 10, 1869, is not annulled or superseded by the act of Congress of March 3, 1887, chap. 397, § 18, conferring and regulating the right of dower. Said § 18 applies to the territory of Utah only, and not to the other territories of the United States.

[No. 68.]

Argued May 2, 3, 1895. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of Wyoming to review a judgment of that court affirming a judgment for defendants in a proceeding for the assignment of dower in lands in the county of Carbon, in said territory, brought by Amanda W. France, plaintiff, against John W. Connor *et al.* *Affirmed.*

See same case below, 3 Wyo. 445.

Statement by *Mr. Justice* **Gray:**

*This was a petition for the assignment[66 and setting off of dower in lands in the county of Carbon and territory of Wyoming, filed April 1, 1889, in the district court for that county, and alleging that the plaintiff on February 7, 1887, intermarried with James France, then and until his death a resident and citizen of that county and territory; that he died August 21, 1888, intestate, leaving the plaintiff his widow, and having been seised, during the marriage, of an estate of inheritance in lands situated in that county, and fully described in the petition; that, upon his death, the plaintiff, by virtue of the marriage, became entitled to dower in these lands, which had never been assigned or set off to her, and which she had never received any compensation or equivalent for, or at any time lawfully released her right to; that on March 16, 1888, he, being insolvent, made an assignment, according to the laws of the territory, to the defendants for the benefit of his creditors, of all his property, including these lands; and the defendants took and since held possession of these lands, and refused to assign and set off to the plaintiff her dower therein. The defendants filed a general demurrer, which was sustained, and judgment entered for the defendants.

The plaintiff filed a petition in error in the supreme court of the territory, which, upon the

NOTE.—*As to dower, how barred*, see note to Barrett v. Failing, 28: 505.

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admission of the state of Wyoming into the Union, was entered and argued in the supreme court of the state, and the judgment affirmed upon the ground that the act of Congress of March 3, 1887, chap. 397, § 18, did not apply to the territory of Wyoming. 3 Wyo. 445. The plaintiff sued out this writ of error.

Messrs. **A. B. Browne, Charles N. Potter,** and *A. T. Britton* for plaintiff in error.

Messrs. **Samuel Shellabarger** and *Melville C. Brown* for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

[67] *By a statute of the territory of Wyoming, passed December 10, 1869, and embodied in the subsequent codes of the territory, "dower and the tenancy by the curtesy are abolished, and neither husband nor wife shall have any share in the estate of the other, save as herein provided." Wyo. Stat. 1869, chap. 41, § 1; Comp. Laws of 1876, chap. 42, § 1; Rev. Stat. of 1887, § 2221.

The single question in this case is whether this provision of the territorial statute has been annulled or superseded by § 18 of the act of Congress of March 3, 1887, chap. 397, conferring and regulating the right of dower; or, in other words, whether this section applies to the territory of Utah only, or extends to all the territories of the United States. In order to determine this question, it becomes necessary to consider the scope and the connection of the various parts of the act. 24 Stat. at L. 635.

The act is entitled "An Act to Amend an Act Entitled 'An Act to Amend § 5352 of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes,' approved March 22, 1882."

Sections 1 and 2 relate to testimony in prosecutions for bigamy, polygamy, or unlawful cohabitation; §§ 3–5 define and punish the offenses of adultery, incest, and fornication. These five sections do not mention the place of commission of any offense, and may perhaps be held to include "any territory, or other place over which the United States have exclusive jurisdiction," since so much of the act of March 22, 1882, chap. 47, referred to in the title of this act, as defined and punished offenses, expressly included any such territory or place. 22 Stat. at L. 30. But upon the question whether such provisions apply to the District of Columbia there have been conflicting opinions. *United States* v. *Crawford*, 6 Mackey, 319; *Knight* v. *United States*, 5 App. D. C.——. And we are not now required to determine the application of those provisions of the act of 1887.

The next three sections of this act are in terms limited to the territory of Utah. Section 6 re-[68] lates to the institution of *prosecutions for adultery; § 7, to the powers of commissioners of the courts; and § 8, to the powers of the marshal and his deputies as peace officers.

Sections 9 and 10 relate to evidence, by certificate or otherwise, of marriages "in any of the territories of the United States."

Section 11 disapproves and annuls all laws enacted by the legislature of the territory of Utah, providing for or recognizing the capacity of illegitimate children to inherit or to be entitled to any distributive share in the estate of their father, and enacts that no illegitimate child shall hereafter be entitled to inherit from the father, or to receive any distributive share in his estate, unless born within twelve months after the passage of the act, or made legitimate under the act of Congress of March 22, 1882, chap. 47, § 7. See *Cope* v. *Cope*, 137 U. S. 682, 688 [34: 832, 834].

Section 12 disapproves and annuls all statutes of the territory of Utah conferring jurisdiction upon the probate courts, other than over estates of deceased persons, or over guardianships of the persons and property of infants or insane persons, and transfers the jurisdiction so withdrawn to the district courts of the territory.

Section 13 directs that proceedings shall be instituted to forfeit and escheat to the United States property obtained or held by corporations in violation of the act of June 1, 1862, chap. 126, § 3 (12 Stat. at L. 501), or of section 1890 of the Revised Statutes,—each of which provides that "no corporation or association for religious or charitable purposes shall acquire or hold real estate in any territory, during the existence of the territorial government," of a greater value than $50,000,—and that the proceeds of the forfeiture shall be applied to common schools "in the territory in which such property may be;" but that houses of worship, parsonages, and burial grounds shall be exempt from forfeiture. The terms of the acts referred to, as well as those of the section itself, show that it extends to all the territories. And § 14 provides for the discovery of documents in such proceedings "in any territory of the United States."

*Sections 15, 16, and 17 disapprove and [69] annul the acts of the legislature of the territory of Utah, and of the so-called government of the state of Deseret, creating or continuing the Mormon corporations known as "The Perpetual Emigrating Fund Company" and "The Church of Jesus Christ of Latter Day Saints." See *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1 [34: 478].

Then comes section 18, relating to dower, the extent and effect of which are now in question.

Then follow seven sections, each of which is restricted, in terms, to the territory of Utah: § 19 requires the judges of probate in Utah to be appointed by the President of the United States, with the consent of the Senate, and annuls the laws of Utah providing for their election by the territorial legislature; § 20 makes it unlawful for women to vote at any election in Utah, and annuls all laws of Utah providing for their registration or voting; § 21 annuls all laws of Utah providing for numbering or identifying the votes at elections; § 22 abolishes the election districts and the apportionment of representatives established by the legislature of Utah, provides for new election districts and a new apportionment, and declares that none but citizens of the United States shall be entitled to vote at any election in that territory; § 23 temporarily continues in force in Utah provisions of § 9 of the act of 1882 concerning the registration of voters and the conduct of elections; § 24 requires of voters, officers, and jurors in Utah an oath to

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obey this act and those of which it is an amendment, and disqualifies those convicted under this act, or under the act of 1882, or guilty of polygamy or of cognate offenses; § 25 abolishes the office of superintendent of schools, created by the laws of Utah, requires a commissioner to be appointed instead by the supreme court of the territory, and prescribes his duties.

Section 26 (which might perhaps have been more appropriately inserted after § 13 or § 14) provides that all religious societies may hold, through trustees nominated and appointed as therein directed, "in a territory," real estate necessary for houses of worship, parsonages, and burial grounds.

70] *The 27th and final section annuls all laws of the so-called state of Deseret, or of the territory of Utah, for the organization of the militia, and requires the militia of Utah to be organized under and subject to the laws of the United States.

The leading provisions of § 18 are as follows:

"(*a*) A widow shall be endowed of third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she shall have lawfully released her right thereto.

"(*b*) The widow of any alien who at the time of his death shall be entitled by law to hold any real estate, if she be an inhabitant of the territory at the time of such death, shall be entitled to dower of such estate in the same manner as if such alien had been a native citizen."

The whole section was taken from the statutes of the state of New York, with little more than verbal changes, one of which was a substitution of "the territory" for "this state" in the second sentence just cited. N. Y. Rev. Stat. pt. 2, chap. 1, tit. 3, §§ 1-8.

It was argued by the plaintiff in error that these words, "the territory," not being restricted to the territory of Utah, mean any territory in which the land lies of which a widow seeks to be endowed.

To this it was answered that, if such had been the intention of Congress, it would have been expressed, either by such general words as "a territory," or "any territory," or else, as in § 18, by such a definition as "the territory in which such property may be;" and that the words "the territory," without more, in § 18, grammatically and naturally refer to the last antecedent, which is the territory of Utah, mentioned in § 17. But there are broader considerations leading to the same result.

Most of the other sections of the act relate to the territory of Utah only; and, whenever it is intended to include other territories in them, the intention is expressed in so many words, either in the section itself, or in earlier statutes to which it distinctly refers.

71] *Not only the three sections which immediately precede § 18, but the seven sections which immediately follow it, are expressly restricted to the territory of Utah.

The restriction to the territory of Utah of the provisions denying the right of voting to women, in § 20, and to polygamists, in § 24, is the more marked, because women had the right to vote in the territory of Wyoming; (Wyo. Rev. Stat. of 1887, § 1103) and the act of Congress of 1882, referred to in § 24, had prohibited polygamists from voting in any territory of the United States. Act of March 22, 1882, chap. 47, § 8 (22 Stat. at L. 31).

The only section other than § 18 in the act of Congress of 1887, which affects the title that any member of a man's family shall take in his estate, is § 12, enacting that illegitimate children shall take no share by descent or distribution in the estate of the father; and this section is restricted to the territory of Utah, although § 7 of the act of 1882, referred to in the saving clause of this section, legitimated the issue of Mormon marriages "in any territory of the United States." 22 Stat. at L. 31.

The well-known fact that the practice of plural marriages was more common and more firmly rooted in Utah than in any other territory afforded special reasons for protecting the lawful wife and children, by reinstating in that territory the rules of the common law, securing to her the right of dower, not permitting illegitimate children to inherit from their father.

Under the laws of the territory of Utah, as existing at the time of the passage of the act of Congress of 1887, all illegitimate children inherited from their father; no right of dower was allowed; and there was no community of property between husband and wife, but all property acquired by either, before or after marriage, remained his or her separate property absolutely. Utah Comp. Laws of 1876, §§ 677, 1020, 1022.

At the time of the passage of the act of 1887, there were, beside Utah and Wyoming, six other organized territories of the United States—New Mexico, Arizona, Dakota, Montana, Idaho, *and Washington—to all of which § 18] 72 of that act must apply, if it applies to Wyoming. The wife's right of dower in the husband's lands existed in Montana only, and had been expressly abolished by territorial statute in Dakota, Idaho, and Washington. In New Mexico and Arizona, as well as in Idaho and Washington, the law of community of property between husband and wife, derived from the civil law through the laws of Spain and France, prevailed, to a greater or less extent. *Martinez* v. *Lucero*, 1 N. M. 208, 216; N. M. Comp. Laws of 1884, §§ 1087, 1422; *Charauleau* v. *Woffenden*, 1 Ariz. 243; Ariz. Comp. Laws of 1877, §§ 1968, 1977; Dak. Civ. Code of 1877, §§ 78, 779; Mont. Stat. Feb. 11, 1876; Idaho Stat. Jan 6, 1875, §§ 2, 9-11; Wash. Code of 1881, §§ 2409-2412, 2414.

Although Congress has the undoubted power to annul or modify at its pleasure the statutes of any territory of the United States, yet an intention to supersede the local law is not to be presumed unless clearly expressed. *Davis* v. *Beason*, 133 U. S. 333 [33: 637]; *Cope* v. *Cope*, 137 U. S. 682 [24: 832].

It cannot be presumed that Congress, in an enactment which was peculiarly called for in the territory of Utah, intended to make so important a change in the law of real property in other territories of the United States.

For these reasons, which are substantially those upon which the court below proceeded, its judgment is affirmed.

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THOMAS BALL, *Plff. in Err.*,
v.
JULIA F. HALSELL, Executrix of J. G. HALSELL, Deceased.

(See S. C. Reporter's ed. 72-85.)

Contract to give attorney a share of moneys collected from the government—restriction of compensation.

1. A contract to give an attorney one half of all money which may be received by him for prosecuting a claim against the government on account of Indian depredations, acting under which the attorney had procured a recommendation from the Interior Department for payment, but no appropriations previous to the Indian depredation act of March 3, 1891, does not entitle him, on obtaining judgment in the court of claims under that act, to any compensation for his services except the allowance which the court may make to him in rendering the judgment, since that act expressly declares such contracts void.

2. A restriction of the compensation of attorneys on collection of claims against the United States is one of the terms and conditions which the United States may impose upon its consent to be sued.

[No. 471.]

Submitted December 18, 1895. Decided March 2, 1896.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment for the defendant, Julia F. Halsell, Executrix, in an action brought by Thomas Ball to recover compensation as attorney for prosecuting a claim against the United States on account of Indian depredations and loss of property by means thereof. *Affirmed.*

Statement by *Mr. Justice* **Gray**:

This was an action brought August 18, 1893, in the circuit court of the United States for the northern district of Texas, by Thomas Ball, a citizen of the state of Virginia, against Julia F. Halsell, a citizen of the state of Texas, residing in that district, and the widow, legatee, and executrix of J. G. Halsell, upon a written contract made with the plaintiff by said Halsell in his lifetime, in these words:

We, the undersigned parties of the first part, do hereby constitute and appoint Thomas Ball our lawful attorney to receive, and to make, sign, and give all necessary acquittances and receipts for, one half of all money which may be received by him as our attorney at law, for prosecuting claims against the United States government, on account of the depredations of the Comanche and Kiowa Indians on our property of horses, mules, and cattle in the state of Texas. Said one half being the amount agreed by us to pay him of all that he may recover of said government for said depredations.

Given under our hands this 22d day of May, A. D. 1874.

J. G. Halsell.

The signature of the contract was admitted. The other material facts, as alleged in the petition and found by the court (to which the parties, waiving a trial by jury, submitted the case), were as follows:

The plaintiff presented to the Department of the Interior in March, 1875, a claim of Halsell, amounting to $24,860, for such depredations, and prosecuted it before the *department,[74 and the department recommended payment of the sum of $19,625 to Halsell for such depredations. No appropriation was made by Congress to pay the sum so awarded. On March 6, 1891, after the passage by Congress of the act of March 3, 1891, chap. 538, entitled "An Act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations," Ball, acting under his power of attorney, brought a suit in behalf of Halsell, under the provisions of that act, in the court of claims, to recover the sum so awarded by the Department of the Interior; and after the death of Halsell, and the substitution of his executrix as claimant in his stead, judgment was rendered for the sum of $17,720, in her favor, and against the United States and the Kiowa and Comanche tribes of Indians; and by the terms of that judgment the sum of $1,500 was awarded to Ball as the claimant's attorney. Soon afterwards the United States paid this sum to him, and paid the amount of the judgment for $17,720, less this sum, to the executrix.

In the present suit Ball claimed to be entitled to recover, under the contract aforesaid, one half of said amount of $17,720 less the sum of $1,500 paid him.

The defendant in her answer alleged that "the contract described in the plaintiff's petition, if any such was ever made, was declared void by the 9th section of the act of March 3, 1891, of the Congress of the United States, entitled 'An Act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations;' and by the authority and directions of the same section an allowance, and all that said act permitted to be paid the plaintiff under his said employment was made to the plaintiff in the judgment rendered by said court of claims in favor of this defendant, and was paid to him out of the Treasury of the United States."

Upon the facts above stated, the circuit court made the following conclusion of law: "The court being of opinion that said contract is rendered nugatory, and the provision therein made for compensation for said attorney, Thomas Ball, is superseded by the 9th section of the act of March 3, 1891, and being of opinion that said contract is not *enforceable, and[75 that said statute above referred to fixes and provides for the payment of all the compensation which attorneys prosecuting the claim under said act are entitled to receive, judgment is rendered for the defendant." The plaintiff sued out this writ of error.

NOTE.—*As to attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage; purchase of interest in the suit or subject of litigation by attorney,*—see note to McMicken v. Perin, 15: 504.

As to construction of written contracts, how far a question for the court, see note to Ward v. United States, 20: 792.

As to lien of an attorney for compensation, see note to Texas v. White, 19: 902.

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Mr. **John J. Weed,** for plaintiff in error:

The contract between the plaintiff in error and J. G. Halsell, dated May 22, 1874, was a legal contract, and having been fully performed by the plaintiff in error, he was entitled to be paid the compensation therein stipulated to be paid upon such performance.

Wylie v. *Coxe*, 56 U. S. 15 How. 416 (14: 753); *Wright* v. *Tebbitts*, 91 U. S. 252 (23: 820); *Stanton* v. *Embry*, 93 U. S. 548 (23: 983); *Taylor* v. *Bemiss*, 110 U. S. 42, 46 (28: 64, 65).

The contract between the plaintiff in error and Halsell, being a contract authorized by law, was protected by the Constitution from the effect of any act of Congress which would impair its obligation or deprive the plaintiff in error of such rights of property as were therein secured to him.

Union P. R. Co. v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700 (25: 496); *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *Bowman* v. *Middleton*, 1 Bay, 252; *Wilkinson* v. *Leland*, 27 U. S. 2 Pet. 627 (7: 542); *Terrett* v. *Taylor*, 13 U. S. 9 Cranch, 43 (3: 650); *Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 499; *People* v. *Morris*, 13 Wend. 325; *United States* v. *Klein*, 80 U. S. 13 Wall. 128 (20: 519).

Such claims, although no provision of law existed for the ascertainment of their validity and amount, constituted such rights of property as are recognized by this court.

Erwin v. *United States*, 97 U. S. 392 (24: 1065); *Comegys* v. *Vasse*, 26 U. S. 1 Pet. 193 (7: 108).

A statute which is remedial in its character and provides for the judicial determination of claims against the United States, is neither "an act of grace" a bounty, a gift, nor a donation.

DeGroot v. *United States*, 72 U. S. 5 Wall. 419 (18: 700); *United States* v. *Clyde*, 80 U. S. 13 Wall. 35 (20: 479); *United States* v. *Anderson*, 76 U. S. 9 Wall. 56 (19: 615).

The acceptance by the plaintiff in error of the sum of $1,500 allowed by the court of claims in its judgment in the case of *Halsell* v. *United States*, and its subsequent payment by the United States to the plaintiff, did not render the contract made by Halsell with the plaintiff, not enforceable in the courts of the United States.

Redfield v. *United States*, 27 Ct. Cl. 473.

The receipt by the plaintiff of the sum of $1,500, allowed by the court of claims and paid by the United States, did not satisfy or discharge the obligations of the defendant in error to the plaintiff under the contract of May 22, 1874.

Bostwick v. *United States*, 94 U. S. 53 (24: 65).

Messrs. **Henry C. Coke** and *Julia F. Halsell*, in person, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

In determining the construction and effect of the contract sued on, it is important to keep in mind the acts of Congress and the decisions of this court bearing upon the subject.

In *Kendall* v. *United States*, 74 U. S. 7 Wall. 113 [19: 85], certain attorneys in 1843 (before Congress had passed any act regulating assignments of claims against the United States) made an agreement with the representatives of the Western Cherokees, a branch of the Cherokee tribe of Indians, to prosecute a claim of the Western Cherokees against the United States, and to receive directly from the United States 5 per cent of all sums collected upon the claim. By a treaty between the United States and the Cherokee tribe in 1846, it was agreed that certain sums found due to the Western Cherokees should be paid by the United States directly to the heads of families *per capita*, and should not be assignable. 9 Stat. at L. 874. And by the act of September 30, 1850, chap. 91, making an appropriation of the sum necessary to fulfil that treaty, Congress provided that "in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due." 9 Stat. at L. 556. This court held that the attorneys could not maintain a suit in the court of claims to recover, as compensation for their services in procuring the treaty and appropriation, the 5 per cent that the Indians had agreed should be paid to the attorneys by the United States; and, speaking by *Mr. Justice* Miller, said: "We apprehend that the doctrine has never been held that a claim of no fixed amount, nor time or mode of payment, a claim which has *never received the assent [78 of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignor an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them. . . . We have no hesitation in saying that the United States, under the circumstances, had the right to make the treaty that was made, without consulting plaintiffs or incurring any liability to them. The act of Congress which appropriated the money only followed the treaty in securing its payment to the individual Indians without deduction for agents. And both the act and the treaty are inconsistent with the payment of any part of the sum thus appropriated to plaintiffs." 74 U. S. 7 Wall. 116–118 [19: 86].

By the act of February 26, 1853, chap. 81, § 1, "all transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." 10 Stat. at L. 170. This section has been re-enacted, in almost the same words, in U. S. Rev. Stat. § 3477.

At the first term of this court after the passage of the act of 1853, it was said by this court, speaking by *Mr. Justice* Grier, that "this act annuls all champertous contracts with agents of private claims." *Marshall* v. *Baltimore & O. R. Co.* 57 U. S. 16 How. 314, 336 [14: 953, 962]. And the act has since been held by this court to include all specific assign-

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ments, in whatever form, of any claim against the United States under a statute or treaty, whether to be presented to one of the executive departments, or to be prosecuted in the court of claims; and to make every such assignment void, unless it has been assented to by the United States. *United States* v. *Gillis*, 95 U. S. **79**] 407 [24: 503]; **Spofford* v. *Kirk*, 97 U. S. 484 [24:1032]; *McKnight* v. *United States*, 98 U. S. 179 [25: 115]; *St. Paul & D. R. Co.* v. *United States*, 112 U. S. 733 [28: 861]; *Hager* v. *Swayne*, 149 U. S. 242, 247 [37: 719, 721].

In *Spofford* v. *Kirk*, above cited, the owner of a claim against the United States for military supplies had, before its allowance or the issue of a warrant for its payment, drawn upon the attorneys employed by him to prosecute it an order to pay to a third person a certain sum out of any moneys coming into their hands on account of the claim; the order had been accepted by the drawees, and sold by the payee to a purchaser in good faith for value; and the drawer and acceptors, after the issue of the treasury warrant, declined to admit the validity of the order. It was adjudged that the accepted order, otherwise an equitable assignment, was void, by reason of the statute, and therefore passed no right in the fund, and could not be enforced against the drawer and acceptors.

That decision has never been overruled or questioned by the court, although the act has been held not to apply to general assignments made by a debtor of all his property for the benefit of his creditors, whether under a bankrupt or insolvent law, or otherwise (*Erwin* v. *United States*, 97 U. S. 392 [24: 1065]; *Goodman* v. *Niblack*, 102 U. S 556 [26: 229]; *Butler* v. *Goreley*, 146 U. S. 303 [36: 981]); nor to enable the original claimant to recover of the United States a sum once paid by the United States to his attorney in fact, holding a power of attorney, made before the allowance of the claim and the issue of the warrant, and remaining unrevoked (*Bailey* v. *United States*, 109 U. S. 432 [27: 988]); nor to invalidate a contract of partnership in furnishing supplies to the United States, or a promise by one to another of the partners to pay a sum already due him under the partnership articles, out of money to be received from the United States for such supplies (*Hobbs* v. *McLean*, 117 U. S. 567 [29: 940]); nor to affect the right of a mortgagee of real estate leased to the United States, or of a pledgee of the rents thereof, to recover from the mortgagors and pledgeors the amount of rents paid to them by the United States. *Freedman's Sav. & T. Co.* v. *Shepherd*, 127 U. S. 494 [32: 163].

80] **In the latest case in which the act was considered, the court, speaking by the present Chief Justice, said: "The legislation shows that the intent of Congress was that the assignment of naked claims against the government for the purposes of suit, or in view of litigation or otherwise, should not be countenanced. At common law, the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and, although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy." *Hager* v. *Swayne*, 149 U. S. 242, 247, 248 [37: 719, 721].

By several decisions of this court, indeed, beginning at December term, 1853, contracts for contingent fees, by which attorneys employed to prosecute claims against the United States were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid. *Wylie* v. *Coxe* (1853) 56 U. S. 15 How. 415 [14: 753]; *Wright* v. *Tebbitts* (1875) 91 U. S. 252 [23: 320]; *Stanton* v. *Embry* (1876) 93 U. S. 548 [23: 983]; *Taylor* v. *Bemiss* (1883) 110 U. S. 42 [28: 64]. The reason for upholding the validity of such contracts was first stated by *Mr. Justice* Miller, in *Taylor* v. *Bemiss*, as follows: "The well-known difficulties and delays in obtaining payment of just claims, which are not within the ordinary course of procedure of the auditing officers of the government, justify a liberal compensation in successful cases, where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means, residing far from the seat of government, who can give neither money nor personal attention to securing their rights." 110 U. S. 45 [28: 65]. The proportion allowed to the attorneys in *Wylie* v. *Coxe* was one twentieth; in *Wright* v. *Tebbetts*, one tenth; in *Stanton* v. *Embry*, one fifth; and in *Taylor* v. *Bemiss*, one half.

Congress has evidently considered that, in some cases at least, to permit contracts to be made for the payment to attorneys, by way of contingent fee, of a large proportion of the amount to be recovered, is in danger of leading to extortion and oppression.

It was apparently owing to such con- [81** siderations that Congress, in the act of March 3, 1891, chap. 538, when conferring upon the court of claims jurisdiction of claims arising from Indian depredations, including such claims as had been examined and allowed by the Department of the Interior, and providing that the judgments of that court, unless reversed or modified on rehearing or appeal, should "be a final determination of the causes decided, and of the rights and obligations of the parties thereto," enacted, in § 9, that "all sales, transfers, or assignments of any such claims, heretofore or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void; and all warrants issued by the Secretary of the Treasury in payment of such judgments shall be made payable and delivered only to the claimant or his lawful heirs, executors, or administrators, or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys; and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case, and entered of record as part of the findings thereof; but in no case shall the allowance exceed 15 per cent of the judgment recovered, except in case of claims of less amount than $500, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed 20 per cent of such judgment

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shall be allowed by the court." 26 Stat. at L. 851-854.

The contract now sued on begins in the form of a power of attorney, appearing on its face to have been intended to be signed by several persons, constituting and appointing Ball their attorney "to receive, and to make, sign, and give all necessary acquittances and receipts for, one half of all money which may be received by him, as our attorney at law, for prosecuting claims against the United States government" on account of Indian depreda-[82]tions; and the instrument ends with *this clause: "Said one half being the amount agreed by us to pay him of all that he may recover of said government for said depredations." It is signed by Halsell only.

The instrument was a unilateral contract, not signed by the attorney, nor containing any agreement on his part, and—so long at least as it had not been carried into execution—might be revoked by the principal, or might be disregarded by him in making a settlement with the United States, or might be treated by him as absolutely null and void in any contest between him and the attorney. *Kendall* v. *United States*, 74 U. S. 7 Wall. 113 [19: 85]; *Spofford* v. *Kirk*, 97 U. S. 484 [24: 1032]; *Bailey* v. *United States*, 109 U. S. 432, 439 [27: 988, 990]; *Missouri* v. *Walker*, 125 U. S. 339 [31: 769].

By the very terms of the contract the attorney was to be paid only out of money recovered and received by him from the United States. Although he prosecuted the claim before the Department of the Interior, and that department recommended payment of a certain sum upon the claim, yet before that sum had been paid, or Congress had made any appropriation for its payment, and, therefore, before he had either recovered or received any money from the United States, or was entitled to any compensation by the terms of the contract now sued on, Congress passed the act of March 3, 1891, chap. 358.

By this act, as already stated, Congress, while giving to the court of claims jurisdiction and authority to inquire into and finally adjudicate certain claims arising from Indian depredations, including such as had been examined and allowed by the Department of the Interior, not only declared void all sales, transfers, or assignments of such claims, theretofore or thereafter made,—except in the administration of the estates of deceased persons,—and all contracts theretofore made for fees and allowances to claimant's attorneys, but expressly provided that all treasury warrants in payment of the judgments of the court should be made payable and be delivered only to the claimant, or to his heirs, executors, or administrators, except so much thereof as the court, at the time of rendering the judgment, and as part thereof, should allow to be paid directly to the claimant's attorney, not exceeding in any case 20 per cent of the amount recovered.

[83] *In view of previous experience, this last provision was a wise, reasonable, and just provision for the protection of suitors; and it was clearly within the constitutional power of Congress.

As was said by *Chief Justice* Taney, "It is an established principle of jurisprudence, in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Beers* v. *Arkansas*, 61 U. S. 20 How. 527, 529 [15: 991, 992]; *Re Ayers*, 123 U. S. 443, 505 [31: 216, 229]; *Hans* v. *Louisiana*, 134 U. S. 1, 17 [33: 842, 848].

Much reliance was placed by the plaintiff upon the recent decision of the supreme judicial court of Massachusetts in *Davis* v. *Com.* 164 Mass. 241 [30 L. R. A. 743], in which an agent whom the state of Massachusetts had employed to prosecute a claim of the state against the United States, and to whom the state had agreed to pay, in full compensation for his services, 2 per cent of the amount recovered, was held to be entitled to recover from the state the amount of the compensation so agreed upon; notwithstanding that Congress, in the act appropriating money to pay the claim of the state, had provided that no part of the money should be paid by the state to any attorney or agent under a previous contract between him and the representative of the state. But the case was treated by the court as not free from difficulty; and it differed in several respects from the case at bar. The original agreement between the agent and the state was expressly authorized by its legislature, and was therefore lawful and valid when made. That agreement, as construed by the court, did not necessarily require the agent's compensation to be paid out of money received from the United States. The act of Congress, as the court observed, "did not *undertake to declare[84] void any contracts theretofore made between the representative of the state and an agent or attorney." It did provide that no part of the money received from the United States should be paid by the state to its agent. The act was passed after the services in question had been substantially performed. The act itself fixed the fact and the amount of the liability of the United States; appropriated the money to pay it; and left nothing to be ascertained by subsequent judicial proceedings.

But in the present case, as has been seen, the original agreement was contrary to the express terms of the act of Congress of 1853. That agreement cannot, as it appears to us, be construed as a promise of the principal to pay to the attorney any sum whatever, except out of money recovered and received by the attorney from the United States. The act of Congress of 1891 expressly declared void "all contracts heretofore made for fees and allowances to claimants' attorneys." This act was passed before the attorney had either recovered or received any money upon the principal's claim against the United States. The act did not recognize either the lawfulness or the amount of the claim, or make any appropriation for its

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payment. But it provided for its ascertainment and adjudication by judicial proceedings, and for the allowance, by the judgment in those proceedings, of a reasonable compensation to the attorney. The restriction of the compensation of attorneys to the amounts so allowed by the court was one of the terms and conditions upon which the United States consented to be sued.

In the suit brought by Ball on behalf of Halsell against the United States under the act of 1891, the court of claims rendered judgment in favor of the executrix of Halsell against the United States for $17,720, a smaller amount than had been recommended by the Department of the Interior, and fixed the allowance to Ball at the sum of $1,500, between 8 and 9 per cent of the amount of the judgment. The United States have paid this sum to Ball, and the rest of the judgment to Halsell's executrix.

For the reasons above stated, Ball cannot 85] maintain this *action upon the contract between him and Halsell; and he does not sue, and could not recover, upon a *quantum meruit*. *Marshall* v. *Baltimore & O. R. Co.* 57 U. S. 16 How. 314, 337 [14: 953, 962].

Judgment affirmed.

CHARLES SMITH, *Plff in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 85-90.)

Evidence in criminal case—erroneous instruction.

1. On a trial for murder, evidence that the deceased was a larger and more powerful man than the defendant, as well as evidence that the deceased had the general reputation of being a quarrelsome and dangerous person, is competent, —especially if there is evidence tending to show that his character in this respect was known to the defendant.
2. On a trial for murder, where several witnesses who testified that the deceased had the reputation of being a quarrelsome and dangerous character had been arrested for various offenses, and one of them convicted, while none of them had kept a gambling place, an instruction to the jury to cast aside as worthless matter such testimony if it comes from "keepers of dives and gambling houses and gambling hells and violators of law and prison convicts," with reiterated statements to the effect that men of pure character only are competent to know what character is,—is error, and entitles defendant to a new trial, as the credibility of witnesses is a matter for the jury, and the instruction withdrew this matter from their consideration.

[No. 608.]

Argued and Submitted November 19, 1895. Decided March 2, 1896.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting Charles Smith of the murder of John Welch. *Reversed, and case remanded with directions for a new trial.*

Statement by *Mr. Justice* **Gray**:

This was an indictment in the circuit court of the United States for the western district of Arkansas for the murder, at the Cherokee Nation in the Indian country, on September 27, 1894, of John Welch, a negro and not an Indian, by shooting him with a pistol.

*At the trial the government introduced [86 evidence tending to show that Welch and the defendant, about noon, at a fair-ground in Muscogee, at a spot close by their respective tents, and near a merry-go-round, a dance hall, gambling places, refreshment booths, and other tents and buildings, and in the presence of a crowd of people, fell into dispute; that the defendant ran into his tent, and, finding one Scott Gentry inside, snatched Gentry's pistol from his belt, came out, and shot and killed Welch; and that Welch was unarmed at the time.

The defendant admitted the killing, and contended that he did it in self-defense; and, being called as a witness in his own behalf, testified that he knew Welch, "was very nearly raised up with him," and they had "tussled together all the way up from boys;" that Welch was a bigger and much stronger man than himself; that he knew that Welch had a pistol the night before; and that, when he shot Welch, Welch was advancing, with his right hand at his hip pocket, towards the defendant, and threatening to kill him.

The defendant also called witnesses, who testified that the deceased had previously made threats against the defendant's life; and five other witnesses, living at Muscogee, who testified that they had known Welch for years, and that he had the general reputation of being a man of quarrelsome and dangerous character.

Each of these five witnesses was asked by the district attorney, on cross-examination, whether he had ever been arrested for anything. In answer to this question, one of them testified that he had been arrested, tried, and acquitted for murder, and had been arrested for gambling and discharged. A second witness testified that he had been arrested for "fighting and gambling" only. A third witness testified that he had once been arrested, three or four years before, and brought to Fort Smith, for selling whiskey; and, on re-examination, that the grand jury ignored the charge, and that he had never been convicted of anything. A fourth witness testified that he had been arrested for "fighting and whiskey," but for nothing else, and had twice "served a jail *sentence for whiskey." The [87 fifth witness testified that he had never been arrested for anything; and there was no other evidence of the arrest or conviction of any of these witnesses, or that any of them had anything to do with keeping a gambling place.

The court, in the charge to the jury, instructed them as to the evidence of the character of the deceased as follows: "Now, what is reputation? It is the reflection of character. Character is the thing itself. It is that which a man makes day after day, and

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NOTE.—*As to questions of law and fact for court and jury*, see note to King v. Delaware Ins. Co. 2: 155.

As to threats by the deceased in cases of homicide, when admissible in evidence,—see note to Wiggins v. Utah, 23: 941.

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hour after hour, and year after year, by his bearing and conduct in the community where he lives. If that thing is reflected by the words spoken by men of credit, by men of standing, by men of pure character standing before you, that such reputation is so reflected as that you can believe it, of course it is entitled to consideration and to be taken in the case if it is applicable. But it is to come from men who are morally and mentally competent to know what it means. If a man is without character himself, if his action has been characterized by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is. He has none himself, and he is incompetent to determine when other men have one. And above all is it necessary, important, and essential to the interests of public justice, that justice should not be defeated by men of that character scraped from the four corners of the earth. You are to see to it that it comes from a pure source; and then, again, you are to see to it that it is the reflection, not by keepers of dives and gambling hells, and violators of law, and prison convicts, but it is the reflection of honest and conscientious men, of men who possess character themselves; men of integrity; men whose judgments make up in your community your character that you prize so highly, because it is the opinion of honest, intelligent, judicious, and just men and women in your community. That is the source that character is to come from, and the only source from which you can derive it in a reliable way. If it does not come from that source, but comes from the source I have designated, cast it [88] aside as so much worthless *matter invoked wrongfully in cases of this character." To this instruction the defendant at the time excepted; and, after being convicted and sentenced for murder, sued out this writ of error.

Messrs. **Wm. M. Cravens** and *C. J. Frederick* for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

The main question in controversy at the trial was whether the killing of Welch by the defendant was in self-defense. Upon that question any evidence which, according to the common experience of mankind, tended to show that the defendant had reasonable cause to apprehend great bodily harm from the conduct of the deceased towards him just before the killing was admissible; and upon principle, and by the weight of authority, evidence that the deceased was a larger and more powerful man than the defendant, as well as evidence that the deceased had the general reputation of being a quarrelsome and dangerous person, was competent, especially if his character in this respect was known to the defendant, which there was evidence in this case tending to show. *Wiggins* v. *Utah*, 93 U. S. 465 [23: 941]; *Allison* v. *United States*, 160 U. S. 203, 215 [*ante*, 85, 400]; *State* v. *Benham*, 23 Iowa, 154, 92 Am. Dec. 416; *Com.* v. *Barnacle*, 134 Mass. 215, 45 Am. Rep. 319; *Hurd* v. *People*, 25 Mich. 405; *State* v. *Bryant*, 55 Mo. 75; *Marts* v. *State*, 26 Ohio St. 162; *State* v. *Nett*, 50 Wis. 524; *State* v. *Turpin*, 77 N. C. 473, 24 Am. Rep. 455; Whart. Hom. (2d ed.) §§ 606-623, and cases cited. In *Wiggins* v. *Utah*, above referred to, evidence that "the deceased's general character was bad, and that he was a dangerous, violent, vindictive, and brutal man" was admitted at the trial, and was assumed to be competent, both in the opinion of this court delivered by *Mr. Justice* [89] Miller, and in the dissenting opinion of *Mr. Justice* Clifford. 93 U. S. 466, 470, 474 [23: 942-944].

The testimony introduced by the defendant to the character of the deceased was therefore competent and material.

All that was shown, by way of impeaching the credibility of any of the five witnesses who testified to this point, was that one of them had been arrested, tried, and acquitted for murder, and had been arrested for gambling, and discharged; another had been arrested for fighting and gambling; another arrested for fighting and selling whiskey; and another arrested, convicted, and imprisoned for selling whiskey. There was no evidence that any of the witnesses, except this one, had been convicted of any offense whatever, or that any one of the five had anything to do with keeping a gambling place.

Yet the court, in instructing the jury as to the weight to be given to the evidence of the character of the deceased, told them that reputation was the reflection of character, and, in order to be entitled to consideration, must "come from a pure source," and be "the reflection of honest and conscientious men, of men who possess character themselves, men of integrity, men whose judgments make up in your community your character that you prize so highly, because it is the opinion of honest, intelligent, judicious, and just men and women in your community;" and that "if a man is without character himself, if his action has been characterized by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is; he has none himself, and he is incompetent to determine when other men have one;" and charged the jury "to see to it that it is the reflection, not by keepers of dives and gambling hells, and violators of law, and prison convicts," and, if it comes from that source, to "cast it aside as so much worthless matter invoked wrongfully in cases of this character."

This heaping up of injurious epithets upon the witnesses, coupled with the injunction (which could have no application to anything before the court except their testimony) to "cast it aside as so much worthless matter invoked wrongfully," could not have been understood by the jury otherwise than as *a com- [90] mand to disregard all the testimony introduced in behalf of the defendant, bearing upon the character of the deceased as a quarrelsome and dangerous man.

The character of a quarrelsome and dangerous man is not always so well known to peaceable and law-abiding citizens that their testimony upon the subject can be had. In this, as in other matters involved in the administration of the criminal law, it is often necessary to resort to those who are more familiar with the persons between whom, and the places in

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which, quarrels and affrays are apt to take place.

No doubt has been suggested as to the competency of any of the witnesses in question; and their credibility was a matter to be determined by the jury. The judge having in effect peremptorily withdrawn this matter from their consideration, the defendant is entitled to a new trial. *Hicks* v. *United States*, 150 U. S. 442 [37: 1137]; *Starr* v. *United States*, 153 U. S. 614 [38: 841]; *Allison* v. *United States*, 160 U. S. 203 [*ante*, 395].

It is, to say the least, doubtful whether evidence of an arrest only, not followed by a conviction, is competent to affect the credibility of a witness. *Ryan* v. *People*, 79 N. Y. 593; *Van Bokkelen* v. *Berdell*, 130 N. Y. 141. But such evidence having been admitted without objection as to these witnesses, and having been previously introduced by the defendant's counsel in cross-examining the witnesses for the government, the expression of a decisive opinion upon it would be out of place.

It becomes unnecessary to consider the other exceptions to the rulings and instructions of the court.

Judgment reversed, and case remanded, with directions to set aside the verdict and to order a new trial.

91] UNION PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* ANNA CALLAGHAN, Administratrix, etc.

(See S. C. Reporter's ed. 91-95.)

Dismissal of writ of error—exception, when waived—general exception.

1. A writ of error will not be dismissed on account of the defective character of a bond, since a proper bond may be allowed to be filed if necessary.
2. In an action against a railway company for damages for its negligence, an exception to a refusal to instruct the jury to find for the defendant, requested at the conclusion of defendant's evidence, is waived if the defendant afterwards puts in evidence one of the company's rules which may have an important bearing on the case, and does not renew the motion.
3. A general exception taken to the refusal of a series of instructions will not be considered if any one of the propositions is unsound.

[No. 271.]

Submitted January 22, 1896. Decided March 2, 1896.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment affirming the judgment of the Circuit Court in favor of the plaintiff, James Callaghan, against the Union Pacific Railway Company for damages for injuries received by him through the negligence of defendant. There was a motion to dismiss or affirm. *Affirmed.*

See same case below, 56 Fed. Rep. 988.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought by James Callaghan against the Union Pacific Railway Company, in the circuit court of the United States for the district of Colorado, to recover damages for injuries received by him through the alleged negligence of defendant. The evidence tended to establish these facts: On August 18, 1890, a repair train operated by defendant, consisting of five flat cars, loaded with timber to be used in repairing bridges, three box cars, and a caboose, in running from Trinidad to Trinchera, went through a defective bridge, and Callaghan, who was riding on the train, was injured.

Heavy storms had prevailed during the preceding week, causing extensive washouts and damages to the roadbed and bridges, so that none but repair trains had passed over the line between Trinidad and Trinchera for three days.

Callaghan was a section foreman on a branch railroad from Trinidad to Sopris, and some time on August 17 he received orders from the superintendent of the railway company to take all the men in his section and assist in repairing the line between Trinidad and Trinchera, and accordingly went to Trinidad, where he was joined by some other section foremen with their crews, all being under one De Remer, a contractor *in the employment of the company, who had been called in to assist in repairing the road, but who had no control over the management of the train, which was in charge of a conductor, with an engineer and fireman. [92

The train left Trinidad about 5 P. M., Sunday, the 17th, pursuant to orders received from the superintendent, then at Trinchera, and who had that day examined the bridge, which subsequently fell, but, so far as appeared, gave no directions or warning to De Remer, or the trainmen, in respect of its condition. The train proceeded slowly during the night, De Remer and a track walker going in front with a lantern, and before morning they found one bridge washed out and another rendered dangerous by floods, and repaired them. The bridge where the accident occurred was about ½ mile north of Trinchera and 3 miles south of Adair, another station on the road. The approaches at each end of it had been washed away for over 15 or 20 feet, so that it was unsafe. The foreman of that section discovered its condition on the 17th, and caused the usual danger signal, a red flag, to be placed along the road between the rails at about 700 feet north of the bridge, and its condition was known to the road master as well as to the superintendent before the train left Trinidad.

When the train reached Adair it was running about 15 miles an hour. The section foreman was there and signaled the train to stop for the purpose of telling them about the bridge, and if it had stopped, would have done so. The engineer saw his signal and commenced to stop, and had slowed up to about 4 miles an

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NOTE.—*As to damages for personal injury from negligence*, see note to Pennsylvania Co. v. Roy, 36: 141.

As to exception, when must be taken, to be available on review, see note to Phelps v. Mayer, 14: 643.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, —see note to Parks v. Turner, 13: 868.

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hour, when the conductor signaled him to go ahead. The train then went on without giving the section foreman any opportunity to give information concerning the danger. The bridge could be seen for about 900 feet north on the road, but the engineer apparently neither saw its condition nor the red flag, but drove his train upon it, and the car upon which Callahan was riding went through.

At the conclusion of defendant's evidence, except reading the rules, defendant asked the 93] court to instruct the jury that *there was no evidence sufficient to warrant a verdict for plaintiff, which request was denied, and defendant excepted. Defendant then introduced in evidence the company's rule 227, which read as follows:

"In case of an extraordinary rain storm or high water, trains must be brought to a stop, and a man sent out to examine bridges, trestles, culverts, and other points liable to damage, before passing over. Conductors will make careful inquiry at all stopping places, and, when thought advisable, make extra stops to ascertain the extent and severity of storms, taking no risk. In case of doubt as to the safety of proceeding, they will place their trains upon a siding, and remain there until certain it is safe to proceed."

Thereupon plaintiff offered and introduced evidence to show that there was a conductor on the train. Defendant then asked the court to give to the jury the following instructions:

"1. The court is asked to instruct the jury that, under the evidence in this case, the accident appears to have been caused by the failure of the engineer of the work train to observe the rules and regulations of the company in respect to running trains in cases of extraordinary floods, etc., and in his failure to observe the danger signal that, according to the evidence, had been placed in places where he ought to have seen the same in the exercise of the care that was required of him in respect thereto.

"2. The court is asked to instruct the jury that they are not at liberty to infer from the evidence in the case that the accident was caused by the negligence of the conductor in signaling the engineer to proceed after the train had slowed down, since such signal to the engineer in no wise released the engineer from care in respect to observance of all precautions necessary to prevent an accident under the circumstances, the evidence showing that the engineer must have been aware of the likelihood of danger at any place along the line.

"3. The court is asked to instruct the jury that the mere fact that the accident would not probably have happened if the conductor had allowed the train to be brought to a stop at Adair affords no ground for saying that not stopping the 94] *train at Adair was the cause of the accident, since it is true that if the train had not started from Trinidad or Adair or run at all the accident would not have happened, and the mere fact of starting the train, or continuing the train in motion after it had started, does not make the running of the train under those circumstances the proximate cause of the accident by which the plaintiff was injured.

"4. The court is asked to instruct the jury that the jury are not at liberty to infer, or even from the mere fact that the conductor gave signal to proceed after the engineer had slowed up at Adair was the proximate cause of the injury to the plaintiff, since such signal to proceed can be held to proceed in precisely the same manner as the engineer was bound to proceed under the rules and regulations of the company under which he was acting, and in view of what the engineer knew of the dangers he was bound to apprehend from the floods, etc., that had existed for some days prior to the accident; and that even if the jury believe from the evidence it was negligent in the conductor to proceed after he had slowed down, yet the plaintiff will not be entitled to recover because of such negligence of the conductor unless they further believe from the evidence that such negligence was the proximate cause of the injury."

The record then states: "But the court refused to give each and every of said instructions; to which ruling of the court the defendant, by his counsel, then and there duly excepted." The court thereupon charged the jury at large upon the whole case. No exception was taken to any part of the charge. The jury found for plaintiff, judgment was entered on the verdict, the cause taken on error to the circuit court of appeals for the eight circuit, and the judgment affirmed. 56 Fed. Rep. 988. This writ of error was then allowed and a supersedeas bond given and approved, in which no penal sum was named. A motion to dismiss or affirm was submitted. Callaghan subsequently died and the cause was revived in the name of Anna Callaghan, administratrix, etc.

Messrs. **John F. Dillon** and **John M. Thurston** for plaintiff in error, in opposition to motion.

Messrs. **C. S. Thomas** and **W. H. Bryant** for defendant in error, in favor of the motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We should not dismiss this writ of error on account of the defective character of the bond, but allow a proper bond to be filed, if necessary, which in this instance it is not, as the motion to affirm must be sustained.

It is settled that an exception to the refusal of the trial court to instruct the jury to find for the defendant is waived if made by defendant without resting his case. The question goes to the sufficiency of the evidence, and that is, of course, of the entire evidence. *Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202, 206 [36: 405, 406]. After defendant's motion for an instruction in its favor was denied, it put in evidence its rule 227, which manifestly might have had an important bearing. The motion was not renewed, and we think the action of the court cannot be assigned for error.

Again, it is firmly established that where propositions submitted to a jury are excepted to, in mass, the exception will be overruled provided that any of the propositions be correct, and where a general exception is taken to the refusal of a series of instructions, it will not be considered if any one of the propositions is unsound. *Newport News & M. V. Co.* v. *Pace*, 158 U. S. 36 [39: 887]. It was contended by defendant that the accident was the

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result of the engineer's negligence alone, and that therefore plaintiff could not recover. In the light of the evidence the first instruction requested by defendant was properly refused, and, without considering the others, the exception as taken to the ruling of the court must fail. And no exception was saved to any of the instructions given by the court on the whole case.

Judgment affirmed.

96] WILLIAM M. FISHBACK ET AL.,
Appts.,
v.
WESTERN UNION TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 96-101.)

Jurisdiction of United States courts—jurisdictional amount.

1. The facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them.

2. An aggregation of the amounts of the taxes to be collected in different counties cannot be made for the purpose of obtaining the jurisdictional amount of $2,000, in a suit in a circuit court of the United States to restrain the railroad commissioners of a state and the tax collectors of its counties from enforcing the collection of taxes assessed on a telegraph company by such commissioners, and certified to the several counties, and warrants for collection of which have been delivered to the several county tax collectors, it not being shown that any one of the county assessments exceeded that jurisdictional amount; nor can the jurisdiction be sustained against the commissioners to restrain their making the assessment as a whole, where they had already made it.

[No. 841.]

Argued January 22, 23, 1896. Decided March 2, 1896.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas perpetually enjoining the defendants and their agents and deputies from enforcing the collection of taxes assessed against the Western Union Telegraph Company in an action brought by that company against Wm. M. Fishback *et al.*, commissioners, *et al. Reversed, and cause remanded with directions to dismiss the suit for want of jurisdiction.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill filed by the Western Union Telegraph Company January 2, 1894, in the circuit court of the United States for the eastern district of Arkansas against William M. Fishback, Henry B. Armistead, and Charles B. Mills, constituting the board of railroad commissioners for the state of Arkansas, and some forty-seven clerks of different counties in the state in which complainant had lines of telegraph, alleging that the complainant was a corporation and citizen of New York and each of the defendants was a citizen of Arkansas, "and that the amount or value in controversy in this suit exceeds the sum of $2,000, exclusive of interest and costs;" that on and prior to April 8, 1893, complainant was and had ever since been engaged in the business of operating telegraph lines and sending telegrams over the same to different parts of the United States, with extensive cable lines under the sea, having its general office in the city of New York; that on that day the general assembly of Arkansas passed *an act entitled "An Act to Assess [97 and Collect Taxes from Certain Corporations," a copy whereof was attached to and made part of the bill; that, as stated in the company's return under the act, the value of the lines of the company within Arkansas, made upon the basis of actual cost less depreciation, would not exceed $102,229.68, and that if valued on the basis of the cost of the reproduction of an entirely new line, would be $282,763.71; that any apportionment to Arkansas of the company's capital stock on a mileage basis would necessarily include the value of bonds, real estate, contracts, franchises, and patent rights, all of which were outside the jurisdiction of the state of Arkansas; that in Arkansas the gross receipts averaged $23 per mile of wire, and that the net earnings in Arkansas did not exceed $6 per mile of wire; that taking the entire capital of the company at the stock exchange price of July 1, 1893, if the apportionment thereof to the state of Arkansas upon the mileage basis were taxed at an average of 2 per cent, "which is probably the average rate of taxation in Arkansas," it would require the company to pay a tax annually in Arkansas of nearly 50 per cent of its earnings from all its business in that state, whether from interstate or local traffic, which was a rate of taxation unheard of, grossly unequal, and substantially destructive. It was further alleged, among other things, that on July 1, 1867, the company formally accepted the provisions of the act of July 24, 1866, now U. S. Rev. Stat. §§ 5263, 5269, and by virtue thereof the company was an agent of the government of the United States in the transmission of intelligence by electricity, and that the enforcement of the scheme of taxation provided in the alleged law would substantially destroy the value of the company's property in Arkansas and prevent it from performing its obligations under said act. Schedules of the real estate of the Western Union Telegraph Company, of the miles of wire, and poles of all the lines owned by the company within the state of Arkansas, and the location thereof in each county, and of the gross receipts for 1892, were also made part of the bill. The bill charged that the act in question was unconstitutional and void for reasons given at length, but averred that *the board of railroad [98 commissioners of the state, composed of the governor, secretary, and auditor, had nevertheless assessed complainant's property for taxes within the state, under said act, at the sum of $195 per mile of its lines of telegraph therein, making the whole amount of property thus as-

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NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,*—see note to Schunk v. Moline, M. & S. Co. 37: 256.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

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sessed $396,387, and a copy of the assessment was made a part of the bill, showing the number of miles, the value per mile, and the total value in each county; also the mileage in cities and towns, and the total value thereof.

And it was also alleged that the secretary of state had certified said several assessments to the several county assessors, who had listed the same as property owned by complainant subject to taxation for 1893 in those counties, and had returned said assessments to the county clerks thereof, whose duty it was to make out tax books for their respective counties, enter the assessments, levy the taxes thereon at the rate fixed for state, county, and all other purposes, extend the same on the tax books, and deliver them to the tax collectors with warrants requiring the collection of said taxes.

The prayer of the bill was that the railroad commissioners should be required to show the grounds of their assessment; that the act of April 8, 1893, be decreed to be unconstitutional and void; that the act of the board in assessing complainant's property for taxation be canceled; and that defendants be enjoined from proceeding under said act or pursuant to said assessment, to execute the same, and the county clerks specifically restrained from discharging the duties thereby imposed.

On January 29, 1894, complainant filed an amended bill averring that since the filing of the original bill the county clerks had, pursuant to the assessment of complainant's property by the railroad commissioners, made out the tax books for their several counties, entered the said several assessments, levied the taxes thereon at the rate fixed for state, county, and all other purposes, spread the same upon the tax books and delivered the books to the several tax collectors of the several counties, together with a warrant authorizing and requiring the collection of the same. The amended bill then charged that forty-seven persons, 99]naming them, were the *tax collectors for the counties severally named, and citizens of Arkansas, prayed that they be made parties defendant, and be enjoined from proceeding to collect the taxes.

Defendants demurred to the bill and amended bill, and on February 20, 1894, the circuit court overruled the demurrer, whereupon complainant dismissed the bill as to the several county clerks, and the defendants electing to abide by their demurrer, it was decreed "that the defendants and each and every of them, their agents and deputies, be perpetually restrained and enjoined from taking any steps or proceeding in any manner to enforce the collection of taxes assessed against the property of the Western Union Telegraph Company under the assessment made by defendants, William M. Fishback, Henry B. Armistead, and Charles B. Mills, in their capacity as a board of railroad commissioners for the said state of Arkansas, under the provisions of an act of the general assembly entitled 'An Act to Assess and Collect Taxes from Certain Corporations,' approved April 8, 1893, and for costs." An appeal to this court was duly prayed and allowed, citation waived, cost bond approved and filed, together with an assignment of errors.

Messrs. **A. H. Garland,** *James P. Clarke,* and *R. C. Garland* for appellants.

Messrs. **Rush Taggart,** *John F. Dillon, Willard Brown, Charles W. Wells,* and *U. M. Rose* for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is argued that under the averments of the bill the circuit court had jurisdiction on two grounds: (1) diverse citizenship; (2) in that the case made by the bill was one arising under the Constitution and laws of the United States. Even if this *were so, the circuit court [100 could not take cognizance of the suit unless the matter in dispute exceeded, exclusive of costs and interest, the sum of $2,000. 24 Stat. at L. 552, chap. 373, § 1; 25 Stat. at L. 433, chap. 866; *United States* v. *Sayward,* 160 U. S. 493, 498 [*ante,* 508, 509].

In *Walter* v. *Northeastern R. Co.* 147 U. S. 370 [37:206], we held that "a circuit court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments in separate counties, no one of which amounts to $2,000, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined together in the bill, making an aggregate of over $2,000.

The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. *Ex parte Smith,* 94 U. S. 455 [24:165]; *Metcalf* v. *Watertown,* 128 U. S. 586 [32:543]. The general averment in this bill that "the amount or value in controversy in this suit exceeds the sum of $2,000, exclusive of interest and costs," was a mere conclusion, and it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach $2,000. If the rate of taxation in Arkansas did not exceed 2 per cent as indicated in the return of the telegraph company to the railroad commissioners, the highest amount of taxes in any one county would fall below $400.

Although if these county assessments were aggregated they would considerably exceed $2,000, yet the several county clerks or tax collectors cannot be joined in a single suit in a Federal court, and the jurisdiction sustained on the ground that the total amount involved exceeds the jurisdictional limitation, as already ruled in *Walter's Case*; nor do we *find [101 any ground as we did in *Northern P. R. Co.* v. *Walker,* 148 U. S. 391 [37:494], upon which an amendment could be permitted.

Without intimating in any degree under what circumstances, if at all, such a bill might lie, we may add that jurisdiction cannot be sustained here on the ground that, as the railroad commissioners were parties defendant, this bill might be treated, though they had al-

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ready acted, as seeking to restrain the making of the assessment as a whole.

Decree reversed with costs, and cause remanded with a direction to dismiss the suit for want of jurisdiction.

WILLIAM M. FISHBACK *et al.*, *Appts.*,
v.
PACIFIC EXPRESS COMPANY.

Argued January 22, 23, 1896. Decided March 2, 1896.

[No. 342.]

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

Messrs. **A. H. Garland,** *James P. Clarke,* and *R. C. Garland* for appellants.

Messrs. **Westel W. Morsman** and *John W. Moore* for appellee.

THE CHIEF JUSTICE: This case differs in no essential respect from that just decided, and must take the same course.

Decree reversed with costs, and cause remanded with a direction to dismiss the suit for want of jurisdiction.

BOARD OF FLOUR INSPECTORS for the Port of New Orleans ET AL., *Appts.*,
v.
BOOTH F. GLOVER ET AL.

(See S. C., "*New Orleans Flour Inspectors* v. *Glover*," Reporter's ed. 101-103.)

Vacating order dismissing appeal.

An order dismissing an appeal from an injunction against enforcing a statute because it has been repealed, where the injunction is in fact too broad because it restrains actions at law to test rights claimed to have accrued under the act before it was repealed, may be vacated and the decree reversed and the cause remanded, with direction to dismiss the bill.

[No. 88.]

Petition for rehearing submitted January 11, 1896. Decided March 2, 1896.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana enjoining defendants from enforcing an act of the Louisiana general assembly in regard to the inspection of flour. This court dismissed the appeal and a petition for rehearing was presented. Order dismissing the appeal vacated, and the decree reversed, and cause remanded, with direction to dismiss the suit.

See same case, 160 U. S. 170 [*ante*, 382].

Mr. **J. R. Beckwith** for appellants and petitioners.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill filed by complainants June 19, 1891, in the circuit court of the United States for the eastern district of Louisiana against the Board of Flour Inspectors for the Port of New Orleans and the individual members thereof, to enjoin the enforcement of a certain act of 1870 of the general assembly of Louisiana. The ground of equity interposition set up was want of adequate remedy at law, as indicated by the following averments: "Your orators show that they respectively each receive their large consignments of flour from other states of the Union almost daily, and, as each lot arrives at the port of New Orleans, the defendants claim and insist on the right and power to inspect the same on its arrival and to make such inspections compulsory, and claim and demand their fees of 2 cents a barrel therefor on every barrel arriving, and if such fees are not paid the defendant board will bring a great multitude of suits and prosecutions under said statute to enforce its illegal claims; that as to each of your orators such suits will be each of small amounts, in inferior courts, and will be of great number, each arising out of almost daily inspections and involving large, constant, and daily expenses, many counsel fees, and much loss of time, vexation, annoyance, and irreparable injury; that there is no practicable method under the said act of 1870 or any other law of Louisiana of paying said fees to said board under protest and recovering the same; that such a course would involve for each of your orators a multiplicity of controversies and suits and great expense, loss of time, and vexation, and if each of your orators should recover judgments from time to time against the board for the return of such fees as unduly paid they could have no judgments for their counsel fees, nor has the defendant board any fund or property whatever to respond to the same, nor is there any appropriation or provision of law to pay the same, and the collection of such judgments or any of them would be utterly impossible."

*The court granted a preliminary in- [103 junction, on condition of bond being given for $10,000, enjoining defendants from enforcing the act of 1870 by "demanding any inspection of flour imported or brought to the port of New Orleans by complainants," and "from demanding from complainants by suit or otherwise any fees for compulsory inspection established by said law."

Defendants demurred, their demurrer was overruled, and, they electing to abide by it, a decree was entered January 25, 1892, perpetually enjoining defendants "from enforcing against the complainants or any of them the act No. 71 of the extra session of the general assembly of Louisiana of the year 1870, by demanding any inspection of flour imported to the port of New Orleans for sale by the complainants from states of the United States other than Louisiana or from foreign countries, and from demanding from any of the complainants or suing any of them for any fees of compulsory inspection of such flour under said act No. 71 of 1870, extra session." From this decree defendants prosecuted an appeal to this court.

Note.—*As to when a judgment at law will be enjoined by a bill in equity*, see note to Davis v. Tileston, 12: 366.

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Upon the submission of the case, it appearing that the act complained of as unconstitutional was repealed June 28, 1892, we were of opinion that the case came within the rule laid down in *Mills* v. *Green*, 159 U. S. 651 [*ante*, 293], and the appeal was accordingly dismissed. 160 U. S. 170 [*ante*, 382].

Our attention has been since called by counsel to the fact that the decree was so broad as to restrain defendants from testing at law their right to recover fees prior to the date when the repealing act went into effect, which restraint was of course left in force by the dismissal of the appeal. We should not, therefore, have entered the order of dismissal, but it is equally clear that the bill cannot be maintained for an injunction against bringing actions at law if appellants should be so advised.

The order hereinbefore entered dismissing the appeal will therefore be vacated and the decree reversed, without costs to either party, and the cause remanded to the circuit court with a direction to dismiss the bill.

Ordered accordingly.

104] EUGENE BEEBE ET AL., *Plffs. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 104-115.)

Lien of judgment—sale of land—alias execution—original execution—conveyance by debtor—levy—presumption.

1. In Alabama a judgment in itself imposes no lien upon the property of the judgment debtor, real or personal, but the issue of an execution and its delivery to the officer are necessary to create a lien.
2. A sale of land under an alias execution in Alabama which was duly issued on the return of a prior valid execution relates back and defeats a conveyance by the judgment debtor made after the prior original execution was delivered to the officers, and before the sale.
3. The presumption is that alias executions were preceded by others regularly issued.
4. In Alabama, where an execution comes to the hands of the sheriff the lien attaches and continues from term to term, provided alias and pluries writs are duly issued and delivered; and while it is so kept alive the lien is, upon levy and sale, paramount to any intermediate conveyance of the debtor.
5. The fact of the levy of an original execution does not make a sale under an alias execution issued and levied on the same property invalid.
6. The presumption is that an execution was rightly issued, nothing appearing to the contrary, although issued before the expiration of the time, in a consent for stay of execution indorsed on the judgment record, where the judgment debtor was notified of the levy and did not complain that the execution was premature.
7. An execution is not absolutely void because issued during the period for which a stay had been agreed upon,—especially when this agreement is a mere memorandum which does not form part of the judgment and therefore a sale under such execution is valid as against persons claiming under the judgment debtor where he takes no steps to quash the execution or to vacate the levy.

[No. 71.]

Argued November 18, 1895. Decided March 2, 1896.

IN ERROR to the Circuit Court of the United States for the Middle District of Alabama to review a judgment in favor of plaintiff, the United States, against Eugene Beebe *et al.*, defendants, for the recovery of land. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was an action "in the nature of ejectment," as so denominated in the Alabama Code, brought by the United States against Eugene Beebe, Sims Phillips, and Adeline Thomas for the recovery of an undivided one-fourth interest in a tract of land known as the Montgomery race track, containing 80 acres, in the circuit court of the United States for the middle district of Alabama. Beebe defended as landlord, and Phillips and Thomas were his tenants. Trial was had, a verdict rendered for plaintiffs, and judgment entered thereon accordingly. On the trial plaintiffs put in evidence a deed executed by Josiah Morris and wife, June 14, 1873, to Eugene Beebe and Ferrie Henshaw of an undivided one half of the 80 acres in question, of which it was admitted Morris was seised and possessed at that date. The records *of two sepa [105 rate judgments recovered in favor of the United States against Beebe and others, December 19, 1876, at the regular November term, 1876, of the circuit court of the United States for the middle district of Alabama, for the sums respectively of $991 and $1,638.68, were put in evidence. The consideratum clause in each instance concluded, "for which let execution issue." Above the record of each judgment appeared the amount thereof in figures, followed by the words: "Stay of ex. till 25th March, 1877. R.;" and at the foot of each judgment were these words: "And by consent execution is stayed until the 25th of March, A. D. 1877."

Two alias executions issued on said judgments May 10, 1877, "with the indorsements thereon," were put in evidence. They ran in one of the forms of an alias writ, "Again you are hereby commanded," and were entitled on the back, "Alias fi. fa." Each had indorsed upon it (in almost verbally identical words) the following:

Received in office January 23d, 1877.
Geo. Turner, U. S. Marshal.

To satisfy the within execution I have levied, this 5th day of April, 1877, on an undivided half interest in the following described property, to wit: . . .

2nd. The tract of land known as the Montgomery race track, near Montgomery, containing 80 acres, more or less. . . .

Notice in writing given the defendant.
Geo. Turner, U. S. Marshal.

. . . . . .

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Returned for alias, not advertised and sold for want of time. April 6th, 1877.

Geo. Turner, U. S. Marshal.
P'r F. J. Jost, Dep.

Below these indorsements, on each writ, the clerk of the court certified, under his hand and 106]seal, May 10, A. D. 1877, *"the foregoing page to contain a true copy of the return of the marshal on the execution issued next last preceding this in the aforesaid cause as the same appears of record and on file in my office as clerk of said court."

There was also indorsed on each writ, "Received in office May 10, 1877," which included said tract of land.

On the execution for $1,688.68 appeared this return:

"The property of the defendant Beebe, herein described [certain property being named as excepted], was, on the second day of July, 1877, sold to the United States for $1,000, and deed made to the United States for the same.

"Geo. Turner, U. S. Marshal."

Plaintiffs then introduced in evidence a deed of the United States marshal to the United States, dated July 2, 1877, and duly acknowledged and recorded, reciting the levy of execution on the property and the sale thereof on that date, after due advertisement, to the United States, as the highest and best bidder, and conveying all Beebe's interest in the tract.

Defendants offered in evidence a deed from Beebe to Henshaw, dated March 22, and acknowledged and recorded March 23, 1877. This instrument recited that a copartnership had existed between Beebe and Henshaw, under the name of E. Beebe & Co.; that Beebe would be found on the settlement of the affairs of the firm to be indebted to it, and also to Henshaw for moneys advanced and paid out by him in excess of his proportion as partner, the precise amount of which could not be ascertained until the debts of the firm were paid and a settlement had between Beebe and Henshaw; that Beebe and Henshaw were owners as partners of real and personal property, which was enumerated, and included an undivided half interest in a tract of land called the "old Montgomery race track;" and, therefore, "to protect and secure" the creditors of the firm and to enable Henshaw "the more easily and readily" to settle and pay its debts and "to protect and secure" Henshaw for moneys paid out and advanced for the firm in excess of his proportion, and "to protect and secure him" for all moneys that Beebe might 107]owe the firm or *Henshaw on a settlement between them of the firm's affairs, Beebe conveyed all his interest in the property described, as partner or otherwise, to Henshaw, "in trust, to sell the same at such times and places and on such terms, for credit or for cash, or for part cash and part credit, at private or public sale, as the best interests of the said creditors of said firm and of him and myself as he may determine, and to apply the proceeds thereof to the payment of the debts of the said firm, and to the payment of what I may be found indebted to said firm or to said Ferrie Henshaw on the settlement between us of the affairs and business of said firm, and if any excess should remain in his hands from the sale of said property after the payment of said debts of said firm and of what I may owe the said firm or owe him on the said settlement of the business and affairs of said firm, then he shall pay back to me such excess; and if there should remain in his hands any of said property not required to be sold for the purposes aforesaid, then on such final settlement between us he shall reconvey the same to me, my heirs, or assigns."

Plaintiffs objected to the introduction of this deed in evidence on the grounds, among others, that it "is void upon its face," and that it "sets up no claim superior to the title of the United States acquired at the execution sale." Beebe was then sworn as a witness, and defendants proposed to prove by him that at the time of the execution of the deed offered in evidence Beebe and Henshaw were in copartnership; that at that date the partnership was indebted to various persons in amounts aggregating $40,000, and Beebe was indebted to Henshaw about $2,000 individually, and also about the same sum on account of partnership matters; that the property was purchased while Beebe and Henshaw were partners, and was purchased with partnership assets; that the deed had been delivered to and accepted by Henshaw; but defendants admitted that Henshaw had never sold any of the property conveyed by the deed, and that nothing had been done thereunder. The court sustained plaintiff's objection to the introduction of the deed, and refused to allow the same to be read in evidence, and defendants*excepted. There-[108 upon plaintiffs offered in evidence a deed by Henshaw to Beebe, dated February 23, 1878, which recited that the debts and business affairs of the partnership had been fully settled without the necessity of having to sell any of the property for that purpose, and, therefore, Henshaw reconveyed to Beebe an undivided one-half interest in and to the property. In that connection defendants "proved" (offered to prove) that after March 22, 1877, Henshaw became incapable of attending to business; and that thereupon Beebe procured Henshaw to execute the deed of February 23, 1878, at which time the debts and business affairs of the partnership had not in fact been settled and paid.

The court instructed the jury that "if they believed the evidence the plaintiff was entitled to recover the land sued for in the complaint filed in this cause."

The following errors were assigned: "(1) The rejection of the deed executed by the plaintiff, Eugene Beebe, to Ferrie Henshaw on the 22d day of March, 1877, offered in evidence by the plaintiffs in error, conveying to said Henshaw the property involved in this cause. (2) The rejection of said deed, offered in evidence by the plaintiffs in error, in connection with the facts the plaintiffs in error proposed to prove by the testimony of the said Eugene Beebe. (3) The rejection of the testimony of said Eugene Beebe, offered by the plaintiffs in error in connection with said deed and to support the same. (4) The charge of the court to the jury 'that if they believed the evidence the plaintiff was entitled to recover the land sued for in this cause.'"

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Messrs. **H. C. Tompkins** and *H. S. Cattell*, for plaintiffs in error:

Where a plaintiff claims under a sale under execution, the burden is upon him to prove that defendant had an estate or interest in the lands which were subject to such execution; and, necessarily, if he makes out a prima facie case, defendant may rebut it by showing he had no such title. There is no estoppel against defendant.

Doe, Davis, v. *McKinney*, 5 Ala. 719; *Elmore* v. *Harris*, 18 Ala. 360; *Doe, Cook*, v. *Webb*, 18 Ala. 810; *You* v. *Flinn*, 34 Ala. 409; *Smith* v. *McCann*, 65 U. S. 24 How. 398 (16: 714); *Badham* v. *Cox*, 11 Ired. L. 456; *Dickinson* v. *Smith*, 25 Barb. 102; *Westheimer* v. *Reed*, 15 Neb. 662; *McArthur* v. *Oliver*, 60 Mich. 606.

When the United States go into court as plaintiffs they have no other or greater right than any citizen who is a plaintiff.

Mitchel v. *United States*, 34 U. S. 9 Pet. 711 (9: 283); *United States* v. *The Siren* ("*The Siren*") 74 U. S. 7 Wall. 159 (19: 181); *United States* v. *Beebee*, 17 Fed. Rep. 36.

The rights of judgment creditors in the Federal courts are the same as those of judgment creditors in the state courts, and in determining whether a judgment is a lien upon property, or what interest in property can be sold under execution, we are to look to the statutes of the state in which the Federal court rendering the judgment sits.

U. S. Rev. Stat. §§ 914, 967; *United States* v. *Morrison*, 29 U. S. 4 Pet. 124 (7: 804); *Williams* v. *Benedict*, 49 U. S. 8 How. 107 (12: 1007); *Ward* v. *Chamberlain*, 67 U. S. 2 Black, 430 (17: 319).

In Alabama, from the adoption of the Code of 1852 to the enactment of the act of February 28, 1887, making a recorded judgment a lien, judgments were not liens on the defendant's property, either real or personal.

Daily v. *Burke*, 28 Ala. 328; *Curry* v. *Landers*, 35 Ala. 280; *Dane* v. *McArthur*, 57 Ala. 448; *Walker* v. *Elledge*, 65 Ala. 52; *Enslen* v. *Wheeler*, 98 Ala. 200.

The deed offered in evidence by the defendants and excluded on the objection of plaintiffs, grants, bargains, sells, and conveys to Henshaw all of Beebe's interest and estate in the property described. The use of these words very clearly operated to devest out of Beebe his entire legal title and interest in the lands.

4 Kent, Com. *461; *Jones* v. *Reese*, 65 Ala. 134; *Chapman* v. *Abrahams*, 61 Ala. 108; *Chambers* v. *Ringstaff*, 69 Ala. 140.

An interest in lands which may be levied on under execution under the laws of Alabama is where the defendant has a perfect equity, having paid the purchase money.

Shaw v. *Lindsey*, 60 Ala. 344; *Smith* v. *Cockrell*, 66 Ala. 64; *Goodbar* v. *Daniel*, 88 Ala. 583.

Where the instrument conveys property to a trustee to apply the same, or the proceeds thereof, to the payment of some or all of his debts and to return the surplus, if any, to the debtor, it passes all of the grantor's title, legal and equitable, and leaves in him no equity of redemption whatever.

Martin v. *Hausman*, 14 Fed. Rep. 160; *Briggs* v. *Davis*, 21 N. Y. 574; *Hoffman* v. *Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637; *Mills* v. *Williams*, 31 Mo. App. 447; Burrill, Assignments, 6th ed. § 8.

If the facts offered to be proved were true, the property was subject to the payment of those partnership debts, and to what might be due the copartner on a settlement of the partship, before any of it could have been appropriated to the payment of the individual debts of Beebe.

United States v. *Hack*, 33 U. S. 8 Pet. 271 (8: 941); *Claggett* v. *Kilbourne*, 66 U. S. 1 Black, 346 (17: 213); *Shanks* v. *Klein*, 104 U. S. 18 (26: 635); *Emanuel* v. *Bird*, 19 Ala. 596, 54 Am. Dec. 200; *Abraham* v. *Janney*, 102 Ala. 431, 28 L. R. A. 161; *Donelson* v. *Posey*, 13 Ala. 752; *Andrews* v. *Brown*, 21 Ala. 437, 56 Am. Dec. 252.

Until the lien, in execution of which the sale was made, attached, Beebe had full dominion over his property, and could alienate it, unincumbered by any lien, to a purchaser.

Adler v. *Fenton*, 65 U. S. 24 How. 407 (16: 696); *Morsell* v. *First Nat Bank*, 91 U. S. 357 (23: 436); *Gamble* v. *Fowler*, 58 Ala. 576; *Lovelace* v. *Webb*, 62 Ala. 271, 282.

Where the assignment is of partnership property to pay partnership debts, the statute gives the United States no priority over partnership creditors; on the contrary, the courts recognize that their claims are prior to that of the government.

United States v. *Hack*, *supra*.

If the government did under the statute obtain a right to priority of payment out of the property assigned, that would give it no right to enforce the payment by sale under execution.

United States v. *Hooe*, 7 U. S. 3 Cranch, 73 (3: 370); *Prince* v. *Bartlett*, 12 U. S. 8 Cranch, 431 (3: 614); *Thelusson* v. *Smith*, 15 U. S. 2 Wheat. 396 (4: 271); *Lewis* v. *United States*, 92 U. S. 618 (23: 513).

If the defendant at the time of the sale, or at the time the lien, in the enforcement of which the sale was made, attached, did not have such an interest in the property as could be sold under execution, and such a legal title as will support ejectment, then no subsequently acquired title of the defendant will inure to the benefit of such purchaser.

Doe, Cook, v. *Webb*, 18 Ala. 810; *Badham* v. *Cox*, 11 Ired. L. 456; *Westheimer* v. *Reed*, 15 Neb. 662; *Bates* v. *Bacon*, 66 Tex. 348; *Pratt* v. *Phillips*, 1 Sneed, 543, 60 Am. Dec. 162; *McArthur* v. *Oliver*, 60 Mich. 606.

Messrs. **J. M. Dickinson**, Assistant Attorney General, and *George H. Patrick*, for defendants in error:

The levy fixed upon the legal title to the property in question, which was alive when the deed in question was made and which continued in force, so that the subsequent sale related back and devested all legal title out of Beebe and overrode his deed to Henshaw.

Daley v. *Perry*, 9 Yerg. 444.

Courts have the power at any time to quash executions irregularly issued, but a motion must be made and presented with diligence, and any considerable delay will be treated as a waiver.

Henderson v. *Henderson*, 66 Ala. 556.

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An application made after seven years, without explanation or excuse, was held to come too late.

Steele v. *Tutwiler*, 68 Ala. 107; *Hapgood* v. *Goddard*, 26 Vt. 401.

An execution prematurely issued is not void. It is merely irregular and voidable, and must be respected and enforced until set aside on motion.

Lynch v. *Kelly*, 41 Cal. 232; *Scribner* v. *Whitcher*, 6 N. H. 63, 23 Am. Dec. 708; *Allen* v. *Portland Stage Co.* 8 Me. 209; *Cody* v. *Quinn*, 6 Ired. L. 193, 44 Am. Dec. 75; *Shelton* v. *Pitts*, Phil. L. 178, 93 Am. Dec. 586; *Rosenfield* v. *Palmer*, 5 Daly, 318; *Stewart* v. *Stocker*, 13 Serg. & R. 199, 15 Am. Dec. 589; *Lowber & W.'s Appeal*, 8 Watts & S. 389, 42 Am. Dec. 302; *Wilkinson's Appeal*, 65 Pa. 190; *Carpenter* v. *Mechanics' Sav. Bank*, 1 Lea, 202; *Miller* v. *O'Bannon*, 4 Lea, 398; *Dawson* v. *Daniel*, 2 Flip. 305; *Blaine* v. *The Charles Carter*, 8 U. S. 4 Cranch, 331 (2:638).

In Alabama, where an execution is issued and comes to the hands of the sheriff the lien attaches, and even without a levy this lien continues from term to term, provided alias and pluries executions issue without a term elapsing, and a lien so kept alive is upon levy and sale under such execution, paramount to any intermediate conveyance by the judgment debtor.

Toney v. *Wilson*, 51 Ala. 501; *Parks* v. *Coffey*, 52 Ala. 32; *Hendon* v. *White*, 52 Ala. 597; *Gamble* v. *Fowler*, 58 Ala. 576; *Childs* v. *Jones*, 60 Ala. 352; *Carlisle* v. *May*, 75 Ala. 504; *Perkins* v. *Brierfield Iron & C. Co.* 77 Ala. 409.

If the levies did not avail to fix a lien on the legal title of Beebe, nevertheless, when alias executions issued and were levied, he had such an equitable interest as was subject to levy by the laws of Alabama; and plaintiff, having acquired this interest, can sustain an action of ejectment.

Cotton v. *Carlisle*, 85 Ala. 175; *Shaw* v. *Lindsey*, 60 Ala. 344; *Smith* v. *Cockrell*, 66 Ala. 64; *Goodbar* v. *Daniel*, 88 Ala. 583.

The supreme court of Alabama was not controlled by the technical distinction between assignments and mortgages, or deeds of trust.

Watts v. *Eufaula Nat. Bank*, 76 Ala. 477; *Warren* v. *Lee*, 32 Ala. 440; *Longmire* v. *Goode*, 38 Ala. 577; *DuBose* v. *Carlisle*, 51 Ala. 592; *Danner* v. *Brewer*, 69 Ala. 191; *Anniston Carriage Works* v. *Ward*, 101 Ala. 674.

The deed to Henshaw was not an absolute assignment for the benefit of creditors, which left no equitable right in him, but it was a deed of trust in the nature of a mortgage, which left in him an equity of redemption.

Hargadine v. *Henderson*, 97 Mo. 375; *Cooper* v. *Brock*, 41 Mich. 488; *Danner* v. *Brewer*, 69 Ala. 199.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

109] *The exception saved by defendants was to the refusal of the court to admit the deed of March 22, 1877, in evidence, and the first three errors assigned may be considered together.

It is the settled law of Alabama that a judgment in itself imposes no lien upon the property of the judgment debtor, real or personal, but that the issue of an execution and its delivery to the officer are necessary to create a lien. *Dane* v. *McArthur*, 57 Ala. 448; *Carlisle* v. *Godwin*, 68 Ala. 137; *Perkins* v. *Brierfield Iron & C. Co.* 77 Ala. 409.

Under Ala. Code 1867, § 2871, applicable here, executions could be levied on real property to which the defendant had a legal right or a perfect equity, having paid the purchase money, or in which he had a vested legal interest in possession, reversion, or remainder, whether he had the entire estate or was entitled to it in common with others; on personal property of the defendant; on an equity of redemption in land or personal property.

The deed of Morris of June 14, 1873, to Beebe and Henshaw, "their heirs and assigns," conveyed an undivided one-half interest in the lands to the grantees and vested in each of them an undivided one-fourth interest as tenants in common. This was so held in *Southern Cotton Oil Co.* v. *Henshaw*, 89 Ala. 448, 451, and that "this being the case, although a partnership existed between Beebe and Henshaw, upon the death of the latter the legal title of his undivided one-fourth interest descended to, and vested in, his heirs, also as tenants in common with each other and with Beebe."

Defendants conceded legal title in Beebe, but by way of answering the objection to the instrument of March 22, 1877, as on its face lacking in good faith, evidence was tendered to show that the real estate was purchased with partnership funds, though not for partnership purposes. *Hatchett* v. *Blanton*, 72 Ala. 423, 435; Parsons, Partn. *365.

The evidence in this regard, such as it was, was offered in connection with the question of the admissibility of the deed of March 22, 1877, and the action of the court to which an exception was saved was solely to the refusal to permit that deed to be introduced.

*If valid executions were issued and **[110** delivered to the marshal as early as January 23, 1877, and, on return, alias executions were issued and duly levied, then the subsequent sale related back and took the legal title out of Beebe, prior to March 22, 1877, so that the deed of the latter date was immaterial, and there was no error in refusing to admit it.

It is argued that the only executions shown by the record to have been issued on the judgments were those of May 10, 1877, but we do not think so. The executions of that date were alias writs, and the presumption is that they were preceded by others regularly issued. *Sellers* v. *Hayes*, 17 Ala. 749; *Pollard* v. *Cocke*, 19 Ala. 188. But the fact did not rest upon presumption, for these writs bore the indorsements of the receipt by the marshal, January 23, 1877, of the previous writs; their levy on the property in question, April 5, 1877; and their return April 6, 1877, for want of time to advertise the sale. And the return of the marshal covering the date of the receipt and the levy of the prior writs was duly indorsed upon the alias writs and certified to by the clerk of the court under his hand and seal. All this was admitted in evidence without objection, and if defendants desired to raise the objection that the original executions ought to be

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produced, they should have done so then, when, if well founded, the objection could have been removed.

The Code of 1867 provided that the clerk should issue executions as soon after the adjournment of the court as practicable, within the time prescribed, namely, if the session was one week, within ten days; if two weeks, within fifteen days; if three or more weeks, within twenty days; the day, month, and year of its receipt was required to be indorsed thereon; return to be made three days before the first day of the return term, which was the next term after its date, unless issued less than fifteen days before court, and then the term next thereafter; and the reason for its nonexecution in whole or in part was required to be stated in the return. §§ 2838, 2839, 2851-2854.

Sections 2872 and 2873 were as follows:

"Sec. 2872. A writ of fieri facias is a lien only 111] within the *county in which it is received by the officer, on the land and personal property of the defendant subject to levy and sale from the time only that the writ is received by the sheriff; which lien continues as long as the writ is regularly issued and delivered to the sheriff without the lapse of an entire term.

"Sec. 2873. The liens of executions as between different judgment creditors, and between judgment creditors and purchasers from the defendant for valuable consideration, are hereby declared to be: That if an entire term elapse between the return of an execution and the suing out of an alias, the lien created by the delivery of the first execution to the sheriff is lost; but if an alias be sued out before the lapse of an entire term, and delivered to the sheriff before the sale of property under a junior execution, the lien created by the delivery of the first execution must be preferred."

The regular terms of the circuit court of the United States for the middle district of Alabama began on the 1st Monday of November, 1876, and the 1st Monday in May, 1877, and these writs were issued, delivered, and levied without the lapse of an entire term as specified in the statute. *Carlisle* v. *May*, 75 Ala. 502. According to the settled rule in Alabama where an execution comes to the hands of the sheriff, the lien attaches and continues from term to term provided alias and pluries writs are duly issued and delivered; and, while it is so kept alive, the lien is, upon levy and sale, paramount to any intermediate conveyance of the debtor. *Parks* v. *Coffey*, 52 Ala. 32; *Hendon* v. *White*, 52 Ala. 597; *Childs* v. *Jones*, 60 Ala. 352; *Perkins* v. *Brierfield Iron & C. Co.* 77 Ala. 403, 410; *Massingill* v. *Downs*, 48 U. S. 7 How. 760, 767 [12: 903, 906].

The original executions here had been duly issued and levied but returned for want of time to advertise and sell. The alias writs were then taken out, and apparently a new levy and sale made thereunder. In some jurisdictions a formal venditioni exponas might have been issued, but these alias writs with their indorsements thereon of the prior levy were quite as efficacious, and the sale could be sustained as made under the original or new levy.

112] *In *Dryer* v. *Graham*, 58 Ala. 623, 626, the supreme court of Alabama said: "It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of venditioni exponas. If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a venditioni exponas is the proper writ. The venditioni exponas continues the lien of the execution which has been levied, as to the property on which the levy was made, whether the property be real or personal. The writ is, indeed, merely for the continuation and completion of the original execution. And if its mandate is for the sale of land on which there has been a previous levy, it not only compels a sale, but confers the authority to sell, and the title of the purchaser has relation to the date of the lien of the execution. . . . A venditioni exponas is in its nature and operation, as to the property on which the levy may have been made, an alias execution. It merely commands and authorizes, as to real estate, the completion of the execution already begun."

Certainly this sale was none the less valid because there had been a levy of the original writs, and alias executions were issued and levied on the same property.

But it is contended on behalf of plaintiffs in error that no executions could have issued until March 25, 1877, by reason of the memoranda on the judgment records that "by consent execution is stayed until the 25th day of March, A. D. 1877."

Assuming that the consent for a stay was given by some one acting for the government, although that does not appear, yet from the fact that executions were issued before the expiration of the time, the presumption would be reasonable, nothing appearing to the contrary, that they were rightly issued, and that either the agreement lacked consideration, or was not authorized, or had been by mutual assent annulled, or that the terms of the agreement had not been complied with by defendants.

The supreme court of Mississippi held in *Jones* v. *Bailey*, 5 How. (Miss.) 564, where plaintiffs agreed to stay of execution for a certain time, "unless defendants consent for its issuance *sooner," and execution was is- [113 sued without regard to the agreement and property sold, that the presumption was that it issued with the consent of defendants.

The marshal's return on the original writs showed that notice of the levy thereof was given Beebe in writing as required by statute (§ 2857); and the fact that he did not complain that the executions had been issued contrary to agreement renders the presumption that they were not obnoxious to that objection well nigh, if not altogether, unanswerable.

Aside from this, as the executions were in fact issued and received by the marshal January 23, 1877, the question thus suggested would be whether the executions were voidable or absolutely void, if the consent for a stay was lawful and the executions were taken out in violation thereof.

In Freeman on Executions (2d ed.) §§ 25, 26 *et seq.*, a text book cited and relied on in numerous decisions of the supreme court of Alabama, it is said that the decided preponderance of authority is in favor of the proposition that the premature issue of an execution is an irregularity merely; that the execution is

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erroneous but must be respected and may be enforced until it is vacated in some manner prescribed by law; that no one but the defendant can complain of it, and even he cannot do so in any collateral proceeding. And among other cases, *Blaine* v. *The Charles Carter*, 8 U. S. 4 Cranch, 328 [2: 636], is cited, which was decided by *Chief Justice* Marshall on circuit and his decree affirmed by this court, *Mr. Justice* Chase delivering the opinion. In that case, under an act of Congress providing that "until the expiration of ten days, execution shall not issue," certain executions were collaterally objected to on the ground that they were issued within ten days, and the court said: "If irregular the court from which they issued ought to have been moved to set them aside; they were not void, because the marshal could have justified under them, and if voidable, the proper means of destroying their efficacy have not been pursued." So, an execution issued after a year and a day is voidable, but not void; even the defendant cannot attack it collaterally; and a levy and sale, made under it, are suffi-**114**] cient to transfer his *title. Freem. Executions, § 29. In *Brevard* v. *Jones*, 50 Ala. 221, 242, this was so held, and the court remarked: "It can make no difference if the plaintiff in execution is the purchaser, because the question is not one of notice, but of the status of the execution."

In *Steele* v. *Tutwiler*, 68 Ala. 107, 110, the supreme court of Alabama referred to *Morgan* v. *Evans*, 72 Ill. 586, 22 Am. Rep. 154, which ruled that an execution was not void, but voidable where it issued on a dormant judgment after the time limited by statute; and *Stewart* v. *Stocker*, 13 Serg. & R. 199, 15 Am. Dec. 589, where a similar ruling was made in respect of an execution issued on a judgment confessed prematurely, contrary to the terms of a bond; and the court said: "In all such cases, though the execution may be erroneous and irregular, it must be respected and enforced until vacated by a motion to quash, or in some other manner prescribed by law. Freem. Executions, § 25. And it is the duty of the party seeking to take advantage of irregularities or defects of this character to move with proper diligence at the earliest opportunity. Undue laches is treated as a waiver of the right, and operates as an irrevocable renunciation of it. Freem. Executions, §§ 76, 80. And after a delay of seven years in this case, without explanation or excuse, we think the motion comes too late." And to the same effect see *Henderson* v. *Henderson*, 66 Ala. 556, 558. Again, it is held that executions issued contrary to agreement between the parties are subject to the same rules as other premature executions. In *Cody* v. *Quinn*, 6 Ired. L. 193, 44 Am. Dec. 75, it was decided that a memorandum made on the docket, with the consent of the parties by the clerk, "No fi. fa. to issue until October or until ordered," was no part of the judgment, and if execution were issued before then it was not void. In *Townsend* v. *Fontenot*, 42 La. Ann. 890, which was a suit to restrain the execution of a judgment recovered in a suit to enforce payment of certain notes with recognition of a mortgage and vendor's privilege, the judgment contained the following statement, prepared and written by plaintiff's counsel, and inserted by plaintiff's instructions: "The attorney of plaintiff in this suit declares he has been instructed not to seize or sell said *property before the end [**115** of the year;" and it was held to operate a stay of execution.

But in the case in hand the judgment records are complete and perfect in themselves, and executions were thereby ordered to issue. The entries as to stay purported to be memoranda of an agreement of counsel were evidently placed where they were as memoranda merely, and did not form part of the judgments. Even if the entries could be treated as the act of the court, and the executions were improperly issued, which is not to be presumed under the circumstances disclosed by this record, they would not have been absolutely void and incapable of being validated.

So far as appears, Beebe never took any steps to quash the executions or to vacate the levy, if any ground existed for doing so, and the evidence that they issued and were levied was admitted without objection on the trial. We regard the position now taken on his behalf as destitute of merit. The circuit court properly excluded the deed of March 22, 1877, and, this being so, no error was committed in the charge to the jury.

Judgment affirmed.

Mr. Justice **Gray**, who was not present at the argument, and *Mr. Justice* **Peckham**, who was not then a member of the court, took no part in the decision.

STEPHEN W. CAREY ET AL., *Appts.*,

v.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 115-133.)

Question of jurisdiction—ancillary suit—jurisdiction therein.

1. No question of jurisdiction over a foreclosure sale or the rendition of a decree therein can be availed of in a subsequent suit to annul the decree for fraud as a question of jurisdiction which can be certified for the purpose of a direct appeal from the circuit court to the Supreme Court of the United States.

2. Where the United States circuit court had jurisdiction of a foreclosure suit only upon the ground of diverse citizenship, a suit to vacate the decree therein for collusion and fraud is an ancillary suit and a continuation of the main suit, and the jurisdiction of that court over it rests on the jurisdiction over the main suit, and depends entirely on diverse citizenship; and the

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor,—see note to M'Donald v. Smalley, 7: 287.

As to jurisdiction of United States courts over common-law offenses, see note to United States v. Coolidge, 4: 124.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37: 267.

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decree of the circuit court of appeals therein is final under the act of March 3, 1891, § 6, and an appeal therefrom cannot be taken to this court.

[No. 642.]

Submitted December 23, 1895. Decided March 2, 1896.

APPEAL from a decree of the Circuit Court of Appeals for the Fifth Circuit dismissing an ancillary suit brought by Stephen W. Carey *et al.*, plaintiffs, against the Houston & Texas Central Railway Company *et al.*, to vacate a certain decree and a sale thereunder of the property of said company, rendered in a foreclosure action. *On motion to dismiss. Dismissed.*

See same case below, 45 Fed. Rep. 438, 52 Fed. Rep. 671, and same case 150 U. S. 170 [37: 1041].

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill filed by Carey, a citizen and resident of New Jersey, and seven other persons, citizens and residents of New York and citizens of Great Britain, respectively, as stockholders of the Houston & Texas Central Railway Company, in their own behalf and in behalf of all others similarly situated, in the circuit court of the United States for the eastern district of Texas, against the Houston & Texas Central Railway Company, No. 1, a corporation created by and existing under the laws of the state of Texas and a citizen of that state, residing in the eastern district; the Houston & Texas Central Railway Company, No. 2, likewise a citizen of Texas and a resident of the eastern district; the Central Trust Company of New York, a citizen of New York; the Farmers' Loan & Trust Company of New York, as trustee, a citizen of New York; Nelson S. Easton and James Rintoul, as trustees, citizens and residents of New York; Benjamin A. Shepherd, trustee, a citizen of Texas; and many other persons and corporations, citizens of New York, Kentucky, Texas, and Louisiana; to impeach and vacate a certain decree of the circuit court entered in the consolidated cause hereafter mentioned.

The Houston & Texas Central Railway Company was a corporation and citizen of the state of Texas and a resident of the eastern district of that state, owning a railway consisting of a main line from Houston to Dennison; a line from Hempstead to Austin, called the Western Division; and a line from Bremond to Ross, known as the Waco & Northwestern Division; and a large quantity of lands acquired from the state. The property of the company was subject to the lien of seven mortgages, known as **117**] the main line first *mortgage, Western Division first mortgage, Waco & Northwestern Division first mortgage, Main Line and Western Division consolidated mortgage, Waco & Northwestern Division consolidated mortgage, income and indemnity mortgage, and general mortgage. The company made default January 1, 1885, in the payment of interest on its main line first mortgage bonds and its Western Division first-mortgage bonds. On February 11, 1885, Nelson S. Easton and James Rintoul, citizens and residents of the state of New York, trustees under the main line first mortgage and Western Division first mortgage, filed their two bills in equity in the circuit court of the United States for the eastern district of Texas against the Houston & Texas Central Railway Company as a corporation and citizen of the state of Texas for the purpose of enforcing the trust provided in the mortgages, protecting the trust property, obtaining proceedings for the sale of certain lands covered by the mortgages, and for other relief; and prayed for an accounting, an injunction, a decree of sale of part of the trust property, and for a receiver. These suits were numbered 183 and 184 on the equity docket. The railway company appeared and answered these bills.

On February 16, 1885, the Southern Development Company, a corporation organized under the laws of California and a citizen and resident of that state, in its own behalf and in behalf of all other persons similarly situated, who might intervene in the suit to protect their own interests, filed its bill of complaint in the circuit court against the railway company as a corporation organized under the laws of Texas, alleging among other things that it was a creditor of the defendant for large sums advanced for supplies, labor, operating, and managing expenses, and other necessary expenses, which defendant had promised to pay out of its earnings; that the indebtedness was in equity a charge upon defendant's income and property; that there had been a diversion of the income and that by reason thereof a lien had resulted in complainant's favor which it was entitled to have enforced. The bill alleged the absolute insolvency of the railway company, and that loss and injury would be occasioned by a sale of the property *in parcels, and prayed for the[**118** appointment of receivers and the payment of complainant's claim out of the rents, revenues, and earnings of the property. The railway company appeared in this suit, which was numbered 185, and on February 20, 1885, an order was made by the circuit court appointing Benjamin G. Clark and Charles Dillingham joint receivers of all the property, real and personal, of said company. On the succeeding 20th of April, the Southern Development Company amended its bill, making Nelson S. Easton and James Rintoul, trustees, the Farmers' Loan & Trust Company, a corporation and citizen of the state of New York, and Benjamin A. Shepherd, trustee under the income and indemnity mortgage, a citizen of Texas, and a resident of the eastern district of that state, defendants thereto, and praying that accounts might be taken, liens and encumbrances marshaled, net earnings applied, and if the amounts realized should not be sufficient for the payment of the claim, that the property should be sold for that purpose. The railway company answered the bill on its merits, and the defendants Easton and Rintoul, trustees, filed demurrers.

March 18, 1885, the Farmers' Loan & Trust Company, a corporation and citizen of New York, filed its bill in equity in the circuit court against the railway company, which was numbered 188 on the equity docket, alleging that it was the trustee under the Waco & Northwestern Division first and consolidated mortgages, and the Main Line and Western Division

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consolidated mortgages; that the mortgagors had violated many of their agreements and that default had been made in the payment of interest; that the company was insolvent; that the suits hereinbefore-mentioned were pending; that the trust property was in jeopardy; and it prayed for an accounting, injunction, and a decree of sale of part of the trust property and for a receiver of all the property of every description of the railway company, with the usual powers. The railway company answered this bill on the merits, June 22, 1885.

The circuit court made three orders on May 7, 1885, in these cases: In No. 185, as to sales of lands and their proceeds, and directing the re-[119]ceivers to account; in Nos. 183 and *184; making that order applicable to those cases, and in No. 188, making the same order as to that case.

January 21, 1886, Easton and Rintoul, trustees in the two mortgages involved in Nos. 183 and 184, citizens of the state of New York, filed two other bills in equity for the foreclosure and sale of the railway property covered by those mortgages; that to foreclose the main line first mortgage was numbered 198, and that to foreclose the Western Division first mortgage was numbered 199. In No. 198 complainants made the Houston & Texas Central Railway Company and Benjamin A. Shepherd, a citizen and resident of Texas, and trustee under the income and indemnity mortgage, defendants, and as to the Farmers' Loan & Trust Company averred that as trustees under the mortgages or deeds of trust, "hereinafter described, that company would be found benefited by, and it is to their advantage that, the judgment and relief hereinafter prayed for, or some part thereof, should be granted to your orators. That said property covered by the said first mortgage on said main line, as well as all the other property, assets, and effects of said railway company, being now in the hands of this court, by the receivership existing in respect of the same, and your orators thereby being required by law to institute this action in this court and to come before this tribunal, in order to reach the property in its possession, and to obtain its rights concerning the same, and all the parties interested in the property covered by said mortgage on the main line, as well as all the other mortgages and property of said railway company, being now before the court in said actions hereinbefore described as Nos. 183, 184, 185, and 188, on the equity docket of this court, the said Farmers' Loan & Trust Company may and should be made a party defendant in this cause irrespective of its citizenship. And said corporation should be brought in as a defendant herein by the order and direction of this court, and should be bound by the judgment and proceedings herein."

The record does not show that this company was made a defendant or appeared at this stage of the proceedings.

In No. 199 the same parties were joined as de-[120]fendants and *a like averment made as to the Farmers' Loan & Trust Company. Process was issued under both of these bills against the railway company and Shepherd, trustee, and duly served upon them. Thereafter, and on April 24, 1886, the Farmers' Loan & Trust Company filed a bill in equity in the circuit court for the foreclosure of the general mortgage, which was numbered 201. The railway company was made sole party defendant, and the bill prayed for a sale of all the property of the railway company to satisfy the mortgage debt. Process was issued and served.

On May 26, 1886, an order was entered by *Mr. Justice* Woods and the circuit judge in the six suits upon the mortgages, whereby it was ordered, adjudged, and decreed that no further proceedings should be taken in causes Nos. 183, 184, and 188, without notice to the railway company, and that causes Nos. 198, 199, and 201 should be consolidated under No. 198, under the name and style of "Nelson S. Easton and James Rintoul, Trustees, and the Farmers' Loan & Trust Company, Trustee, against The Houston & Texas Central Railway Company and Benjamin Shepherd, Trustee, consolidated cause;" that in said cause Easton and Rintoul should stand as complainants as trustees under the mortgages made by the defendant railway company, dated respectively July 1, 1866, and December 21, 1870; that the Farmers' Loan & Trust Company, expressly assenting thereto, should stand as complainant, as trustee under the mortgages made by the railway company, dated, respectively, June 16, 1873, October 1, 1872, May 1, 1875, and April 1, 1881; that Shepherd should stand as defendant, as trustee under the mortgage made by the railway company, dated May 7, 1877; that the bills filed in causes Nos. 198, 199, and 201 should stand as bills in the consolidated cause, and might be amended by either complainant, as it might be advised, and that any party might file an answer to any original or amended bill; and that in case any one or more of the bills filed by the complainants, in the causes consolidated, should be finally dismissed, the remaining bill or bills should continue to stand as the bill in such consolidated cause. On the same day an order was made in said *consolidated cause [121 No. 198, appointing Nelson S. Easton, James Rintoul, and Charles Dillingham receivers of all the property of the railway company, and directing Clark and Dillingham, as receivers in No. 185, to immediately transfer and deliver all said property to the receivers so appointed. May 27, 1886, and after the possession of all the property in controversy had passed into the hands of Easton and Rintoul and Dillingham, as receivers, the court made a decree dismissing the bill of the Southern Development Company in No. 185 for want of equity, and declared and directed that "all said property being now in the custody of the court, and such custody and control being continuous, the entry of this decree shall operate *ipso facto* a transfer of the legal custody of said property from said Clark and Dillingham to said receivers in No. 198." Various amendments were subsequently filed.

The railway company answered in consolidated cause No. 198, September 3, 1886. The Farmers' Loan & Trust Company, though co-complainant in the consolidated cause, answered the bills of Easton and Rintoul, trustees, August 2, 1886.

On April 30, 1888, Shepherd, trustee, with leave of court, filed a cross bill in No. 198 to foreclose the income and indemnity mortgage, and the railway company answered admitting the truth thereof.

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On May 1, 1888, the Farmers' Loan & Trust Company filed bills in the nature of cross bills, with leave of court, to foreclose the Main Line and Western Division consolidated mortgage and the Waco & Northwestern Division consolidated mortgage. The railway company answered these bills May 2, 1888, and the Farmers' Loan & Trust Company answered Shepherd's cross bill on the same day. All the mortgages were thus under foreclosure except the Waco & Northwestern Division first mortgage.

On May 4, 1888, the court made its decree of foreclosure and sale in consolidated cause No. 198. The property was sold under the decree September 8, 1888, at Galveston, Texas. The property covered by the Waco & Northwestern Division first mortgage was purchased subject 122] to that *mortgage by George E. Downs for $25,000, and all the residue of the property of the railway company was sold to Frederick P. Olcott, president of the Central Trust Company, for $10,580,000. The sale was duly confirmed December 4, 1888.

On December 23, 1889, Carey and others, as stockholders of the Houston & Texas Central Railway Company, filed their bill in the circuit court for the vacation of said sale and decree, and an amended bill February 18, 1890. The contents of these pleadings are largely set forth in *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170 [37:1041]. The gravamen of the bill was that the decree was entered through collusion and fraud. Briefly, the bill alleged that prior to 1883, defendant Huntington, who, with his associates, controlled the Southern Development Company, formed a syndicate with them for the purpose of acquiring, in his own interest and in the interest of that company, and of the Southern Pacific Company, the control of the Houston & Texas Central Railway Company in such manner that the railway might be run solely in the interest of the syndicate and the Southern Pacific Company, the rights of the stockholders being effectually shut out and barred. The bill further alleged that in January, 1885, the holders of the first mortgage bonds presented their coupons for payment, and it was fraudulently contrived by Huntington and his associates so that the coupons were cashed and secretly taken up by the Southern Development Company, without notice to the holders thereof; that thereupon that company commenced suit against the Houston & Texas Central Railway Company in the circuit court, and in February, 1885, the appointment of receivers was procured in that suit, the order being made with the consent of the railway company through its solicitors; that subsequently defendants Easton and Rintoul, trustees, filed their bills in the circuit court for foreclosure; and the Farmers' Loan & Trust Company filed its bill, which said bills were numbered 198, 199, and 201, and the causes were by consent consolidated as No. 198; that the suit of the Southern Development Company was dismissed, and thereupon receivers of the 123]railway company were *appointed in the consolidated cause, the company through their counsel consenting. It was also averred that in none of the mortgages was it provided that the failure to pay interest upon any of the bonds should be taken to precipitate the maturity of the principal, nor did they provide for nor permit the sale of the railway prior to the maturity of the principal of the bonds; and that the answer of the railway company in said suits expressly denied that the principal sum of the bonds had become due or demandable, and averred that the court had no power to decree a sale of the railway prior to the maturity thereof or prior to the sale of the lands covered by the mortgages.

The bill then set up an agreement for the reorganization of the railway company, and alleged that in pursuance thereof and of the scheme mapped out, complainants in the consolidated causes applied for and on consent procured to be entered the decree of May 4, 1889, for the foreclosure of the mortgages and a sale of the property, and the sale followed accordingly.

The bill charged that "the said decree was and is absolutely invalid and void and beyond the power of the court to grant; that there was no foundation for said decree or jurisdiction in the court to award it, and that the same was entered by consent and agreement and without any investigation or adjudication by the court, but was the result of agreement simply, and was procured, as complainants allege on information and belief, by collusion and fraud on the part of said Huntington and his associates and the directors and officers of said Houston & Texas Central Railway Company, and was and is a part of the scheme to acquire possession of said railway in the interest of said Huntington and the said Southern Pacific Company without regard to the rights or interests of the holders of the stock of the said company No. 1 and in direct disregard of the provisions and terms of the mortgages; that the defenses interposed that the principal of the mortgages had not become due and that the said railway could not be sold without a sale first of the lands, and the other defenses interposed were substantially abandoned and withdrawn as part *of the said wrongful and fraudulent [124 scheme herein referred to; that the said defenses were never submitted to the court for adjudication or determination, nor was evidence heard or offered to sustain the same, but the decree was the result of the agreement which the bondholders had made with the said Southern Pacific Company and Central Trust Company, and the rights of the stockholders were not considered or protected by any of the parties to the record in said cause, nor submitted to the court for adjudication or investigation, nor were the stockholders in any way advised or permitted to be informed of the transaction herein complained of."

It was further averred that the decree fixed no amount due, and no amount which the company was required to pay to redeem, and that it contradicted the provisions of the mortgages.

The organization of a company styled the Houston & Texas Central Railway Company, designated in the bill as No. 2, after possession under the sale was acquired for the purpose of operating the railway, was then set up, and the terms on which the stockholders of the original company were informed September 1, 1889, they could participate in the new company, which required payment of an enormous and unnecessary assessment, and constituted an at-

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tempt to compel the stockholders of company No. 1 to turn over their stock to Huntington and his associates, etc. The prayer of the bill was that the decree rendered by the court May 4, 1888, in the consolidated cause, be vacated and set aside and adjudged to be fraudulent, collusive, illegal, and void, and that complainants be permitted to intervene and become parties defendant in said suit, and be heard and defend the same; that the sale of the railway and lands of the Houston & Texas Central Railway Company, No. 1, under said decree be vacated and set aside, and the said railway and lands be restored to the possession of the receivers; that defendants be enjoined temporarily and perpetually from delivering or recording any mortgage upon the property of the company referred to in said decree, and from issuing, alienating, or parting with any of the shares of stock of the new or reorganized **125**] *Houston & Texas Central Railroad Company, No. 2, or any bonds secured by mortgage upon any property claimed to be possessed by said company, or any stock or bonds issued or intended to be issued pursuant to the reorganization agreement; and for general relief.

The principal defendants at first demurred, and then answered the bill, denying the allegations upon which complainants sought to impeach the validity of the decree of the circuit court in the foreclosure proceedings and other transactions referred to. Complainants filed replications. A motion for an injunction *pendente lite* was denied. *Carey* v. *Houston & T. C. R. Co.* 45 Fed. Rep. 438.

The cause came on for final hearing on the pleadings and proofs November 16, 1892, and the circuit court entered a final decree dismissing the bill as to all the defendants with costs. *Carey* v. *Houston & T. C. R. Co.* 52 Fed. Rep. 671.

Complainants prayed two appeals from this decree, one to the circuit court of appeals for the fifth circuit, and the other to this court. The appeals were allowed, citations issued, and assignments of errors filed. On motion of appellees, the appeal to this court was dismissed November 13, 1893. *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170 [37: 1041]. The case on the appeal taken to the circuit court of appeals was heard by that court, Circuit Judge McCormick presiding, and on June 5, 1894, being one of the days of November term, 1893, a decree was rendered affirming the decree of the circuit court.

May 2, 1895, a petition was presented to Circuit Judge McCormick, praying the allowance of an appeal from the decree to this court, which on the same day was allowed by an order in writing upon the petition, and at the same time a citation was signed, and a cost bond approved. The petition for appeal and the order allowing the same and the bond and assignment of errors were all filed May 2, 1895, in the office of the clerk of the circuit court of appeals The record was filed here June 4, 1895, and appellees now move to dismiss the appeal.

Messrs. **J. Hubley Ashton, E. B. Kruttschnitt,** and **Adrian H. Joline** for appellees, in favor of motion to dismiss.

Messrs. **Jefferson Chandler, A. J. Dittenhoefer, George Clark,** and **Russell H. Landale** for appellants, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the 5th section of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), it is provided that appeals may be taken from the circuit courts directly to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." And we held in respect of the direct appeal to this court taken from the decree of the circuit court in this cause that such an appeal was not authorized simply because the jurisdiction of the circuit court over another suit previously determined by the same court might be involved, and we said: "It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it and duly certified, justifies such appeal directly to this court. This suit to impeach the decree of May 4, 1888, and to prevent the consummation of the alleged plan of reorganization, was a separate and distinct case, so far as this inquiry is concerned, from the suit to foreclose the mortgages on the railroad property; and no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein can be availed of to sustain the present appeal from the decree in this proceeding." *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170, 180 [37: 1041, 1044].

We are quite content with the conclusion there reached, for this suit is in itself unquestionably a distinct suit in the sense in which those words were used in disposing of the former appeal; and in respect of it the jurisdiction of the circuit court was not in issue, nor was any question of *jurisdiction certified. [**127** Carey and his cocomplainants did not intervene in consolidated cause No. 198, and seek to have the question of the jurisdiction of the circuit court therein certified to this court and appeal directly therefrom, nor did they file a bill of review for error of law apparent in that the circuit court took jurisdiction as a court of the United States. The gravamen of the bill they did file was fraud and collusion, and the allegations of want of jurisdiction relate to prematurity in the attempt to foreclose or to other matters not bearing on the jurisdiction of the Federal courts as such. And the prayer was that the decree be vacated and adjudged fraudulent, collusive, illegal, and void; that complainants might be permitted to intervene and become parties defendant; that the sale of the railroad and lands of the company under the decree be vacated and set aside; "and the said railway and lands be restored to the possession of the receivers appointed by this court or such other officers or receivers as the court may name;" for injunction and general relief.

But the question now before us is whether the decree of the circuit court of appeals affirming the decree of the circuit court upon the merits is made final by the 6th section of the act of March 3, 1891, which provides that

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"the judgment or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

The suits "of a civil nature, at common law or in equity," of which the circuit courts of the United States have original cognizance, are enumerated in the 1st section of the judiciary act of March 3, 1887 (24 Stat. at L. 552, chap. 373) as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866).

It is denied that the jurisdiction of the circuit court in the present suit depended entirely or at all upon the fact that the opposite parties were citizens of different states, and insisted 128] *that jurisdiction was entertained because it was a bill to set aside a foreclosure decree entered in the circuit court by consent and in pursuance of a fraudulent plan to reorganize the company, and the *res* was in possession of the court whether "rightfully or wrongfully." The ground of jurisdiction thus suggested is not a ground of Federal jurisdiction, but of the exercise of the power of courts of superior general jurisdiction; and it undoubtedly exists over all suits and proceedings ancillary, auxiliary, or supplemental to other suits, of which the circuit courts have cognizance as courts of the United States.

The character of this jurisdiction is thus treated by *Mr. Justice* Miller in *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609, 633 [17: 886, 895], where, speaking for the court, he said: "It is not a question whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided, many times, that when a bill is filed in the circuit court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law."

In *Rouse* v. *Letcher*, 156 U. S. 47 [39: 341], we have already adjudged that the 6th section authorizes no appeal to this court from a decree of a circuit court of appeals in an ancillary or supplemental suit or proceeding in the circuit court, where the jurisdiction of that court in the main or original suit depends entirely upon the parties being citizens of different states. In that case the main foreclosure suit 129]was between *citizens of different states, and receivers had been appointed. A proceeding by intervention was afterwards instituted in the circuit court against the receivers, who appealed to this court from the decree of the circuit court of appeals against them, and the appeal was dismissed because the opposite parties to the foreclosure suit were citizens of different states, and the decree was therefore made final by the statute. And we said:

"And since, where jurisdiction would not obtain in an independent suit, an intervening proceeding may nevertheless be maintained as ancillary and supplemental under jurisdiction already subsisting, such proceeding is to be regarded in that aspect, even in cases where the circuit court might have had jurisdiction of an independent action. Here, as we have said, the jurisdiction of the circuit court was invoked in the first instance by the filing of the bill, and it was under that jurisdiction that appellee intervened in the case, and that jurisdiction depended entirely upon diverse citizenship. . . . If the word 'controversy' added anything to the comprehensiveness of the section, the fact remains that the exercise of the power of disposition over this intervention, whether styled suit or controversy, was the exercise of power invoked at the institution of the main suit, and it is to that point of time that the inquiry as to the jurisdiction must necessarily be referred. *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138 [37: 1030]. Nor can the conclusion be otherwise because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed, but the jurisdiction of the circuit court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit."

Rouse v. *Letcher* was followed in *Gregory* v. *Van Ee*, 160 U. S. 643 [*ante*, 566], and it was there observed:

"The circuit courts of the United States have cognizance of suits as provided by the acts of Congress, and when their jurisdiction as Federal courts has attached, they possess and exercise all the powers of courts of superior general jurisdiction. Accordingly, they entertain and dispose of interventions and the *like on familiar and recognized princi- [130 ples of general law and practice, but the ground on which their jurisdiction as courts of the United States rests is to be found in the statutes, and to that source must always be attributed. Manifestly, the decree in the main suit cannot be revised through an appeal from a decree on ancillary or supplemental proceedings, thus accomplishing indirectly what could not be done directly. And even if the decree on such proceedings may be in itself independent of the controversy between the original parties, yet if the proceedings are entertained in the circuit court because of its possession of the subject of the ancillary or supplemental application, the disposition of the latter must partake of the finality of the main decree, and cannot be brought here on the theory that the circuit court exercised jurisdiction independently of the ground of jurisdiction which was originally invoked as giving cognizance to that court as a court of the United States."

Complainants and defendants in the bill under consideration were not all citizens of different states, and the jurisdiction of the circuit court over the suit did not purport to be

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founded upon diverse citizenship. Independently, therefore, of the foreclosure suit, the decree in which was sought to be impeached, the bill was not sustainable in the circuit court.

It is very well settled that a bill in equity by a corporation or the stockholders of a corporation in the circuit court to set aside a final decree of that court against the corporation in a foreclosure suit upon the ground that such a decree was obtained by collusion and fraud, and the court had no jurisdiction to make it, is an ancillary suit and a continuation of the main suit so far as the jurisdiction of the circuit court as a court of the United States is concerned. *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609 [17: 886]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]; *Pacific R. Co.* v. *Missouri P. R. Co.* 111 U. S. 505, 522 [28: 498, 504]. The bill in the latter case was brought in the circuit court for the eastern district of Missouri by a corporation, a citizen of Missouri, against another corporation, also a citizen of Missouri, other citizens of Missouri, and others, alleging fraud and collusion in the 131] original foreclosure suit *and praying that the decree of foreclosure and sale be set aside. *Mr. Justice* Blatchford, delivering the opinion of the court, said:

"The bill falls within recognized cases which have been adjudged by this court, and have been recently reviewed and reaffirmed in *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]. On the question of jurisdiction the suit may be regarded as ancillary to *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289 [25: 932], so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by *Mr. Justice* Miller in *Pacific Railroad* v. *Missouri P. R. Co.* 1 McCrary, 647. The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the circuit court. *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609, 633 [17: 886, 895]."

The same principle was applied to a bill by the stockholders of a corporation filed for the purpose of impeaching a decree of foreclosure and sale, by *Mr. Justice* Jackson, then circuit judge, in *Foster* v. *Mansfield, C. & L. M. R. Co.* 36 Fed. Rep. 628, in the circuit court for the northern district of Ohio, where he said:

"There is no want of jurisdiction growing out of the fact that some of the defendants to the present suit are citizens of the same state (Ohio) with the complainant, inasmuch as this suit may properly be regarded as ancillary or supplemental to the original suit in which the decree complained of was made. It is well settled that in such cases suit may be maintained without regard to the citizenship of the parties. *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609 [17: 886]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]; *Pacific R. Co.* v. *Missouri P. R. Co.* 111 U. S. 505 [28: 498]. It is also well settled that a shareholder may interpose and set the machinery of the law in motion for the protection of corporate rights, or the redress of corporate wrongs, when the corporate management, after proper demand, refuse or fail to act in the matter."

The decree in that case was affirmed by this court (146 U. S. *88 [36: 899]), and there[132 is a marked resemblance between the bill exhibited there and that before us.

We regard it as not open to argument that the jurisdiction of the circuit court, as a court of the United States, over this suit, rested on the jurisdiction of that court over the suit in which the decree of May 4, 1888, was rendered, and we think it clear that that jurisdiction depended entirely upon diverse citizenship.

The bill in No. 201 was filed by the Farmers' Loan & Trust Company, trustee, a citizen of New York, against the Houston & Texas Central Railway Company, a citizen of Texas, April 24, 1886, to foreclose the general mortgage, and no other party was named as defendant. The ground of Federal jurisdiction was diverse citizenship. How efficacious a decree could have been rendered in that cause, if it had stood alone, we need not consider, nor inquire when persons who might be considered necessary parties may be dispensed with as such. It may be noted, however, that the general mortgage was the last mortgage, and prior encumbrancers, the validity of whose encumbrances is not drawn in question, are not indispensable parties to a bill to foreclose a mortgage so situated. *Hagan* v. *Walker*, 55 U. S. 14 How. 29, 37 [14: 312, 316]; Jones, Mortg. § 1439.

The bills in Nos. 198 and 199 were filed by Easton and Rintoul, trustees, citizens of New York, January 21, 1886, against the Houston & Texas Central Railway Company and Benjamin A. Shepherd, trustee, both citizens of Texas, to foreclose the main line first mortgage and the Western Division first mortgage, and it was alleged that the Farmers' Loan & Trust Company, trustee, under subsequent mortgages, should be made a party defendant and brought in by the order and direction of the court, in view of the fact that the property was in the circuit court's possession, and complainants had therefore been obliged to institute their suit therein. These cases were consolidated by the order of May 26, 1886, the parties being arranged, for the purposes of jurisdiction, on the one side or the other of the matters in dispute, as indicated in *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289 [25: 932], and, unless that *order is to be disregarded, the ques-[133 tion whether either case lacked an indispensable party became immaterial. Thereafter cross bills and answers were filed as has been stated. The jurisdiction over these three separate suits and over the consolidated cause depended entirely upon diverse citizenship, and if maintainable as to either of them, could be maintained as to all by reason of lawful possession of the *res*.

In No. 185 the Southern Development Company, a corporation and citizen of California, filed its bill against the railway company as a corporation and citizen of Texas, February 16, 1885, the jurisdiction resting upon diverse citizenship, and in that suit the court appointed receivers February 20, 1885, and took and retained possession of the property under that receivership up to May 26, 1886, when it was

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transferred to the receivers appointed in the consolidated cause, who thereby became receivers under each of the separate bills so consolidated, all of which had in fact been filed long after the property was in the possession of the court. Certainly, possession under one or the other of these bills drew to the court the right to decide upon conflicting claims to the ultimate possession and control of the property, to marshal all liens upon it, and to enforce them. *Morgan's L. & T. R. & S. S. Co.* v. *Texas C. R. Co.* 137 U. S. 171, 201 [34: 625, 635].

We conclude, therefore, that as the jurisdiction of the circuit court for the eastern district of Texas as a court of the United States was invoked throughout the litigation upon the ground of diverse citizenship, and as this bill must be regarded as ancillary, auxiliary, or supplemental to the foreclosure suit, or, as it were, in continuation thereof, the decree of the circuit court of appeals was made final by the 6th section of the act of March 3, 1891, and the appeal to this court from that decree will not lie.

Appeal dismissed.

Mr. Justice **Peckham** was not a member of the court when this motion was submitted, and took no part in its disposition.

134] BANK OF COMMERCE and JAMES A. OMBERG, *Plffs. in Err.*,
v.
STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS.

BANK OF COMMERCE and JAMES A. OMBERG, *Plffs. in Err.*,
v.
STATE OF TENNESSEE and the COUNTY OF SHELBY.

(See S. C. Reporter's ed. 134-143.)

Exemption from taxation—bank stock—state decision—exemption of surplus.

1. A charter of a bank which gives it a lien on its stock for debts due it by stockholders, and provides that it "shall pay to the state an annual tax of ¼ of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes," constitutes an exemption of the stock in the hands of shareholders from any other tax than that thus imposed by the charter.
2. A subsequent revenue law of a state which imposes an additional tax on the shares of stock of such bank in the hands of shareholders impairs the obligation of the contract and is void.
3. The decision of a state court in favor of an exemption from taxation, claimed by a bank by virtue of a contract with the state, is not subject to review by the Supreme Court of the United States under U. S. Rev. Stat. § 709.
4. The exemption from taxation of stock of a bank, upon payment of an annual tax of ¼ of 1 per cent upon each share, which shall be in lieu of all other taxes, does not grant exemption to the surplus belonging to the bank, as the surplus is distinct property from the capital stock.

[Nos. 668, 669.]

Argued January 20–22, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment of that court in favor of the State in each of two suits in equity brought by the State for the use of the City of Memphis in the one case, and for the County of Shelby in the other, against the Bank of Commerce *et al.* to recover the amounts of certain taxes alleged to be due such city and county. *Reversed as to so much of the judgment as is against the shareholders.*

The facts are stated in the opinion.

Messrs. **William H. Carroll, R. J. Morgan, T. B. Turley,** and *L. B. McFarland,* for plaintiffs in error:

A grant whereby the corporators, their associates and successors, in the plaintiff in error corporation, are invested with the immunities and subjected to the liabilities given to the Gayoso Savings Institution imposes upon such corporators, their associates and successors, the liability to pay the annual excise or tax as a consideration for the exercise of the franchises annexed to the grant of that institution, and entitles them to the exemption from all other taxes, for the annual excise is stipulated to be in lieu of all other taxes.

Farrington v. *Tennessee,* 95 U. S. 679 (24: 558); *Gordon* v. *Appeal Tax Court,* 44 U. S. 3 How. 133 (11: 529); *State* v. *Butler,* 15 Lea, 107; *State, Memphis,* v. *Butler,* 86 Tenn. 614; *Memphis* v. *Union & P. Bank,* 91 Tenn. 555; *New Jersey* v. *Yard,* 95 U. S. 116 (24: 355); *Piqua Branch of State Bank* v. *Knoop,* 57 U. S. 16 How. 369 (14: 977); *Dodge* v. *Woolsey,* 59 U. S. 18 How. 336 (15: 402); *Jefferson Branch Bank* v. *Skelly,* 66 U. S. 1 Black, 448 (17: 179); *Society for Savings* v. *Coite,* 78 U. S. 6 Wall. 594 (18: 897); *Home Ins. Co.* v. *New York,* 119 U. S. 144 (30: 350); *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575 (23: 663).

The proviso to the 3d section of chapter 26 of the Extra Session Acts of 1891, and the 10th subdivision of § 7 of chap. 2 of the Session Acts of 1887, which the supreme court of the state of Tennessee held to be valid laws, authorizing the assessment and taxation of surplus and undivided profits in the Bank of Commerce, are repugnant to the contract provision of the Constitution of the United States, because they impair the obligation of that contract, which the state of Tennessee made with it and its shareholders on the 29th of February, 1856.

Union Bank v. *State,* 9 Yerg. 490; *DeSoto Bank* v. *Memphis,* 6 Baxt. 415, 32 Am. Rep. 530; *Memphis* v. *Hernando Ins. Co.* 6 Baxt.

NOTE.—*That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,*—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

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527; *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429 (39: 759); *Bank of Commerce* v. *McGowan*, 6 Lea, 703; *Bank of Commerce* v. *Tennessee*, 104 U. S. 493 (26: 810); *Tennessee* v. *Whitworth*, 117 U. S. 136 (29: 832); *New Haven* v. *City Bank*, 31 Conn. 106; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 (39: 311).

Messrs. **S. P. Walker**, *C. W. Metcalf*, and *F. T. Edmondson*, for defendant in error:

If the decision in *Farrington* v. *Tennessee*, 95 U. S. 679 (24: 558), is to be considered as controlling, the charter tax in question is laid upon the shares of stock, and the exemption is of the shares alone; the capital stock and franchises of the defendant bank are taxable, under the rulings of that case.

The commuted charter tax is to be paid by the corporation on the capital stock, and the exemption is of that subject of taxation alone.

Farrington v. *Tennessee*, 95 U. S. 679 (24: 558); *Memphis* v. *Farrington*, 8 Baxt. 539; *Memphis & C. R. Co.* v. *Gaines*, 97 U. S. 697 (24: 1091); *Tennessee* v. *Whitworth*, 117 U. S. 129 (29: 830); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware Railroad Tax*") 85 U. S. 18 Wall. 206 (21: 888); *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665 (29: 770).

The surplus is taxable in any event.

However the general question of charter exemption may be determined, the capital stock paid in, or the shares of stock of the defendant bank subscribed and issued since the adoption of the state Constitution on the 5th of May, 1870, is or are taxable.

Cairo & F. R. Co. v. *Hecht*, 95 U. S. 170 (24: 423); *Ex parte North East & S. W. A. R. Co.* 37 Ala. 679; *Howard* v. *Kentucky & L. Mut. Ins. Co.* 13 B. Mon. 282; *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 245 (4: 561); *Aspinwall* v. *Daviess County Comrs.* 63 U. S. 22 How. 376 (16: 299); *Memphis & L. R. R. Co.* v. *Berry*, 112 U. S. 621 (28: 841); *Chicago City R. Co.* v. *Allerton*, 85 U. S. 18 Wall. 235 (21: 903); *State* v. *Bull*, 16 Conn. 179; *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 688 (4: 671); *Frost* v. *Frostburg Coal Co.* 65 U. S. 24 How. 278 (16: 637); *Trask* v. *Maguire*, 85 U. S. 18 Wall. 391 (21: 938); *Memphis* v. *Memphis City Bank*, 91 Tenn. 574.

Mr. Justice **Peckham** delivered the opinion of the court:

These are writs of error to the supreme court of the state of Tennessee, sued out by the plaintiffs in error for the purpose of reviewing the judgment of the state court in favor of the state in each case. They are both of them suits in equity brought by the state for the use of the city of Memphis in the one case, and by the state and the county of Shelby in the other, for the purpose of recovering the amounts of certain taxes alleged to be due the city of Mem-
135] phis and the *county of Shelby for various years, commencing in 1887. The suits are substantially alike and involve the same questions, and the decision of the one will be the decision of the other. In the further discussion it will only be necessary to refer to the first case.

The bill, after it was amended, set forth the material facts necessary to raise the questions herein involved. It alleged the incorporation of the bank in 1856, and in its charter was contained the following provision: "Said institution shall have a lien on] the stock for debts due it by the stockholders before and in preference to other creditors, except the state for taxes; and shall pay to the state an annual tax of ¼ of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes." It alleged that notwithstanding the above provision, there had been assessed upon the stock certain amounts, alleged to be due for taxes, for the years 1887 to 1890, inclusive, by virtue of chapter 2 of the general tax laws of the state for the year 1887, and chapter 104 of the laws of 1889, and in the amended supplemental bill an additional sum was claimed for the taxes from 1891 to 1894, inclusive, under the above-mentioned acts. The bill also made claim to recover the ad valorem taxes on the surplus and undivided profits of the plaintiff in error bank for the years 1892, 1893, and 1894, under the proviso contained in § 8 of chapter 26 of the Extra Session Acts of 1891, the proviso reading: "*Provided*, That the surplus and undivided profits in such bank, banking association, or other corporation shall be assessable to said bank or other corporation, and the same shall not be considered in the assessment of the stock therein." All the material allegations necessary to show a valid and legal assessment upon the stock were set forth in the bill, unless the provision in the charter of the bank above alluded to prevents the assessment of such stock or shares of stock in the hands of shareholders in any other way or for any other sum than that stated in the charter. The bill also alleged that complainant was advised that the capital stock in a corporation and shares of stock in the hands of shareholders were separate and distinct subjects of taxation, and that in the *absence of any exemption clause it was[**136** within the power of the state, without subjecting such legislation to the objection of double taxation, to have taxed both the capital stock of the corporation and the shares of stock in the hands of the stockholders; that the charter tax, bonus, or whatever else it may be called, of ¼ of 1 per cent to be paid to the state is a tax upon the shares of stock, and that the language "in lieu of all other taxes" means in lieu of all other taxes on the shares of stock, and that it has no effect to exempt the capital stock of the corporation from taxation. The question of law whether the capital stock is subject to ad valorem taxes or the shares of stock in the hands of the shareholders was submitted to the court for determination. The bill also sets forth that after the adoption of the Constitution of Tennessee of 1870 (on the 4th day of May in that year) the capital of the bank had been increased from either $60,000, or from $200,000, to $1,000,000, and the plaintiffs allege that the new stock, whatever may be the amount thereof, aside from all other questions, is taxable.

To the original bill a demurrer was filed upon the ground that the general tax laws, under which the taxes against the bank or its shareholders were assessed and sought to be collected, were violative of the contract provision of the Constitution of the United States. The demurrer was overruled with leave to the defendants to rely on it in their answer. Thereupon a stipulation was made, in each

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case fixing the basis of the reassessments for the years 1891 to 1894, inclusive, waiving the necessity for the discovery of the shareholders in the bank upon the bank's agreeing "that for the purposes of this case the shares of stock in the name of J. A. Omberg shall be taken as validly and legally assessed for the years aforesaid." It was further stipulated "that any liability that might be adjudged against Mr. Omberg as a shareholder in such corporation should be treated as establishing a like liability of all the shareholders therein, and that for such liability of all the shareholders as thus established a decree should be entered against the corporation, the said corporation consenting that complainants have a decree against it for 137]*any liability for taxes that may be herein established against the shareholders." The stipulation between the parties was that the defendant J. A. Omberg should, for the purpose of testing the liability of the shareholders for taxes, be considered and treated as a representative of all the shareholders, and that a liability decreed against him for taxes due as a shareholder should be considered as the liability of all the shareholders duly established, and that a decree in favor of complainants should be entered against the bank and against its unknown shareholders.

The case thereupon was heard upon the amended and supplemental bills, the stipulations above spoken of, which were filed, and the demurrer of the defendants which raised the question that the tax laws under which these taxes were sought to be collected against it and its shareholders were void, because in conflict with U. S. Const. art. 1, § 10. The chancellor before whom the case was tried was of opinion that the demurrer was well taken, and accordingly dismissed the bill of complaint. The supreme court of the state of Tennessee reversed this decree of dismissal and held, first, that the owners of shares of stock in the Bank of Commerce were thus liable for ad valorem taxes to the city of Memphis; and, second, that the bank was liable for ad valorem taxes to the city for the years 1892 to 1894, inclusive, on its surplus and undivided profits. Judgment was entered accordingly, and the plaintiffs in error, the Bank of Commerce and J. A. Omberg, have sued out this writ of error to obtain a review of the judgment by this court.

The errors assigned are: (1) That the supreme court of Tennessee erred in adjudging a liability of the shareholders in the Bank of Commerce to pay to the state of Tennessee or to the county of Shelby or to the city of Memphis ad valorem taxes on their shares of stock for the years specified, because, as is alleged, the shareholders are thereby deprived of the immunity from taxes guaranteed to them by the contract contained in the charter of the Bank of Commerce, and that the general 138] tax laws *affirmed to be valid against them are repugnant to the Constitution of the United States. (2) For the like ground error is assigned to so much of the decree as denies to the plaintiff in error, the Bank of Commerce, an exemption from taxation on its surplus and undivided profits, notwithstanding its exemption therefrom under its charter provision.

The claim of the state seems to have been in the alternative, that either the corporation was liable for the taxes assessed under the general laws above referred to, or else that the shareholders were, and the bill was framed with the idea of obtaining a final decision in regard to which of the two parties was liable without making it necessary to commence two actions for that purpose. The defendants, *the [140 bank and shareholders, claimed entire exemption from all taxes upon either the corporation or the shareholders, other than the taxes imposed in the charter. In support of its claim that the correct construction of the charter clause, as now presented, is that the charter tax was laid on the capital stock, and that it was exempted from further taxation, and that the shares of stock were subject to general taxation, counsel for the state refer to the decision in the case of *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558]. In that report, at page 681 [558], *Mr. Justice* Swayne quotes the exemption clause of the charter in question as taken from the record in that case as follows: "That the said company shall pay to the state an annual tax of ½ of 1 per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." A full and correct quotation of the clause (which is in reality the same in both cases) has already been given, but it may be repeated here. It is as follows: "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the state for taxes; and shall pay to the state an annual tax of ½ of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes." The record from which *Mr. Justice* Swayne made his quotation omitted the prior portion of the clause just set forth, and counsel for the state herein claim that the decision in the *Farrington Case*, by this court, which held "that the exemption was a contract between the state and the bank limiting the amount of tax on each share of stock, and that a subsequent revenue law of the state which imposed additional taxes on the shares in the hands of the shareholders impaired the obligation of the contract and was void," was not decisive of this case. The difference between the provision as quoted by *Mr. Justice* Swayne and the actual provision is, as counsel claim, material, and must lead to different results, because the first quotation was misleading, and the record did not state the whole clause. It was upon this assumed difference that the supreme court of Tennessee, in this case, came to the conclusion it did, and held that the *charter tax was on the capital stock[141 and the exemption from further taxation was an exemption of that stock, and that the shares of stock were, in the hands of the shareholders, subject to general taxation. As this court in the *Farrington Case* has held that the charter tax was laid *on the shares of stock*, and that the same were *not subject to other or further taxation*, the Tennessee court acknowledged the controlling force of that decision upon the case then before it, provided the question was the same or in substance the same as was considered and decided in the *Farrington Case*. The state court then proceeded to point out in its opinion what it considered to be the mate-

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rial difference between the two provisions, and it held that the provision which gives a lien on the stock for debts due the bank by the stockholders before and in preference to other creditors, except the state for taxes, materially changes the meaning from that contained in the exemption clause quoted in the *Farrington Case*, and that the language as now quoted naturally implied that the tax referred to in the charter was upon the capital stock, and that the lien reserved by the state for taxes does not refer to the annual charter tax, for the reason that the charter tax was to be paid by the corporation, but that it referred to such other or general tax as might be levied by the state upon the shares, thus showing that the intention of the state was to reserve to itself the right to tax the shares in the hands of the shareholders, and to exempt the stock as the property of the corporation. It was also said that it was neither natural nor reasonable to assume that the state reserved a lien on the shares which were the property of the shareholders to pay a tax that the corporation was required to pay. In other words, it could not be supposed that the state required one person to pay a tax and reserved a lien upon the property of another to secure its payment, and that if the lien of the state was reserved for securing the payment of the charter tax the state was placed in the attitude of having voluntarily postponed itself to every other creditor of the corporation because all creditors must be paid before the shareholder gets anything. 142] These reasons, which commended *themselves to the supreme court of Tennessee, were sufficient in the judgment of that tribunal to show a difference in the meaning of the two clauses, and it therefore came to the conclusion it did notwithstanding the decision of this court in the *Farrington Case*, and the shareholders were held liable to pay the tax claimed by the state authorities.

On the other hand, it is said that the difference in the language used in the two quotations is wholly immaterial in any event, and that whatever portion of the clause may have been omitted in the record in the *Farrington Case*, the whole charter of the bank was before the court for its examination, and it cannot be supposed that in a case of such importance, argued by such eminent counsel as those who appeared in that case, there was anything overlooked or omitted. The claim is therefore made that the court must have regarded the portion of the clause omitted in the record as immaterial.

We do not think under the circumstances that we ought now to come to a different conclusion upon the question of exemption from that which was arrived at by this court in the *Farrington Case*. As the whole charter was then before the court, we are not prepared to say that its force was misunderstood, or that there was an omission by the court to consider all the language of the exemption clause simply because a portion of it is omitted in the quotation from the record made in the opinion therein delivered. We are not inclined, therefore, to overrule or distinguish the *Farrington Case*, and we must now hold that the charter clause of exemption limits the amount of tax on each share of stock in the hands of the shareholder, and that any subsequent revenue law of the state which imposes an additional tax on such shares in the hands of shareholders impairs the obligation of the contract, and is void. This compels us to reverse the judgments herein against the shareholders.

Counsel for plaintiffs in error also urged in the course of their argument before us that the *Farrington Case* not only decided that the shareholders were exempt from any further taxation by reason of this clause in the charter, but that the corporation was also thereby exempted, so that the only tax *that could [143] be collected from either the corporation, the shareholders, or both, was the ¼ of 1 per cent mentioned in the charter.

Within this general claim of exemption is embraced the right to tax the stock in this bank issued since the adoption of the present Constitution of Tennessee, in 1870. The charter (which was granted long before the adoption of that Constitution) provides (§ 2) that the capital stock of said company shall be divided into shares of $50 each, and when 200 shares shall have been subscribed, and the sum of $1 per share paid thereon, the shareholders may meet and elect five directors. Section 4 provides that the "bank may receive on deposit any and all sums not less than $1 per week offered as stock deposits, . . . and when such deposits shall amount to $50 they may, at the option of the depositor, become stock in the institution." The parties to this suit agreed by stipulation that on the 5th day of May, 1870 (the day the Constitution was adopted), the capital stock of the bank was $200,000, and that on March 17, 1887, and on sundry days prior to June 1, 1887, it was regularly increased to $600,000, and that on the 17th day of March, 1890, and on sundry days prior to June 1, 1890, it was again regularly increased to $1,000,000. The supreme court allowed the claim of exemption and held that the stock issued since the adoption of the new Constitution stood in all respects as to taxation the same as the stock earlier issued, notwithstanding the provision of the Constitution for the taxation of all property, and that therefore the bank was not liable to the tax claimed by the state authorities. The validity of the claim made by the bank for exemption of the new as well as of the old stock was therefore admitted by the state court as a right protected by the Federal Constitution.

The plaintiffs in error claim that as to this portion of the decision of the supreme court of Tennessee it cannot be reviewed by this court, because it was in favor of the bank. The bank by its answer to the bill drew in question the validity of the acts of the assessing officer of the state acting under the authority of the general statutes of Tennessee, providing *for the assessment of its property, on the [144] ground that the authority exercised by the assessing officer under the Tennessee statutes impaired the obligation of the contract entered into between the state and the bank in its charter, and the decision of the supreme court of Tennessee was against the validity of the authority so exercised under those general revenue laws.

The state court decided in favor of the exemption claimed by the bank by virtue of its contract with the state. The protection of

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the constitutional provision was thus accorded it.

We are of the opinion that this court cannot in this case review that decision.

U. S. Rev. Stat. § 709, gives jurisdiction to this court, among other things, upon writ of error to review the final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision of the state court is in favor of their validity. Here the decision of the state court is against the validity of the acts of the assessing officer acting under the authority of the revenue laws as applied to the property of the bank, and is in favor of the exemption claimed under the contract.

In *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 [22: 429], it was held that, under the provisions of the act of February 5, 1867 (14 Stat. at L. 385, of which U.S. Rev. Stat. § 709 is substantially a transcript), it was essential to the jurisdiction of this court to review a question decided in a state court, that one of the questions mentioned in the Federal statute must have been raised and presented to the state court, and that it must have been decided by the state court against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States. To the same effect are *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31: 607]; *St. Paul, M. & M. R. Co.* v. *Todd County*, 142 U. S. 282 [35: 1014].

145] *We cannot, therefore, review the decision of the state court allowing the claim of exemption from taxation of the capital stock of the bank, although the consequence is that in these cases both the capital stock and the shares thereof in the hands of the shareholders escape any taxation other than the charter tax.

Accepting, as we do, the authority of the *Farrington Case* for the point therein decided, which exempts the stock in the hands of the shareholders from any further tax than that which is provided for in the charter, and being concluded in this case by the decision of the supreme court of Tennessee in favor of the exemption of the capital stock of the corporation, we are not here called upon to examine the validity of the claim of the bank as to the decision of this court in cases preceding that of Farrington, where counsel allege it has been determined that both the corporation and the shares of stock in the hands of the shareholders are exempt from further taxation under clauses which are said to be similar to those in the charter under consideration.

In this case of *Bank of Commerce* v. *State of Tennessee for the Use of the City of Memphis* (the first of the above-entitled actions), the supreme court held that the bank was liable to pay the municipal taxes under the revenue law (Acts 1891 (Extra Sess.) chap. 26, § 3), above mentioned, upon its surplus and undivided profits. Section 3 of that act has already been referred to, but the material portion of it is here set forth, and is as follows:

"Provided that the surplus and undivided profits in such bank, banking association, or other corporation shall be assessable to said bank or other corporation, and the same shall not be considered in the assessment of the stock therein."

The corporation plaintiff in error demands the same exemption from taxation on its surplus that has been accorded it for its capital stock, and it bases its contention upon the same clause of exemption in its charter. We think it cannot be sustained as to the surplus, which we believe is taxable under the law above quoted. This whole demand of exemption from taxation made by the bank and its shareholders must be *considered with **[146** reference to the general rule governing claims of that nature. It is well known, has long existed, and is undoubted. *New Orleans City & L. R. Co* v. *New Orleans*, 143 U. S. 192, 195 [36: 121, 122]; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665 [29: 770], and many cases there cited; *Farrington* v. *Tennessee*, 95 U. S. 679, 686 [24: 558, 560]; *West Wisconsin R. Co.* v. *Trempealeau County Supers.* 93 U. S. 595 [23: 814]; *Tucker* v. *Ferguson*, 89 U. S. 22 Wall. 527 [22: 805].

These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being made the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must, on that account, be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Churchill* v. *Utica* ("*Van Allen* v. *Assessors*") 70 U. S. 3 Wall. 573 [18: 229]; *New York* v. *Tax Comrs.* 71 U. S. 4 Wall. 244 [18: 344], cited in *Farrington* v. *Tennessee*, 95 U. S. 687 [24: 560].

This statement has been reiterated many times in various decisions by this court, and is not now disputed by any one. In the case last cited, *Mr. Justice* Swayne, in delivering the opinion of the court, enumerated many objects liable to be taxed other than the capital stock of a corporation, and among them he instanced: (1) the franchise to be a corporation; (2) the accumulated earnings; (3) profits and dividends; (4) real estate belonging to the corporation and necessary for its business; and he adds that "this enumeration shows the searching *and comprehensive taxation to **[147** which such institutions are subjected where there is no protection by previous compact." And in *Tennessee* v. *Whitworth*, 117 U. S. 129 [29: 830], at page 136 [832], *Mr. Chief Justice*

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Waite, in delivering the opinion of the court, says "that in corporations four elements of taxable value are sometimes found: First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and fourth, the shares of capital stock in the hands of the individual stockholders."

The surplus belonging to this bank is "corporate property," and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of ½ of 1 per cent upon each share of the capital stock, which shall be in lieu of all other taxes. The exemption is not, in our judgment, greater in its scope than the subject of the tax. Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock and there is a surplus over, above, and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders.

The case of *Bank of Commerce* v. *Tennessee*, 104 U. S. 493 [26: 810], does not hold to the contrary of this doctrine. This question was not therein discussed or decided. The question which was decided related only to the taxation of real property not used by the bank in its business, and it was held liable to taxation.

The case is no authority for the proposition contended for here, namely, that the whole surplus of this bank is exempt from taxation. No individual shareholder has any legal right to claim any portion of this surplus. Until divided by the board of directors it remains the property of the corporation itself, and in the sense in which the words "capital stock" are **148**]*used in the exemption clause the surplus does not form any part thereof. It is said that the purpose of incorporating a bank is to enable the institution to accumulate profits and to make dividends out of them, and that the dividends cannot be made until the profits have been accumulated, and that under this ruling profits would come under the description of surplus to be taxed before distribution in a dividend. It is true that dividends cannot rightfully be made until profits have accumulated; but it is one thing to accumulate profits each six months or annually and then divide them among the stockholders by way of dividends, and quite another thing to accumulate profits year after year, and, while still declaring dividends, accumulate a surplus which is not so divided. The sums accumulated by way of profits between the regularly recurring dividend days might not be regarded as surplus, provided those profits were regularly distributed in dividends. The surplus in this case is clearly not of that kind which has been saved for the purpose of being distributed by dividends. It may be true that the general effect of a tax on this surplus might indirectly operate upon the shareholder by possibly lessening the value of his shares to some extent, but that is not the same as if a tax had been laid upon those shares. In levying the charter tax it was conceded that the tax has always been measured by the par value of the shares of stock, while the actual value of such shares, because of the large surplus owned by the bank, may have been very much greater, and the statute under which the surplus is taxed provides that such surplus must not be considered in the assessment upon the stock; so that provision is made whereby a tax upon the surplus and the charter tax upon the shares of stock will neither be double nor unjust taxation. Although a surplus may be required by the national banking act, and also by the laws of good and safe banking, yet we do not perceive that this fact has any material effect upon the question.

We are therefore of opinion that the surplus was properly taxed, and that the bank's claim of exemption as to such surplus is without foundation in law. **These views lead to a reversal of so much of the judgment as is against the shareholders*, and the cases are therefore remanded to the state court for further proceedings in conformity with this opinion.

Mr. Justice **White** concurs in so far as the decree recognizes the exemption of the shares of stock from all taxation except that enumerated in the contract, but dissents from the conclusion as to the power to tax the surplus and undivided profits.

COUNTY OF SHELBY, CITY OF MEMPHIS, W. B. HENDERSON, ET AL., *Appts.*, *v.* UNION & PLANTERS' BANK.

(See S. C. Reporter's ed. 149-161).

State decisions, when not binding—capital stock of corporation—exemption of bank from taxation.

1. This court when construing the meaning of a state statute as to what contract is contained therein, and whether the state has passed any law impairing its obligation, is not bound by the previous decisions of the state courts, except when

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679; and Commercial Bank of Cincinnati v. Buckingham, 12: 109.

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they have been so long and so firmly established as to constitute a rule of property, but will decide independently whether there is a contract and whether its obligation is impaired.

2. There is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders, so that the taxation of the one property is not the taxation of the other.

3. A charter giving a bank a lien on shares of its capital stock for debts of shareholders, and imposing a certain tax on shares of stock to be in lieu of all other taxes, exempts such shares in the hands of shareholders from further taxation, but does not exempt the corporation from taxation on its capital stock or surplus or accumulated profits.

[No. 766.]

Argued January 20-22, 1896. Decided March 2, 1896.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Tennessee granting an injunction at the suit of the Union & Planters' Bank, to restrain the County of Shelby *et al.* from collecting any tax upon the surplus of the bank on the ground of a clause in the charter of the bank exempting such surplus from taxation. *Reversed, and cause remanded with directions to dismiss the suit.*

The facts are stated in the opinion.

Messrs. **S. P. Walker,** *C. W. Metcalf,* and *F. T. Edmondson,* for appellants:

The only effect of the charter of the defendant bank is to exempt the shareholders, as individuals, from taxation on account of their shares of stock therein. The charter tax is laid upon the shares of stock, and the words "in lieu of all other taxes" mean in lieu of all other taxes upon the same subject of taxation —to wit, the share of stock. There is no exemption, express or implied, of the capital stock or franchises of the corporation.

Farrington v. *Tennessee,* 95 U. S. 679 (24: 558); *Tennessee* v. *Whitworth,* 22 Fed. Rep. 80, 117 U. S. 136 (29: 833); *New Orleans* v. *Houston,* 119 U. S. 265 (30: 411); *Churchill* v. *Utica,* ("*Van Allen* v. *Assessors*") 70 U. S. 3 Wall. 573 (18: 229); *New York* v. *Tax Comrs.* 71 U. S. 4 Wall. 244 (18: 344); *Jones & N. Mfg. Co.* v. *Com.* 69 Pa. 137; *Union Bank* v. *State,* 9 Yerg. 490; *Memphis* v. *Farrington,* 8 Baxt. 539; Cooley, Taxn. (1886) § 231.

The capital stock and shares of stock are distinct subjects of taxation; and, in the absence of a charter or contract exemption, the state would have had the undoubted power to tax both the capital stock and the shares of stock.

Union Bank v. *State, supra; Memphis* v. *Ensley,* 6 Baxt. 553, 32 Am. Rep. 532; *Nashville Gaslight Co.* v. *Nashville,* 8 Lea, 407; *South Nashville Street R. Co.* v. *Morrow,* 87 Tenn. 406, 2 L. R. A. 853; *Farrington* v. *Tennessee, supra; New Orleans* v. *Houston,* 119 U. S. 277 (30: 415); Cooley, Taxn. § 231.

The power to tax both the capital stock and the shares of stock, in the absence of charter exemption, being undoubted, it must be adjudged that the power as to both subjects of taxation remains unimpaired, except to the extent that it appears, in unmistakable terms, to have been surrendered. The exemption of the one does not by implication exempt the other.

Ohio L. Ins. & T. Co. v. *Debolt,* 57 U. S. 16 How. 416 (14: 997); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*"), 85 U. S. 18 Wall. 225 (21: 894); *Erie R. Co.* v. *Pennsylvania,* 88 U. S. 21 Wall. 498 (22: 596); *Tucker* v. *Ferguson,* 89 U. S. 22 Wall. 575 (22: 816); *Farrington* v. *Tennessee,* 95 U. S. 686 (24: 560); *Vicksburg, S. & P. R. Co.* v. *Dennis,* 116 U. S. 665 (29: 770); *Tennessee* v. *Whitworth,* 117 U. S. 136 (29: 832).

An accumulated surplus is a distinct and separate subject of taxation.

New York v. *Tax Comrs.* 94 U. S. 415 (24: 164); *Central Nat. Bank* v. *United States,* 137 U. S. 355 (34: 703); *First Nat. Bank* v. *Peterborough,* 56 N. H. 38, 33 Am. Rep. 416; *State, North Ward Nat. Bank,* v. *Newark,* 39 N. J. L. 380; *State* v. *Bank of Smyrna,* 2 Houst. (Del.) 99, 73 Am. Dec. 699.

Messrs. **William H. Carroll** and *Isham G. Harris,* for appellee:

The legislature of Tennessee had the power under the state Constitution of 1834 to grant to corporations created by it exemption from taxation, and such exemption must either confer total or partial immunity from taxation, and extend for any length of time the legislature might deem proper.

Knoxville & O. R. Co. v. *Hecks,* 9 Baxt. 445; *State* v. *Butler,* 13 Lea, 400; *State, Memphis,* v. *Butler,* 86 Tenn 614; *University of the South* v. *Skidmore,* 87 Tenn. 156; *Memphis* v. *Union & P. Bank,* 91 Tenn. 546; *Memphis* v. *Memphis City Bank,* 91 Tenn. 577; *Farrington* v. *Tennessee,* 95 U. S. 679 (24: 558); *Tipton County* v. *Locomotive & Mach. Works,* 103 U. S. 523 (26: 341); *Bank of Commerce* v. *Tennessee,* 104 U. S. 493 (26: 810); *Hazen* v. *Union Bank,* 1 Sneed, 115; *Mobile & O. R. Co.* v. *Tennessee,* 153 U. S. 499 (38: 798).

From the words employed to express the immunity from taxation, it is apparent the parties intended it should include all taxes; otherwise greater burdens are at once imposed on the bank in an excise tax, and the right to impose additional taxes reserved.

Tennessee v. *Whitworth,* 117 U. S. 137 (29: 832); *Platt* v. *Union P. R. Co.* 99 U. S. 48, 60 (25: 424, 428).

The taxes set out in the bill are direct taxes upon the funds out of which dividends must be declared, and are in substance as taxes on the shares of stock.

Postal Teleg. Cable Co. v. *Adams,* 155 U. S. 688 (39: 311), 5 Inters. Com. Rep. 1; *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429 (39:759).

The charter necessarily exempts all the property of the bank required for the successful prosecution of its business.

The acquisition of surplus and undivided profit is indispensable to such prosecution—therefore they are within the exemption.

Wilmington & W. R. Co. v. *Reid,* 80 U. S. 13 Wall. 264 (20: 568); *Cook* v. *State, Camden & B. C. R. Co.* 33 N. J. L. 475; *State, Camden & A. R. & Transp. Co.,* v. *Mansfield Comrs.* 23 N. J. L. 510; *State, New Jersey R. & Transp. Co.* v. *Hancock,* 35 N. J. L. 537; *State* v. *Flavell,* 24 N. J. L. 370; *Milwaukee & St. P. R. Co.* v. *Crawford County Supers.* 29 Wis. 116; *State* v. *Ross,*

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24 N. J. L. 497; *Schuylkill Nav. Co.* v. *Berks County Comrs.* 11 Pa. 202; *State, New Jersey R. & Transp. Co.*, v. *Newark*, 26 N. J. L. 519; *State, Elizabeth Libary Asso.*, v. *Leester*, 29 N. J. L. 541.

Mr. Justice **Peckham** delivered the opinion of the court:

This is an appeal from the decree of the circuit court of the United States for the western district of Tennessee, granting an injunction at the suit of the Union & Planters' Bank to restrain the municipal authorities from collecting any tax laid upon the surplus of the bank, on the ground that such surplus is exempt under a clause in the charter of the bank similar to the one discussed in the above cases of the Bank of Commerce. The circuit court granted the injunction and permanently enjoined the municipal authorities from the collection of the tax. They have appealed to this court.

There are two grounds, either of which, if decided in favor of appellants in this case, would result in upholding the validity of the tax upon the surplus: First, if it should be held that by the true interpretation of the charter the exemption, while applying to the shares of stock in the hands of the shareholders, does not extend to the corporation itself, the tax would be valid; second, even if the tax on the capital stock were void, that upon the surplus might still be upheld on the authority of the case of *Bank of Commerce* v. *Tennessee*, 161 U. S. 134 [*ante*, 645]. We have already held in that case that a tax on the surplus was valid, but the question whether a tax on the capital stock of the bank was valid could not be raised there, because the case was before us on a writ of error taken to a state court, and the question in the state court was decided in favor of the exemption claimed by the bank. This being an **151**] appeal from *a judgment of the United States circuit court, both questions are open for our decision. We think it therefore proper to here decide the question first above stated.

Various decisions of the courts of Tennessee have been cited by counsel on both sides as to the meaning of the exemption clause, whether or not it covered the capital stock and the shares also. Generally, the courts of that state held before the decision by this court of *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558], that the charter tax was laid upon the corporate capital stock, and the exemption was of that stock from any further tax. Subsequently to the decision in that case the state courts have held that under the construction given to the clause in the *Farrington Case* and in *Bank of Commerce* v. *Tennessee*, 104 U. S. 493 [26: 810], the tax was on the shares, and the exemption covered both the capital stock and the shares thereof. The decision giving exemption to both classes of property was adjudged alone upon the authority cited. In such a case as this, where we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the state has passed any law impairing its obligation, we are not bound by the previous decisions of the state courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves independently of the decisions of the state courts, whether there is a contract and whether its obligation is impaired. *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244, 256 [27: 922, 926]; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665-667 [29: 770, 771]; *Mobile & O. R Co.* v. *Tennessee*, 153 U. S. 486, 492 [38: 793, 795].

While according to the decisions of the supreme court of Tennessee the respect which is most justly due them on account of the high character of that tribunal, nevertheless the responsibility is upon us to determine the question independently, and we cannot agree with that court in its construction of the decisions of this court in the two cases mentioned. Indeed, one of the judges of the state court said in the course of an opinion (*Memphis* v. *Union & P. Bank*, 91 Tenn. 553) that since the *Farrington Case* the court had *recognized [**152** the decision and had, at the same time, adhered to its own former decisions that no ad valorem tax could be lawfully laid on the capital stock, and thus the effect of the two decisions, the one Federal and the other state, was that both classes were exempted. Other judges said they were exempted by reason of the Federal decisions.

We stated in *Bank of Commerce* v. *Tennessee*, 161 U. S. 134 [*ante*, 645], that the tax provided in this charter is laid upon the shares of stock in the hands of the shareholders, and they are exempt from any further taxation on account of their ownership of such shares. In that respect we followed the case of *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558], and we refused in the *Bank of Commerce Case* to overrule or distinguish it; but it is claimed on the part of the appellee herein that the *Farrington Case* also decided that the charter tax is in lieu of all other taxes, not only upon the shares in the hands of the shareholders, but that it exempts the corporation and all its property from any further taxation. We cannot give so broad an effect to the decision in the *Farrington Case*. The question of the exemption of the corporation and its property from taxation did not arise in that case, and there was no adjudication of that question by its decision. Farrington was the owner of certain shares of stock in the bank, and the state and the county of Shelby each claimed the right, under the law, to assess taxes against him by reason of his ownership of those shares, at the same rate that taxes were assessed and levied upon other taxable property. He resisted the payment of the taxes upon the ground that by virtue of the exemption clause in the charter the bank, its franchise, its capital stock, and also the shares of stock of the individual stockholders, were subject to no taxation other than at the rate specified in the charter.

Although in setting forth the grounds of his resistance to the payment of the tax, Farrington stated that the bank, its franchise and its capital stock, were not subject to taxation, still that was not a material question. If the shares of stock owned by him were not subject to taxation in his hands, that was sufficient for him, and the question of the exemption of property of the corporation would not be involved. The *corporation was not a party to[**153** the suit, and although in the opinion written upon the decision of the question whether the shares were liable to taxation in his hands, it

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may have rather been assumed that the stock was not subject to taxation as against the corporation, or that the whole stock was exempt in whosesoever hands it was, the matter actually decided was the exemption from taxation of these shares in the hands of the shareholders. In the suit that was instituted it was agreed that if in any event the decision was adverse to Farrington, judgment should be rendered against him for a certain number of dollars, the amount of the tax assessed against him, and if the decision should be in his favor, then the judgment was to be that the taxes were illegally assessed, and that said shares of stock were to be exempt from all other taxation, except the ½ of 1 per cent to the state, as provided for in the 10th section of the bank's charter, and the collection of any further tax was to be enjoined. The trial court rendered a decree enjoining the collection of the tax, which was reversed by the supreme court of the state on the ground that the shares of stock were not the property or thing exempted, and it was therefore adjudged that Farrington should pay to the state the sums of money assessed upon his shares. Farrington thereupon sued out a writ of error, and coming into this court the judgment of the supreme court of Tennessee was reversed, and it was held that the charter tax was upon the shares of stock in the hands of its shareholders, and that they were consequently exempt from the payment of any further tax.

There are undoubtedly some expressions in the opinion of *Mr. Justice* Swayne which lend color to the idea that, in his belief, not only were the shares in the hands of the shareholders exempt from any further taxation than that imposed by the charter, but that the property of the corporation was itself exempt from any taxation other than that provided for in that section; the latter question, however, was not before the court and was not decided by it, and we are of opinion that assuming that the charter tax was laid upon the shares of stock in the hands of the shareholders, the exemption from 154] *further taxation applies to the subject which was taxed under the charter, and is not of any greater scope, and that it would not, therefore, include the exemption from taxation of either the capital stock or the surplus, which is the property of the corporation itself. We come to this conclusion because of the fact, well established by the decisions of this as well as many state courts, that there is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders. So separate are these properties, and so distinct in their nature, that the taxation of the one property is not the taxation of the other. This is no new doctrine, and the distinction between the two properties was recognized by the supreme court of Tennessee as long ago as in the case of *Union Bank* v. *State*, 9 Yerg. 490, decided in 1836. It was held that, under the clause of the charter there under consideration, any further tax on the capital stock than that which was provided for in the charter itself was void, but that the state might tax the shares of stock in the hands of individuals notwithstanding the exemption from further taxation on the capital stock.

We do not admit the claim made by the counsel for appellee, that the *Farrington Case* must have decided the exemption of the stock of the corporation, because in the case of *Wicks* v. *Tennessee* (mentioned in note to *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558], at page 690 [561]), as is claimed, the exemption was of the capital stock of the corporation which was held nevertheless to come within the principle of the main case decided. There was no material difference in the meaning of the exemption clause in the various cases mentioned in the note to the *Farrington Case*. Those clauses were of substantially the same import as that in the *Farrington Case*, and they are set forth in the dissenting opinion of *Mr. Justice* Strong at page 692 [562] of the report. The whole court was of one opinion upon the subject that there was no substantial difference in the extent of the exemptions contained in the several charters, although there was some difference in their phraseology, but the question was, as stated by *Mr. Justice* Strong, Which of the parties was to *receive the benefit of the exemption, [155 namely, Was it to be the corporation, or was it intended for the individual stockholder? It was upon that question that the court divided; those in the minority believing that the exemption was intended in each case for the corporation, while the case as actually decided holds that the individual shareholder was entitled to the benefit from the exemption, and there is no adjudication that that exemption extended also to the corporation and its property.

Other cases in this court are cited by counsel for the appellee, which it is claimed are authority for their proposition of exemption of the corporate property from further taxation. Among them is the *Piqua Branch of State Bank of Ohio* v. *Knoop*, 57 U. S. 16 How. 369 [14: 977]. The 16th section of the general banking law of the state of Ohio, passed in 1845, required the bank to set off 6 per cent of each semi-annual dividend made by it for the use of the state, which sum or amount so set off was to be in lieu of all taxes to which the company or stockholders therein would otherwise be subject. Subsequently, the state passed an act providing for other and different taxation. The bank refused to pay, whereupon the treasurer of the county brought an action to enforce payment of such tax, and it was claimed on the part of the treasurer that the provision of the general banking law, above mentioned, was not a contract fixing the amount of the tax, but was a law prescribing a rule of taxation until changed by the legislature. This court held that it was a contract, and that as the operation of the law providing for a different tax increased the tax upon the bank, it was protected by the terms of its contract, and was not bound to pay that increase. The claim was also argued in that case, on the part of the state, that it was not within the power of any legislature to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and hence the provision in question, if construed as an attempt to accomplish that end, must be held to be void. But it was held in this court that the legislature had the power to pass the act in question, and that the bank was entitled to be protected from any

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further or other taxation. The question, which of the two properties, the bank or the shares 156] of stock in the hands *of the shareholders, was liable to taxation, was not in the case, and was not decided, but the language of the statute is totally different and much more comprehensive than the language of the charter now before the court. In the *Ohio Case* the payment was to be in lieu of all taxes to which the company or the stockholders would otherwise be subject, embracing both propositions. The case is certainly no authority for the claim made on the part of this appellee.

The next case is that of *Dodge* v. *Woolsey*, 59 U. S. 18 How. 331 [15: 401]. This is substantially the same case as that just above mentioned, with the sole difference that the state in 1851 adopted a new Constitution, in which it was declared that taxes should be imposed upon banks in the mode which an act subsequently passed in 1852 purported to carry out. An assessment was made upon the bank which would result in a larger tax than that provided for in the charter, and one of the shareholders in the bank commenced a suit in equity against the directors to prevent them from paying the tax, on the ground that the bank was exempt from any such payment, and that it would be a misapplication of the capital or profits of the bank if either were taken to pay such tax. This court again decided as to the validity of the contract in favor of the bank, and that there was no material distinction between the two cases arising from the fact that the state of Ohio had adopted a new Constitution in the meantime and under that had passed an act providing for a different method of assessing the property of the bank. This was held to be wholly immaterial as having no effect upon the validity and binding force of the original contract for exemption contained in the charter of the bank.

The same question again came before this court in *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 [17: 178], the only purpose of which case seems to have been to ask of this court a re examination of the questions already decided and a reversal of its judgments already twice rendered. This was refused, and the opinion closed by citing the language of the *Chief Justice* in *Knoop's Case* as follows: "I think that by the 16th section of the act of 1845, the state of Ohio bound itself by a contract 157] *to levy no higher tax than the one there mentioned upon the banks or stocks of banks organized under that law during the continuance of their charters. In my judgment, the words used are too plain to admit of any other construction." Nothing in those cases, construing the charter of the Ohio bank, affords any countenance to the claim made here.

One other case from this court is cited, that of *Gordon* v. *Appeal Tax Court*, 44 U. S. 3 How. 133 [11: 529]. The question in that case depended upon the constitutionality of a tax imposed by the legislature of Maryland in 1841, it being alleged to be in violation of a contract made by the legislature in 1821. The legislature of Maryland in 1821 continued the charters of several banks to the year 1845, upon condition that they would make a road and pay a school tax, and it was provided that if any banks should accept and comply with the terms and conditions of the act the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act. Subsequently a tax was levied upon the stockholders as individuals, according to the amount of their stock, and it was held that by the legislation of 1821 continuing the charters of the banks upon conditions which had been accepted and performed by the banks, a contract was created relating to something beyond the franchise, and that it exempted the stockholders from the tax which the state endeavored to levy upon them thereafter.

This case lends some color to the claim made by the appellee, and yet we do not think it is decisive in favor of that claim. It was a peculiar case. The banks were all in existence, and the question was in regard to their accepting a condition upon compliance with which their charters were to be extended. The act of acceptance, it was stated, would be that of the individual shareholders. The tax was on the shares, and the question which was made was whether the act of the legislature of Maryland of 1841, in imposing a tax upon those shares, impaired the obligation of the contract theretofore entered into between the bank and the state of Maryland. There were two classes of banks, designated as the *old* and *new* banks. The *old* were those which were chartered previous to the *year 1821, and the *new* those [158 which were chartered after the year 1830, and taxes had always, since the incorporation of the banks, been assessed upon their real and personal property in all the cities and counties of the state in the same manner as upon property of the same kind belonging to individuals, and they had always been paid by the banks up to this time. *Mr. Justice* Wayne in the course of his opinion puts the question: "Does it (the act in question) exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts that a tax upon the parts would have upon the whole. Besides, the legislature, in proposing the terms and conditions of the act, used the word 'banks' with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charters. The acceptance of the act could only be made by the stockholders. They did accept, and the state recognized it as the act of the stockholders. It could not have been given or been recognized in any other way. True it is that when accepted and recognized it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character or by whose assent it was to become a contract with the state, to ascertain the intention of the legislature in making the pledge, 'that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'"

The Justice then proceeded in the opinion to discuss the question as to what was meant by

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the language of exemption, and it was claimed that by reason of the peculiar nature of the act of acceptance, which was that of the stockholders as distinguished from the corporate action of the bank by the board of directors, the exemption was offered and directed to that authority which could accept the condition and perform it, namely, the stockholders them-
159] selves, and hence it was *worked out that the meaning of the legislature, under the circumstances of that case, was to exempt from further taxation the shares of stock in the hands of the shareholders. An examination of this case shows that the question of the exemption of both the corporation and the shareholders did not technically arise, although in the course of his opinion *Mr. Justice* Wayne gives an exemption to both, as above quoted. That case has been the subject of criticism in several instances, notably in the case of *New York* v. *Tax Comrs.* 71 U. S. 4 Wall. 244 [18: 344], and in *New Orleans City & L. R. Co.* v. *New Orleans*, 143 U. S. 195 [36: 122], and cases therein cited. Giving to the *Gordon Case* the full weight of authority for the point actually decided, it does not hold that language such as we have in the case under consideration operates to exempt both the capital stock of the corporation and the shares of stock in the hands of its shareholders from all taxation beyond that mentioned in the charter, and we are entirely unwilling to unnecessarily extend the authority of that case so as to cover the question here. Long after that case was decided this court in many cases, notably that of *Churchill* v. *Utica* ("*Van Allen* v. *Assessors*") 70 U. S. 3 Wall. 573 [18: 229], and *New York* v. *Tax Comrs. supra*, recognized the separate and distinct character of the two properties, the capital stock and the shares thereof in the hands of individual shareholders, and such separate property in our opinion is strong proof of the limitation of the exemption to the property which is taxed.

Another case decided in this court is that of *Bank of Commerce* v. *Tennessee*, 104 U. S. 493 [26: 810]. That was a case where the questions arose under this same general statute of exemption. The taxing authorities had taxed the bank on all its real estate, consisting of its banking house, a portion of which only it used for the transaction of its own business and it rented the balance, and it was taxed also for three other pieces of real estate bid in by it upon sales under trust deeds to secure indebtedness. The charter provided that the bank might "purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell and exchange the same, and may hold such real or personal property or estate as may be conveyed to it to secure
160] debts due the institution, and may *sell and convey the same." The supreme court of the state held that while the bank was not liable to be taxed on that portion of its building used by it for the transaction of its business, it was liable for the taxes on the remainder, and also on the other real estate purchased by it. The bank appealed from the decree of the state court, claiming an exemption of the entire property from taxation under its charter. The state did not appeal, although the decree of the court held a portion of the property nontaxable. It will thus be seen that the only question open for review here was, whether the portion actually taxed was exempt, and this court was of the same opinion as the supreme court of Tennessee, and held that as to the portion of the property not used for banking purposes, and as to the other real estate of the bank, it was not exempt from the payment of a tax thereon. The fact of the exemption from taxation of that portion of the property used by the bank in its business seems to have been assumed without argument or decision by this court. There is nothing in that case which affords support to the contention here.

Nor is there anything in the case of *Tennessee* v. *Whitworth*, 117 U. S. 129 [29: 830], tending to show that the court in the case of *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558], held that the exemption covered both properties, the corporation and the shares. *Mr. Chief Justice* Waite in the *Whitworth Case*, on page 136 [832], said, in speaking of the *Farrington Case*, that the question was whether the clause in the charter, there quoted, exempted the shares in the hands of the stockholders from any further taxation by the state. He said: "The court, three justices dissenting, held that it did, because, as the charter tax was laid on each share subscribed, the further exemption must necessarily have been of the shares in the hands of the holders, although the tax as imposed was payable by the corporation. In all cases of this kind the question is as to the intent of the legislature, the presumption always being against any surrender of the taxing power." No comfort can be extracted from the remarks of the Chief Justice as even tending to show that the exemption clause covered both the property of the corporation and the shares of stock in the hands of individual shareholders.

*We have found no case in this court [**161** which is authority for the proposition that language, such as is under consideration in this case, exempts from further taxation both the capital stock of the corporation and the shares of stock in the hands of individual shareholders. As the *Farrington Case* decides that this language does not import that the charter tax is laid upon the shares in the hands of individual shareholders, and that those shares are exempt from further taxation, that question is set at rest, and there being nothing in any case which extends that language to both properties, we hold that when it is made applicable to the separate shares in the hands of individual shareholders, it does not apply to or cover the case of the capital stock of the corporation, and that such stock is liable to be taxed, as the state may determine.

This determines the liability of the capital stock of the Union & Planters' Bank to taxation, and of course it overrules any claim on the part of that bank for exemption from taxation of its surplus or accumulated profits. The question whether such surplus could be taxed if the capital stock itself were to be regarded as exempt has also been decided in the preceding case of the Bank of Commerce.

The decree of the circuit court must therefore be reversed, and the cause remanded to that court, with directions to dismiss the bill with costs.

Mr. Justice **White** dissents.

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MERCANTILE BANK and C. H. RAINE,
Plffs. in Err.,
v.
STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS.

(See S. C. Reporter's ed. 164-173.)

Exemption from taxation.

A judicial sale of the charter of a bank by a receiver does not carry an exemption from taxation of shares of stock given by the charter to shareholders where there was no sale of any specific shares of stock, and the sale was made after the state Constitution had prohibited exemptions from taxation, although purchasers of the charter were recognized by the legislature as a corporation.

[No. 676.]

Argued January 20-22, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree of that court reversing a decree of the Chancery Court of Shelby County, Tennessee, and holding that the plaintiff in error was not entitled to immunity from taxation, and decreeing against the shares of stock and surplus for the full amount of the taxes claimed in an action brought by the State of Tennessee for the use of the city of Memphis for the purpose of collecting taxes alleged to be due. *Affirmed.*

See same case below, 95 Tenn. 212.

Statement by *Mr. Justice* **Peckham:**

This also is a bill filed by the state of Tennessee against the Mercantile Bank for the purpose of collecting taxes alleged to be due plaintiff below under the statutes of that state.

The bill alleges that the legislature of Tennessee, by an act passed February 29, 1856, incorporated by Gayoso Savings Institution, and by the 3d section of the act it was provided that the institution should "pay to the state an annual tax of ½ of 1 per cent on each share of the capital stock, which shall be in lieu of all other taxes." The company, as complainants allege, was duly organized under the act of incorporation, at what date it is not known, but at all events it was engaged in a general banking business in the city of Memphis from a date as early as 1856 down to the year 1869. In that year the institution failed, and a bill was filed by its president, John C. Lanier, in the proper court, for an administration of the affairs of the company as an insolvent corporation under the laws of the state. In the course of the proceedings one E. B. McHenry was appointed receiver of the assets of the company by the court, and on the 11th day of June, 1880, the court directed the receiver to sell the charter of the company. On the 28th of June of that year the receiver did sell the charter at public auction for the sum of $201, to Julius A. Taylor, and the sale was afterwards duly reported to and confirmed by the court. On the 26th of March, 1881, the legislature of the state passed an act changing the name of the company to that of the Mercantile Bank, and thereupon Mr. Taylor undertook to sell the charter to John R. Goodwin and others, who organized the bank with a capital stock of $200,000. Since the year 1885 the company has been carrying on a general banking business in the city of Memphis, claiming to be organized under and to have all the rights, privileges, *and immunities originally granted [163 to the Gayoso institution, and that by virtue of this claim neither the defendant company nor its shareholders have paid any taxes whatever to the state, county, or municipality since its organization, except the ½ of 1 per cent, as provided in the charter.

Complainant charged that it was wholly incompetent to sell the charter of the Gayoso Savings Institution, and that the defendant company had no right or title thereto, and especially that it had no rightful claim to immunity from taxation as contained in that charter, and it is averred that all the stock of the defendant company was subscribed for and issued since the adoption by the state, on May 4, 1870, of the Constitution of that year. For the year 1891 the capital stock of the company was assessed at a valuation of $160,000. The bill then further alleges the various statutes of the state of Tennessee providing for the assessment of shares or of the capital stock of corporations, and various other allegations are made tending to show a valid assessment either upon the capital stock or the shares of stock in the hands of shareholders, if the claim for exemption be not well founded. It prays for a discovery of the names of the shareholders, and that the court may determine whether the corporation or the shareholders have any immunity from taxation under the charter of that company; and that complainants have a decree against the defendant corporation for such taxes, with interest, etc.

To that bill the defendants filed a demurrer, and as grounds thereof stated that the defendant, the Mercantile Bank, is treated and sued in the proceeding as a corporation organized under the charter above mentioned, and exercising all the powers and franchises conferred by it and in the enjoyment of the privileges and immunities bestowed by it, and that therefore the complainants cannot treat the defendant as a corporation under such charter and at the same time deny its right and title thereto; that it cannot treat the defendant as a corporation under that charter and then deny the existence of the charter; that it cannot sue the said defendant as a corporation under the charter for the purpose of imposing burdens on it, and then deny the benefit of *the privi- [164 leges and immunities conferred thereunder; that if the Mercantile Bank has no right or title to the charter, and if the charter was destroyed and ended by the judicial proceedings referred to, then there is no such corporation as the Mercantile Bank, and the business conducted under that name is a mere partnership, and the

NOTE.—*That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations.*—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to powers and duties of receivers, see note to Davis v. Gray, 21: 447.

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bill should have been filed against the persons composing such partnership. Another ground of demurrer was, that it appeared in the 3d section of the charter above mentioned, under which the bank was organized, and it appears on the face of the bill, that the bank was to pay to the state an annual tax of ¼ of 1 per cent on each share of capital stock, which was to be in lieu of all other taxes, and that this constituted a contract between the state on the one side and the bank or shareholders on the other, under which both the capital of the bank and the shares of stock in the hands of the shareholders were exempt, and that the various acts of the legislature subsequent to the grant of that charter and providing for the assessment of the shares of stock in corporations, if applied to the defendant corporation, impaired the obligations of the contract, and are in conflict with U. S. Const. art. 1, § 10, and are void.

This demurrer was overruled, with leave to insist upon the grounds thereof upon the hearing.

Complainants then, by leave of court, filed their amended and supplemental bill, adding various allegations not material to here notice, except that it was stated that by a stipulation between the parties the defendant corporation had assumed the payment of any liability that might be established against the shareholders therein, and that the defendant C. Hunter Raine should be made a defendant in his capacity as a shareholder, and that whatever liability should be established against him should be taken as established against all the shareholders in the defendant corporation, and that the liability of all those established should be assumed by the defendant corporation.

To avoid the labor and expense of taking proof **165**] and to *bring the case to a final hearing, the parties then agreed upon certain facts, among which are the following: That the charter of the Gayoso Savings Institution and all amendments thereto referred to in the pleadings are set forth in the statement. The 1st section of the charter named certain individuals, and it was enacted that they and their associates and successors "be, and they are hereby, created a body politic and corporate by the name and style of the Gayoso Savings Institution, and by that name shall have succession," etc. Provision is then made for subscription for the capital stock, which is to be divided into shares of $50 each, and when 200 shares shall have been subscribed and the sum of $1 per share paid thereon the shareholders may meet and elect five directors. The 3d section contains the exemption clause, which, as therein set forth, is as follows: "Said institution shall have a lien on the stock for debts due it by the stockholders, before and in preference to other creditors, except the state for taxes, and shall pay to the state an annual tax of ¼ of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes." Section 4 granted to it the usual banking privileges as therein set forth. An amendment to this charter, passed March 26, 1881, changed the name of the Gayoso Savings Institution to the Mercantile Bank of Memphis. The statement also shows who were the owners of the capital stock of the Gayoso Savings Institution at the time of the commencement of the suit of John C. Lanier against the institution, mentioned in the original bill.

It is also stated that on the 5th day of March, 1881, Julius A. Taylor (the purchaser of the charter at the receiver's sale in June, 1880), and eight other persons, who were associated with him, held a meeting as stockholders of the Gayoso Savings Institution, the minutes of which meeting are therein set out. The minutes set forth that on the 5th day of March, 1881, a meeting of the stockholders of the Gayoso Savings Institution was held in Memphis, at which certain stockholders were present and who were therein named, and that one of them was elected chairman of the meeting, and he reported that the *requisite [**166** number of shares, 200, had been duly subscribed to as follows (giving the names of the subscribers), and that the sum of $1 per share each had been paid in. It was then moved and seconded to proceed to the election of six directors, which was carried, and such directors were then elected. Just before the time of this meeting the parties therein named signed and executed a stock subscription paper, which is in the following words: "We, the undersigned, agree to take stock in the Gayoso Savings Institution of Memphis, Tennessee, to the amount set opposite our respective names, and to pay the same in such manner as may be ordered by the board of directors, having this day paid in the sum of $1 on each share." Here follow the names of the subscribers. These are the "stockholders" who are mentioned in the minutes of the stockholders' meeting. It is stated that this organization of the institution was continued regularly and without intermission, but without the actual transaction of any banking business until 1883, and that in April, 1883, the said Julius A. Taylor and his associates transferred their stock in the corporation, by regular and proper transfer of the certificates of stock, to John R. Godwin and his associates, and on April 17, 1883, John R. Godwin and his associates, at a stockholders' meeting of said corporation, increased the capital stock to $200,000, and began a regular banking business under said charter, and said corporation has, under that organization, continued said banking business down to the present date, with the same capital stock of $200,000.

The regularity of the organization from the 5th day of March, 1881, the date when Julius A. Taylor and his eight associates held the stockholders' meeting above mentioned, is not questioned. Of the $200,000 capital stock which was issued by John R. Godwin and his associates on the 17th of April, 1883, $180,000 was new stock, which was divided between said John R. Godwin and his associates. The Gayoso Savings Institution from the time it was originally organized under its charter in 1856 to the date when the bill was filed in the case of John C. Lanier and others in 1869, *regularly paid year after year to the state [**167** of Tennessee the commutation tax mentioned in its charter of ¼ of 1 per cent on each share of capital stock, and since the 5th day of March, 1881, the defendant corporation, under the name of the Gayoso Savings Institution and the Mercantile Bank, has constantly paid said commutation tax to the state down to this

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date. It is further stated that the defendants can produce no evidence of the payment of said commutation tax during the interval above shown. Proper copies of the decree of sale of the charter in the case of John C. Lanier against the Gayoso Savings Institution, the receiver's report of the sale and the decree confirming the same are set forth in the agreed statement, and it is admitted that part of the papers in that case are lost or mislaid and cannot be found.

It was further admitted that on June 10, 1880, the receiver in the case of *Lanier* v. *Gayoso Savings Institution* filed a petition in the case asking for instructions as to what should be done with the charter. The petition was lost and no copy could be found. It was stated that there was never any transfer of the certificates of stock from the old stockholders in the Gayoso Savings Institution to Julius A. Taylor and his associates, unless as a matter of law such transfer can be made out as the legal effect of the facts above stated. With one or two exceptions all the old stockholders in the Gayoso Savings Institution were residents of the city of Memphis and the state of Tennessee, and none of them ever claimed any interest in the charter or the business being conducted thereunder or in the stock issued thereunder after the sale of the charter to the said Julius A. Taylor. It is alleged that "the defendants contend that the legal effect of the facts herein stated and of the steps taken in said case of *John C. Lanier* v. *Gayoso Savings Institution*, as set forth above, was to make a legal transfer of the stock in said Gayoso Savings Institution from the persons who owned the same at the time said bill was filed in said case to the said J. A. Taylor and his associates and their successors. This proposition is denied by complainants, and the question is submitted for decision to the court." **168**] Further facts in relation to the *assessment of stock are also set forth, as are also certain cross bills filed by certain depositors in the bank against Lanier, and others who were officers and directors in the bank, alleging fraud on their part in the reception of deposits and in the payment of certain debts or claims. Upon this agreed statement of facts and the bill and supplemental bill and demurrer the parties went to trial.

The decree in the chancery court was in favor of plaintiffs in error on all points. An appeal was taken by the state to the supreme court. That court reversed the decree of the chancery court, and held that the plaintiff in error was not entitled to the immunity from taxation contained in the 3d section of the charter passed in 1856, and gave a decree against the shares of stock and surplus for the full amount of the taxes claimed by the city and county from the year 1888 down. The defendants below sued out a writ of error from this court, and assigned as ground of error that the judgment of the court should have been in their favor, denying the right of the state or city to recover any taxes from either the corporation or shareholders because of the immunity from taxation granted to them by the 3d section of the charter, and that a denial of that right deprived the defendants below of the immunity guaranteed to them by the contract contained in the 3d section of the charter, and that the tax laws affirmed to be valid against them are repugnant to the contract provision of the Constitution of the United States. As a second ground of error, it was stated that the court erred in denying to the corporation, plaintiff in error, an exemption from taxation on its surplus and undivided profits. And the third ground was stated to be error of the court in adjudging a liability of the corporation plaintiff in error to pay the privilege tax mentioned therein on the same ground of immunity granted to it by the 3d section of the charter.

Messrs. **T. B. Turley** and *L. E. Wright* for plaintiffs in error.

Messrs. **S. P. Walker**, *C. W. Metcalf*, and *F. T. Edmondson* for defendant in error.

Mr. Justice **Peckham** delivered the [**169** opinion of the court:

By the original charter granted to the Gayoso Savings Institution in 1856, under which an organization was effected and the institution did business for many years, an exemption was granted to it similar to that granted in the case of the Bank of Commerce, decided at this time. That exemption was applicable to the shareholders upon their shares of stock, and did not apply to the capital stock of the institution. The shareholders in this case have been assessed at a greater rate than is permitted by the 3d section of the charter in question, and the assessment would therefore be void if that section is applicable to this case.

The corporation plaintiff in error can make title to the charter in question only by virtue of the sale thereof under the decree in the suit of Lanier against the Gayoso Savings Institution, which was commenced in 1869. There is not a particle of evidence which in terms shows the transfer of the shares of stock in that institution owned by its shareholders at the time when the charter was sold, nor is there any evidence from which such transfer of stock by those shareholders to Taylor and his associates can properly be inferred; neither they nor their assignees of the charter can claim to be the same original corporation by reason of any previous purchase of specific shares held by the former shareholders. The record shows that the receiver was ordered "to sell at public auction to the highest bidder for cash the charter of the Gayoso Savings Institution, together with all the rights and privileges thereunder." It was the charter which the receiver assumed to sell and which alone he did sell, and not any specific shares of stock. The report of the receiver shows that under that order, which was made on the 11th of June, 1880, he advertised the charter of the Gayoso Savings Institution for sale on the 29th day of June, 1880, "together with all rights, privileges, and franchises thereunder," and that on the last-named day the charter was struck off and sold to Julius A. Taylor at and for the sum of $201, "his being the highest, best, and *last bid; that such bid was followed [**170** by paying to the receiver the amount of same in cash, which the receiver holds subject to the order of the court." On the 21st of July, 1880, the chancellor made a decree, in which

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it is stated that the cause "came on to be further heard on the report of sale by the receiver filed herein, which is in words and figures following: [Here insert report]; and there being no exception to said report, the same is in all things confirmed, and the title to the charter of the Gayoso Savings Institution, with all the powers, privileges, and franchises thereunto belonging, is hereby vested in J. A. Taylor, his heirs, and assigns." This citation from the record is clear evidence of what the transaction purported to be. There is no mention or hint of any assignment or transfer of the shares of stock to the purchaser of the charter by the then owners of such shares, and it seems to be quite clear that none such was ever made. At any rate, there is not the slightest proof upon the subject showing affirmatively that it was made. At the time of the sale of the charter under the decree in the Lanier suit the Constitution of Tennessee had been adopted by the people in 1870, and since that time has been in full force and operation. That Constitution prohibited exemptions from taxation, and provided that all property, real, personal, or mixed, should be taxed, excepting such as in explicit terms was exempt, stating what property might be and what should be exempt from taxation, and directing that all the rest shall be taxed.

We may inquire now, What was the effect of the sale of the charter under the decree in the *Lanier Case*? We have been referred to no statute authorizing the sale of charters of corporations circumstanced as the Gayoso Savings Institution was at the time of this sale, and it is questionable, to say the least, whether any title to the charter passed by the proceedings under the decree in the *Lanier Case*. In order to show the existence of a contract of exemption the corporation plaintiff in error must connect itself with and show that it or its shareholders are entitled to the benefit of the provision of exemption contained in the charter of 1856. Certainly no greater power was exercised by the court of chancery in decree-
171 | ing *the sale of the charter in the Lanier suit than would have been the case had a statute existed providing for the mortgaging of the charter, and its subsequent sale at foreclosure, on breach of condition named in the mortgage. Such a sale, it has been held, does not transfer to the purchaser the franchise to be a corporation, but only the right to reorganize as a corporation, subject to the laws, constitutional and otherwise, existing at the time of the reorganization. *Memphis & L. R. R. Co* v. *Berry*, 112 U. S. 609 [28: 837]. The franchise to be a corporation is distinguished from the franchise to exercise as a corporation the banking powers named in this charter. The exemption from taxation contained in the 3d section of the act of 1856 was a personal privilege in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter, and there is no express or clear intention of the law requiring that exemption to pass as a continuing franchise to the purchaser thereof. *Morgan* v. *Louisiana*, 93 U. S. 217 [23: 860]; *Wilson* v. *Gaines*, 103 U. S. 417 [26: 401]; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244 [27: 922]. In the face of the constitutional provision prohibiting exemption, it can still less be claimed that the sale of the charter carried the exemption. All that Mr. Taylor and his associates could have acquired by the purchase of the charter, after the adoption of the Constitution of 1870, if they acquired anything, were the rights and privileges mentioned in the charter, and subject to the provisions of the Constitution and laws existing at the time of such purchase.

The meeting of Julius A. Taylor and his eight associates on the 5th of March, 1881, was nothing more than an attempt to reorganize by reason of the sale to Taylor under the decree in the Lanier suit. Immediately prior to the organization of that meeting, Taylor and his associates had subscribed for and agreed to take stock in the Gayoso Savings Institution of Memphis, Tennessee, to the amount set opposite their respective names, and to pay the same in such manner as might be ordered by the board of directors, having that day paid in the sum of $1 on each share. These subscribers for stock at once held a meeting, assuming to act as stockholders of the *Gayoso Savings Insti [172
tution, and attempting to reorganize that institution by virtue of the purchase of the original charter, and they assumed by these proceedings to become an organization and corporation known as the Gayoso Savings Institution. It is at least very doubtful whether they succeeded in this way in accomplishing that purpose. However that may be, they claimed to be and assumed to act as a corporation known by that name, and there was, so far as appears, no other corporation of that name and no other proceeding on the part of any one claiming to be that corporation or to have any rights therein. Assuming to act as a corporation by the name of the Gayoso Savings Institution of Memphis, Tennessee, is by no means the same as being in fact the original corporation whose charter they purchased and whose corporate name they took. So far, by their action they had not become a corporation at all, but were simply assuming to be one. The legislature, however, passed an act on the 26th of March, 1881, changing the name of the Gayoso Savings Institution, which these stockholders claimed and assumed to be, to the name of the Mercantile Bank of Memphis, and thus recognized them as a corporation, and from that time the corporation continued regularly and without intermission until 1883, when Taylor and his associates transferred their stock, by regular and proper transfer of the certificates of stock, to John R. Godwin and his associates, who, since the 17th of April, 1883, have been doing a regular banking business under the charter down to the present time. They are the successors of the purchasers of the charter, and have been substantially recognized as a corporation by the legislature.

It may thus be that the corporation plaintiff in error is in fact organized and doing business under the general provisions of the charter of 1856 by virtue of the sale of the charter and the recognition of the legislature, and exercising the banking franchise and other rights granted therein to the original shareholders, but not as the identical corporation originally incorporated, and for that reason it is without the immunity from taxation contained in the

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3d section of the charter. There is nothing, 173 therefore, legally inconsistent in *treating the corporation of plaintiff in error as a corporation doing business by virtue of the charter of 1856, and the legislative recognition accorded to Taylor and his associates in 1881, while at the same time the exemption contained in that same charter is held not to have passed by any of the proceedings above mentioned. This view of the case disposes of the objection taken by plaintiff in error to the position of the state as being inconsistent in that it assumes by taxing the corporation plaintiff in error or its shareholders and by its bill of complaint in this suit to treat the former as a corporation, while at the same time denying it the exemption contained in the 3d section of the act of 1856. We agree that the bill of complaint and the supplemental bill in this suit both proceed upon an implication that the corporation plaintiff in error is actually a corporation under the provisions of the charter of 1856 alone, and that it has no other charter under which to justify its corporate existence than the one just named; but for the reasons already given, the attitude of the state is not inconsistent in treating the plaintiff in error as a corporation, and at the same time denying to it any title to the exemption claimed. The corporation may exist under and by virtue of the purchase of the charter at the receiver's sale, and the legislative recognition and the assumption of the state that it is a corporation, and yet not have the title to the exemption, because it is not in fact or in law the same corporation originally incorporated.

The judgment must be affirmed.

Mr. Justice **White** concurs in the result.

(NOTE.—No. 677, by stipulation, abides the event of foregoing case.)

PHŒNIX FIRE & MARINE INSURANCE COMPANY of Memphis, Tennessee, and JOHN JOHNSON, *Plffs. in Err.*,
v.
STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS.

(See S. C. Reporter's ed. 174-186.)

Immunity from taxation — denial of claim— right to tax presumed—Federal question.

1. Immunity from taxation is not granted to a company by granting to it "all the rights and privileges" of another company to which had been granted "all the rights, privileges, and immunities" of still another prior company which had such exemption. The omission of the word "immunities" raises a doubt as to the exemption, which requires the denial of its existence.
2. The existence of a well-founded doubt is equivalent to a denial of the claim to an exemption from taxation.
3. The universal rule in regard to taxation is that the power and the right to tax are always presumed. The exemption from taxation must be clearly granted. Mere silence is the same as a denial of exemption.
4. The decision of the supreme court of a state as to the weight to be given to a judgment of a court of that state is not reviewable in this court because it is not a Federal question.

[No. 269.]

Argued January 20-22, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment of that court affirming the judgment of the Chancery Court of Tennessee for Shelby County, and for the recovery of taxes due from the Phœnix Fire Insurance Company of Memphis or its stockholders to the city of Memphis, in an action brought by the State of Tennessee for the use of that city against said company and another. *Affirmed.*

See same case below. 91 Tenn. 566.

Mr. **B. M. Estes** for plaintiffs in error.

Messrs. **S. P. Walker** and *F. T. Edmondson* for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This was a bill filed by the plaintiffs below in the chancery court of Tennessee for Shelby county, in October, 1891, to recover taxes alleged to be due from the corporation, plaintiff in error, or its stockholders, to the city of Memphis for the years 1888 to 1891, inclusive. The complainant's bill alleged that neither the defendant company nor its shareholders had any immunity from taxation, and that if any such immunity existed it could not operate to protect both the shareholders and the capital stock. Judgment was accordingly prayed in the alternative against the corporation or the stockholders according as the taxes might be held to have been laid upon one or the other. A demurrer was interposed to the bill, which was sustained in the court below, but upon appeal to *the supreme court, 174 that judgment was reversed. 91 Tenn. 566. The latter court held that the charter of the company contained no immunity from taxation, and that both its shares of stock and capital stock were subject to the taxing power of the state and municipality. The case was thereupon remanded to the court below for further proceedings. It having been determined by the supreme court that the complainant upon the allegations of the bill was entitled to a discovery of the names and residences of the stockholders, a stipulation was entered into between the parties to avoid the necessity of the discovery, by which it was agreed that the corporation would assume any liability that

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NOTE.—*As to exemption from taxation; whether a contract or not; not implied,*—see note to Tucker v. Ferguson, 22: 805.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

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might be established against the stockholders, and that a decree might be entered accordingly, and that the defendant Johnson should be made a defendant in his capacity of a stockholder and as the representative of all the others.

By its answer the defendant company claimed immunity from taxation both for itself and its shareholders, and also set up a plea of *res judicata*, and alleged various objections to the validity of the several assessments upon which complainant claimed taxes due to the state. The case was duly tried, and judgment for the complainant was rendered by the trial court, in which it was adjudged that by the charter neither the defendant company nor its shares of stock had any immunity from taxation, and that both were, for the years mentioned in the bill, subject to the taxing power of the state. The court decided the Federal question made by the defendants below against them, and adjudged that the state tax laws set up in the record, under which the taxes were levied, were not violative of the Constitution of the United States, or void as claimed by the defendants. This judgment was in substance affirmed by the supreme court, and the defendants below sued out a writ of error, and the record is now here for review.

The question first arising is as to the correctness of the judgment holding that the plaintiffs in error were not entitled to any immunity from taxation either as to the capital stock or the shares of stock in the hands of stock-**176**] holders. The *following are the facts: The Bluff City Insurance Company of Memphis was duly incorporated by an act of the legislature of Tennessee, and by § 10 of the act of incorporation it was enacted "that said company shall pay to the state an annual tax of ½ of 1 per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." On the 20th day of March, 1858, the legislature of Tennessee incorporated the De Soto Insurance Company, and that charter was amended on the 30th of March, 1860, and by § 11 of that act "all the rights, privileges, *and immunities*" of the Bluff City Insurance Company were granted to the De Soto Insurance Company. On the 11th day of March, 1867, the legislature incorporated the Washington Fire & Marine Insurance Company of Memphis, Tennessee, and by that act "all the rights and privileges" (omitting the word "immunities") of the De Soto Insurance Company of Memphis, Tennessee, granted to it in its charter or amendments were granted to the Washington Fire & Marine Insurance Company, above named, and by the act of the legislature, approved March 28, 1881, the name of the Washington Fire & Marine Insurance Company was changed to the Phœnix Fire & Marine Insurance Company of Memphis, Tennessee, being the plaintiffs in error. The act of incorporation and the amendments thereto were duly accepted by plaintiff in error and its stockholders, and since that time the business of fire and marine insurance has been conducted by it in Memphis, under the last corporate name.

It will thus be seen that the Bluff City Insurance Company was to pay to the state a certain annual tax on each share of capital stock subscribed, which was declared to be in lieu of all other taxes, and the question is now presented, whether by virtue of these various statutes the plaintiff in error was granted an immunity from taxation to the same extent as that given to the Bluff City Insurance Company and to the De Soto Insurance Company. Is immunity from taxation granted to plaintiff in error under language which grants "all the rights and privileges" of a company which has such immunity? In statutes, as is sometimes the case in legal *documents, more[**177** words are occasionally used than are necessary to convey the meaning of those who passed the statute or executed the document, and it may happen that this very excess of verbiage tends to confuse rather than to enlighten one as to the meaning intended. The words "rights, privileges, and immunities" when used in a statute of the kind under consideration are certainly full and ample for the purpose of granting an exemption from taxation contained in the first or original statute, and when in granting to still another company certain rights the word "immunities" is dropped, its absence would seem and ought to have some special significance. In granting to the De Soto company "all the rights, privileges, and immunities" of the Bluff City company, all words were used which could be regarded as necessary to carry the exemption from taxation possessed by the Bluff City company, while in the next following grant, that of the charter of the plaintiff in error, the word "immunities" is omitted. Is there any meaning to be attached to that omission? And, if so, what? We think some meaning is to be attached to it. The word "immunity" expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an "immunity" than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption. It must always be borne in mind in construing language of this nature that the claim for exemption must be made out wholly beyond doubt, for, as stated by *Mr. Justice* Harlan in *Chicago, B. & K. C. R. Co.* v. *Missouri*, 120 U. S. 569 [30: 732]: "It is the settled doctrine of this court that an immunity from taxation by a state will not be recognized unless granted in terms too plain to be mistaken." See also *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279 [36: 972]. In leaving out a word which, if used, would be regarded as specially and particularly including an exemption from taxation granted to another company, it seems to us that a very grave doubt is cast upon the title of plaintiff in error to the exemption claimed, and in such case the existence *of a well founded doubt is [**178** equivalent to a denial of the claim.

The learned counsel for plaintiff in error have cited many statutes of the state of Tennessee in which it is said the word "immunities" is sometimes used where no exemption from taxation was intended, and he quotes a section from one act (Private Acts 1866-'67, § 49 of an act, page 155), which grants "all the powers, privileges, and immunities" of another

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company that had no exemption, and in another case there were granted "all the rights, franchises, and privileges" of a railroad company which had an exemption from taxation. Many other instances of a like nature are cited. The result of it is to occasion great difficulty in determining what was really intended by the legislature in these various acts. The learned counsel for plaintiff in error also state that about the time these charters in question were granted the legislature customarily expressed the purpose to tax corporations when no exemption was intended. The inference is sought to be drawn in favor of exemption, if the legislature did not affirmatively grant the right to tax. We cannot assent to any such view, and we could come to no such conclusion from an examination of the general statutes cited by counsel. It is a complete overturning of the universal rule in regard to taxation. The power and the right to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption.

We can see nothing in the "surrounding circumstances" which counsel claim should influence our examination and conclusion as to the meaning of these statutes, that in any way induces the belief that an exemption was plainly intended. Our attention has not been called to circumstances which we should regard as of that nature, nor is our judicial knowledge of them sufficient in kind or degree to cause us to conclude that this exemption was intended to be granted to plaintiff in error. We do not find that at this time there was, as counsel insist, any settled rule of the courts that the word "privileges" always embraced exemption from taxation, or that "rights and privileges" and "privileges and [179] immunities" were used *indiscriminately and interchangeably, and always included such exemption. The different words above quoted were undoubtedly used in different statutes, and sometimes it might be insisted that one thing was meant and sometimes another, but we cannot find that there was any well known and definite rule governing the courts of Tennessee at that time which made the words "privileges" or "rights," when used in cases of this nature, include, beyond any doubt and in all cases, an exemption from taxation.

In *Wilson* v. *Gaines*, 9 Baxt. 546, it was held by the supreme court that as the state in its Constitution (Const. 1834, art. 11, § 7), used in the same connection all the words "rights," "privileges," "immunities," and "exemption," each of these words was to be given, in statutory interpretation, a meaning so limited as not to include anything expressed by the others, and that when any one of them is found in a statute the legislature must be conclusively presumed to have used it in its restricted sense. This decision of the Tennessee court tends very strongly to the idea that the words "immunity" or "exemption" would have been required to secure the exemption to a company in a case like this. It is true that this view was not assented to by this court as being the correct one (*Tennessee* v. *Whitworth*, 117 U. S. 139, 146 [29:833, 835]), and it is simply cited for the purpose of showing what the Tennessee court did decide in regard to the meaning of its own Constitution in reference to this subject.

That the legislature was, about the time in question, freely incorporating various companies and granting them exemption from taxation with considerable liberality is not a sufficient reason to induce this court to depart from the universal and well-established rule making a claim for exemption a matter to be proved beyond all doubt. The circumstance which we regard as very significant and which has already been alluded to, consists in the omission of the word "immunities" in the grant to plaintiff in error. That omission we attach great weight to, and the least that can be said of it is that it involves the question in doubt.

It cannot be denied that the decisions of this court are *somewhat involved in relation [180] to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301 [38:450], where under the laws of Missouri (Act of March 2, 1869, § 2) there was a provision that the consolidated companies should be "subject to all the liabilities and bound by all the obligations of the companies within this state," and "be entitled to the same franchises and privileges under the laws of this state as if the consolidation had not taken place." The question was said to admit of doubt whether under the name "franchises and privileges" an immunity from taxation passed to the new company. Various cases are cited in the opinion, which was delivered by *Mr. Justice* Brown, showing the grounds taken by this court in such cases. In *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176 [29:121] (a foreclosure case), it decided that an immunity from taxation enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, "and should succeed to all such franchises, rights, and privileges as would have been had by the original company but for such sale and conveyance." The case followed that of *Morgan* v. *Louisiana*, 93 U. S. 217 [23:860] (also a foreclosure case), where it was held that the words "franchises, rights, and privileges" did not necessarily include a grant of exemption or immunity from taxation. See also, to same effect, *Memphis & L. R. R. Co.* v. *Berry*, 112 U. S. 609 [28:837]. The case of *Pickard* v. *East Tennessee, V. & G. R. Co.* 130 U. S. 637 [32:1051], may also be referred to upon the point that exemption, although it might be granted, must be considered as a personal privilege not extending beyond the immediate grantee unless otherwise so declared in express terms, and it was therein declared that such immunity *would not pass merely by a con- [181] veyance of the property and franchises of a railroad company, although such company might itself hold property exempt from taxation. In

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that case *Mr. Justice* Field, speaking for the court, said: "It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later and, we think, the better opinion is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation." This language is referred to by *Mr. Chief Justice* Fuller in the case of *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S., where, at page 297 [36: 979], he says: "We do not deny that an exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect," citing the *Pickard Case*.

Looking at the other side, we find the case of *Humphrey* v. *Pegues*, 83 U. S. 16 Wall. 244 [21: 326], where there was a grant to a railroad company of "all the rights, powers, and privileges" granted by the charter of another company which exempted the property of such other company from taxation, and it was held that the property of the first company was thereby also exempted. *Mr. Justice* Hunt in delivering the opinion of the court said that "a more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage or special exemption from a burden falling upon others." Again, in *Tennessee* v. *Whitworth*, 117 U. S. 139 [29: 833], it was held that a right to have shares in its capital stock exempt from taxation within the state was conferred upon a railroad corporation by a state statute granting to it "all the rights, powers, and privileges," or granting it "all the powers and privileges" conferred upon another corporation named, if the latter corporation possessed by law such right of exemption. The ques-
182] tion in that case *arose as to the meaning of certain statutes passed by the legislature of Tennessee, resulting in the consolidation of certain railroads therein mentioned. In the course of his opinion *Mr. Chief Justice* Waite cites the case of *Philadelphia & W. R. Co.* v. *Maryland*, 51 U. S. 10 How. 376, 393 [13: 461, 468], where *Mr. Chief Justice* Taney, speaking of a statute which authorized the union of two railroad companies and secured to the union company "the property, rights, and privileges which that law or other laws conferred on them" (the separate companies or either of them), said that such language extended to the union company the exemption from taxation contained in the charter of one of the uniting companies. *Mr Chief Justice* Waite continuing, in his opinion said: "As has already been seen, the word 'privilege' in its ordinary meaning, when used in this connection, includes an exemption from taxation." The decision in this last case should be confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word "privilege," it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out.

The later cases of *Pickard* v. *East Tennessee, V. & G. R. Co.* 130 U. S. 637 [32: 1051], and *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279 [36: 972], show that there must be other language than the mere word "privilege" or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted. The case of *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486 [38: 793], adds nothing to the discussion on either side. The particular point was not in that case, but it seems to be cited by counsel for plaintiffs in error for the purpose of showing what was the general condition of the state at the time of the adoption of the Constitution in 1834, and what was the policy of the state in regard to internal improvements, which the Constitution declared ought to be encouraged. The incorporation of an insurance company would hardly come within the most liberal meaning of the term "internal improvements."

*If this were an original question, we **[183** should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach.

Second. Concluding, as we have, that this plaintiff in error insurance company is not exempt from taxation by the language of the statutes above mentioned, we come to the consideration of the second defense interposed by its shareholders. It seems that some time in the year 1873 the shareholders or some of them were sued by the city of Memphis to collect from them certain taxes alleged to be due that city for the year 1872 upon the shares of stock held by them. By the decision of the supreme court of Tennessee the city recovered a judgment. A stipulation was then entered into between the parties to that suit, which is in the record, by which it appears that the same questions involved in that suit were fully and fairly presented in the case decided in favor of the plaintiffs, at that term of court, wherein the state of Tennessee and Shelby county were complainants, and Napoleon Hill and others, stockholders in the Memphis Fire & General Insurance Company, were defendants, and which action had been carried to the Supreme Court of the United States by writ of error for its decision of the questions, and, therefore, to save the expense of argument in the case, it was agreed by counsel for all parties that the *Memphis City Case* should abide by the decision of *Tennessee* v. *Hill*, which should be conclusive upon the parties to the stipulation in all things the same as though actually rendered in that case. If the decree in the *Hill Case* were affirmed, then this decree was to be affirmed, and if the other should be reversed, then this was to be reversed. After the signing of that stipulation, the *Hill Case* was duly prosecuted by writ of error and argued before the Supreme Court of the United States, where the judgment in favor of complainant was reversed and the cause remanded to the supreme court of Tennessee with directions to enter its decree therein for the defendant Hill. This was

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184]done, and, in accordance *with the stipulation above mentioned, a decree was thereupon entered in the Memphis city action, reversing the judgment in favor of plaintiff, and adjudging and decreeing that the tax levied and assessed by the city of Memphis upon the defendant's share of stock was illegal, and adjudging that the city of Memphis could not legally assess said shares of stock for taxation, in the hands of the owners thereof, and that such shares were exempt from any and all municipal taxation, and the city and its officers were perpetually enjoined from collecting or proceeding to collect such taxes. This judgment was entered by consent, and pursuant to the stipulation of the parties entered into at the time the writ of error was sued out in the *Hill Case* and it is now set up and offered in evidence as an adjudication in favor of the shareholders of the insurance company who are admitted to be the direct successors of the shareholders of the company sued in the former action, and the decision of the state court, refusing the benefit of that adjudication to the shareholders, is claimed to have been error, and to present a Federal question for review by this court. The judgment is not claimed as an adjudication or estoppel in favor of the corporation, because the corporation was not a party to the suit.

We think the decision of the supreme court as to the weight to be given the judgment is not reviewable by us because it is not a Federal question. The former judgment determined that, as between the city and the shareholders, the latter were not subject to pay the taxes for the years specified. In the action now under consideration we have determined that there was no immunity conferred either upon the corporation or the stockholders by the statutes cited. On the trial of this action the former judgment was offered in evidence by the shareholders, and it was held to constitute no bar to the maintenance of this action by the plaintiff, nor did it operate as an estoppel upon their right to claim taxes for subsequent years. The judgment offered in evidence was the judgment of a state court, and the refusal to accord to it all that was claimed for it in the nature of an estoppel by counsel for plaintiffs in error was, in any event, no more 185] than *a refusal to give to a judgment of one of its own courts that degree of force as evidence which it was by the general law entitled to. In no event was it anything other than error committed by the court below in regard to the general law or rule of evidence, which has nothing of a Federal question connected with it. It is entirely different from the case of a refusal of a state court to give the proper effect to a judgment of a court of the United States. If a state court erroneously refuse to give such weight and effect to a judgment of one of the courts of the United States a Federal question arises, which is within the jurisdiction of this court to review upon writ of error to the supreme court of the state. *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141 [30: 614]. Although no higher sanctity or effect can be claimed for the judgment of a Federal court than is due under the same circumstances to judgments of state courts in like cases (*Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130, 135 [22: 588, 590]; *Embry* v. *Palmer*, 107 U. S. 3 [27: 346]), yet in the case of a judgment of the former court the Constitution provides that full faith and credit shall be given it, and whether it has or has not been given it by a state court is a Federal question, while if the state court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own courts and among its own citizens, that error is not subject to review by this court, because it constitutes no Federal question.

If it were otherwise, every decision of a state court, claimed to be erroneous, which involved the failure to give what the defeated party might claim to be the proper weight to one of its own judgments, would present a Federal question, and would be reviewable here. There is no question of contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a state court operated as an estoppel against the plaintiff below, and prevented the state court from granting it the relief to which it would otherwise be entitled. In granting relief it was bound to consider the Federal question, as to whether there was or was not a contract of immunity, and that question was open to review here and we have just *reviewed it. It is, moreover, quite [186 doubtful whether the court below committed any error, even if the question were to be regarded as of a Federal nature and open to us for review. *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301, 314 [38: 450, 456].

It is said that a suit for taxes for one year is no bar to a suit for taxes for another year; that it is not the same transaction, and the judgment in a prior action can never operate as an estoppel other than as to those matters which were in issue and controverted, and upon the determination of which a finding or verdict was rendered. It is not necessary in this case, however, to determine whether there was any one particular fact in issue and litigated in the first case, and which would be closed from further controversy, and which, as thus decided, would preclude a recovery in this case. We hold that the question in any event, as presented in this case, was not a Federal one.

These views render a discussion of any other question in the case unnecessary, and *lead to an affirmance of the judgment herein.*

Mr. Justice **White** dissents.

MEMPHIS CITY BANK ET AL., *Plffs. in Err.*,

v.

STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS.

(See S. C. Reporter's ed. 186-193.)

Exemption from taxation—new charter—banking power—estoppel.

1. A change of the business of a company from that of insurance to that of banking under a law

NOTE.—*As to reserved power to alter, amend, or repeal charters*, see note to Greenwood v. Union Freight R. Co. 26: 961.

As to when an injunction to restrain the collection

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authorizing such change is such a material and radical change that, when made after the state Constitution had prohibited exemptions from taxation, the legislature has no power to continue an exemption from taxation granted by the charter to the insurance company so that it will continue to exist in favor of such company exercising an exclusively banking business.

2. The effect of a state law giving to a company having by its charter the right to receive moneys in trust or otherwise, the right to do a banking business, is to grant a new charter to the extent of granting banking powers, and the company, if it avails itself of the privileges mentioned in such law, takes them subject to the Constitution and laws then in force.

3. The power to receive in trust for any person moneys or other valuable thing, give acknowledgment therefor, and to loan surplus funds, given to an insurance company by its charter, does not authorize it to conduct a general banking business.

4. A judgment establishing an exemption of the shareholders of a corporation from taxes is not an estoppel against a later action based upon facts of a totally different nature and after a change in the charter and business of the company.

[No. 674.]

Argued January 20–22, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment of that court reversing the judgment of the court below and for the recovery of taxes upon the shares of stock in the Memphis City Bank and upon the surplus and undivided profits thereof in an action brought by the State of Tennessee for the use of the city of Memphis against the Memphis City Bank *et al.* *Affirmed.*

See same case below, 91 Tenn. 574.

Statement by *Mr. Justice* **Peckham:**

This suit is similar to those which precede, and is brought for the collection of taxes against the corporation plaintiff in error or its stockholders. It was tried upon an agreed statement of facts. Those which are material to the present inquiry are the following: The defendant corporation in January, 1870, under its then name of the Memphis City Fire & General Insurance Company, was duly organized under the charter granted to it on the 24th of January, 1870, and the organization under it was in all respects valid and no question is made upon the same. The defendant from that date down to the year 1887 carried on an insurance business under its charter in the city of Memphis. In that year, in pursuance of the powers granted in Acts 1887, chap. 190, the corporation (also claiming the right to do so under the powers conferred by its charter) changed its business from that of insurance to that of banking, and since that date down to the present time has exclusively conducted a banking business in Memphis. Section 2 of the original charter empowers the corporation to receive in trust from any person, moneys, jewels, plate, and other valuable things, and to give acknowledgment therefor in such form as the directors of the corporation may deem best suited to the protection and convenience of depositors and the company. And the corporation was also authorized to loan its surplus funds on any public stock, or of any incorporated company, or of the United States, or either of them, or to invest such funds in any real or personal estate, choses in action, or other good securities. Section 7 provides that there shall be levied a state tax of ½ of 1 per cent upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as the other taxes are by law collected, which shall be in lieu of all other taxes and assessments. Acts 1887, chap. 190, enacted that any company incorporated under the laws of Tennessee, having by its charter the right to receive moneys *in trust or otherwise, should be [188 held to have the power to receive deposits and loan the same and its capital stock on any kind of commercial or business paper or real estate, buy and sell exchange and all kinds of public or private securities and commercial paper. It was also further provided in that act "that the exercise of any of the granted powers should not operate to forfeit any franchise, right, power, privilege, or immunity granted in the original charter, and that the nonuser of a part of a corporation's powers, privileges, and franchises should not have the effect of forfeiting any franchise, right, power, privilege, or immunity contained in its charter."

On the 23d of January, 1889, the legislature passed an act changing the name of the corporation plaintiff in error from that of the Memphis City Fire & General Insurance Company to that of the Memphis City Bank, and since that time it has conducted business under the latter name. From its first organization in 1870 down to the present time it has regularly and constantly paid to the state of Tennessee the charter tax provided for in § 7 of its charter, and has regularly filed with the comptroller of the state the statement required and called for by the 7th section of that charter.

The opinion of the supreme Court of Tennessee delivered upon the demurrer to the bill in this case will be found reported in 91 Tenn. 574, under the name of *Memphis* v. *Memphis City Bank.* In the year 1872 the state of Tennessee, the county of Shelby, and the city of Memphis undertook to tax the shares of stock of the Memphis City Fire & General Insurance Company at their market value in the hands of the shareholders, at the same rate as other property was taxed. The shareholders denied this right and claimed an exemption from all taxation except to the extent of the tax provided for in the 7th section of the charter. Thereupon an agreed case was made up between the parties, the state of Tennessee on the one side and Napoleon Hill, a stockholder in the company, on behalf of all the other stockhold-

of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,—see note to Providence Bank v. Billings, 7: 999.

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ers, on the other side. The case was made in conformity with the laws of Tennessee, and the 189] question submitted to the *second chancery court of Shelby county and state of Tennessee to determine whether the said county or state had the right to impose a tax upon the shares other than the ½ of 1 per cent provided for in its charter. The case was regularly heard in the second chancery court of Shelby county, and decided in favor of the shareholders, and against the power to tax. It was then carried to the supreme court of Tennessee, where the decision of the chancery court was reversed, and the power to tax affirmed. The case was heard in the supreme court in connection with several cases of the same character under the title of *Memphis* v. *Farrington*, 8 Baxt. 589. Mr. Hill sued out a writ of error from this court in behalf of himself and the other shareholders, and the case was regularly heard in this court upon the Federal question, and upon that hearing this court reversed the decree of the supreme court of Tennessee and affirmed that of the second chancery court of Shelby county, and upon a mandate properly issued from this court to the state court a judgment was entered in favor of said Hill and the other shareholders in the company. The case, as decided by this court, is reported under the name of *Farrington* v. *Tennessee*, 95 U. S. 679, [24: 558]. The plaintiffs in error herein rely upon that final decree as being a full, final, and complete adjudication of all questions involved in this case, and as being *res judicata* and binding upon the parties hereto.

Upon these agreed facts the case was tried and judgment given for the shareholders, which, upon appeal, was reversed by the supreme court of Tennessee, and judgment entered for the city of Memphis for the recovery of taxes upon the shares of stock in the Memphis City Bank and upon the surplus and undivided profits for the years therein named, and it is to review this judgment that the plaintiffs in error come here.

Messrs. **T. B. Turley**, *T. M. Scruggs*, and *L. E. Wright* for plaintiffs in error.

Messrs. **S. P. Walker**, *C. W. Metcalf*, and *F. T. Edmondson* for defendant in error.

190] *Mr. Justice* **Peckham** delivered the opinion of the court:

The question in this case is whether the corporation plaintiff in error could, while availing itself of the general act (Acts 1887, chap. 190, above referred to), change its business from that of insurance, as provided in its charter granted in January, 1870, to that of banking, and still retain the exemption from the payment of any taxes other than those provided for in § 7 of that charter. After such change of business and by virtue of § 14 of the general revenue law of the state, passed in 1887, the state assumed to tax the plaintiffs in error at a greater rate than that provided for in the original charter, and it is to collect these taxes that this suit is brought. At the time the act of 1887, chap. 190, was passed, under which the corporation plaintiff in error claimed the right to change its business (while also at the same time claiming that right under its original charter), the Constitution of Tennessee, adopted in 1870, was in full force. The Constitution provided (art. 2, § 28) that "all property, real, personal, or mixed, shall be taxed, but the legislature may except such as may be held by the state, counties, cities, or towns." By the Constitution of 1870, art. 2, § 8, it was provided, among other things, "that no corporation shall be created or its powers increased or diminished by special laws, but the general assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may at any time be altered or repealed, and no such alteration or repeal shall interfere with or devest rights which have become vested."

Under these two provisions of the Constitution, giving effect to both, the legislature could not even by general law grant or preserve an immunity from taxation, not otherwise existing, total or partial, to the capital stock or shares of a corporation. The 28th section of the 2d article of the Constitution requires that all property shall be taxed except such as is exempt by that section, or is by that section authorized to be exempt by the legislature, and this kind of property in question *in this [191 case does not come within either class spoken of in that section. We think that the change from the business of insurance to that of banking is a material and radical change, and to such an extent that the legislature, under the Constitution of 1870, would have no power to continue an exemption from taxation granted by the charter to the insurance company so that it should continue to exist in favor of a company exercising an exclusively banking business. The legislature was powerless in the face of the constitutional provision mentioned to provide "that the exercise of any of the granted powers should not operate to forfeit any franchise, right, power, privilege, or immunity" granted in the original charter. The supreme court of Tennessee has so construed the Constitution. 91 Tenn. 574.

That court holds that the legislature could not, by enacting such a proviso in connection with the authority given by it to a corporation to change its business, transfer an exemption from taxation granted to that corporation while exercising the powers originally granted to it by its charter prior to the adoption of the Constitution of 1870.

The substantial effect of Acts 1887, chap. 190, when made applicable to any company having, by its charter, the right to receive moneys in trust or otherwise, was to grant a new charter to the extent of granting banking powers, and the company, availing itself of the privileges mentioned in such act, took them subject to the Constitution and laws then in force. It was not, properly speaking, a mere act increasing the powers of the corporation so that such corporation could perform other acts of a nature similar to those which it was already authorized to perform by its original charter. It was not an increase but it was a change of powers to the extent that those granted by the act of 1887 were of a totally different character and nature. An insurance corporation differs radically from a banking corporation, and the powers given to one cannot be exercised by the other without some authority granted by the state through

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its legislature. This corporation plaintiff in error, since the passage of the act in question, has not only availed itself of the privileges there-
192] in granted, *but it has totally abandoned the exercise of the powers originally granted to it in its charter of 1870, and by such abandonment on the one hand and the exercise of the privileges granted to it by the act of 1887 on the other, it has become, in substance and effect, a banking corporation, and necessarily it must look to the act of 1887 as its authority for the exercise of its banking privileges. The original contract of exemption from taxation was manifestly granted to the original corporation to be availed of by it while it was in the exercise of its corporate powers as an insurance company. It cannot be held to go with the corporation when it abandons the performance of the acts authorized in its original charter and proceeds to exercise the privileges of and do a business as a banking corporation by virtue of the act of 1887. As a result, when it assumes to make use of the privileges granted to it under the act last named, it must do so subject to the Constitution and laws existing at the time when that act was passed, and its rights and privileges must be exercised in subordination thereto.

Upon the proposition argued by plaintiffs in error, that they have the right to engage in their present business of banking by virtue of the original charter, we are of opinion that such right does not exist. The power to receive in trust for any person moneys or other valuable thing, and of giving their acknowledgment therefor, and to loan their surplus funds as provided in the 2d section of the original charter, in no sense authorizes them to conduct a general banking business. They must look to the act of 1887 alone for their power to transact that kind of business, and for the reasons we have stated they are not entitled to the exemption provided for in § 7 of their charter.

Second. We do not think that the plea of *res judicata* can be upheld upon the facts as stated. The former judgment was entered in an action commenced long prior to the act of 1887 to recover taxes alleged to have become due while the corporation plaintiff in error was engaged in its original business of an insurance company, and the judgment was upon the right of its shareholders to be exempt from any
193] further *taxation than that provided for in the charter while the company was doing business as such insurance company. The judgment could therefore not be an estoppel or operate in any manner as a bar to the maintenance of this action, based upon facts of a totally different nature, and arising long after the judgment was obtained in the former action.

The judgment must therefore be affirmed.

(NOTE.—No. 675, by stipulation, is to abide event of foregoing case.)

PLANTERS' FIRE & MARINE INSURANCE COMPANY ET AL., *Plffs. in Errr.*,
v.
STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS.

(See S. C. Reporter's ed. 193-198.)

Exemption from taxation—constitutional prohibition.

1. Many years' delay in accepting a charter which contains an exemption from taxation is fatal to the exemption although the legislature recognizes the existence of the corporation under the charter, when before the acceptance a constitutional provision has prohibited such exemptions.
2. A suit against a corporation for taxes, based on a denial of the right to an exemption from taxation granted by its charter, for the reason that the acceptance was after a constitutional prohibition of exemption is not such a collateral attack upon the charter as to be a calling in question of the existence of the corporation, and to be in the nature of a quo warranto, in which the state must act through its attorney general.

[No. 678.]

Argued January 20-22, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment of that court in favor of the plaintiff, the State of Tennessee, for the use of the city of Memphis, against the defendants, the Planters' Fire & Marine Insurance Company *et al.*, for the amount of taxes alleged to be due on the capital stock or shares of stock in said company. *Affirmed.*

See same case below, 95 Tenn. 203.

Statement by *Mr. Justice* **Peckham**:

This is another bill filed by the state of Tennessee for the use of the city of Memphis against defendants *below to recover [194
taxes alleged to be due on the capital stock or shares of stock in the corporation plaintiff in error. The supreme court of Tennessee gave judgment in favor of the plaintiff below, and the plaintiffs in error have brought the case here for review. The case was tried upon an agreed statement of facts, among which are the following: On the 24th day of March, 1860, the Energetic Insurance Company of Nashville was incorporated. By the 60th section of that

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22:805.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to reserved power to alter, amend, or repeal charters, see note to Greenwood v. Union Freight R. Co. 28: 961.

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charter it was provided "that said company shall pay to the state an annual tax or bonus of ¼ of 1 per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." On the 10th day of December, 1866, the Planters' Insurance Company was incorporated, and thereafter it conducted a general fire insurance business in the city of Memphis up to the year 1885. No immunity from taxation was granted that company. On the 27th day of March, 1885, the name of the Energetic Insurance Company was changed to the Planters' & Marine Insurance Company of Memphis, and the company was authorized to remove its *situs* and office to the then taxing district of Shelby county, now the city of Memphis.

From the time of the passage of the act providing for the incorporation of the Energetic Insurance Company in 1860 down to the 30th day of January, 1884, no action was taken by the incorporators named in the act towards organizing a corporation accepting the charter. On the last-named date a meeting was had of some of the incorporators, named in the act, and the first minutes which can be found in the office of the defendant corporation, or which it can produce, are the minutes of the incorporators, stockholders, and directors held on that day. Six individuals were named in the original charter as incorporators, together with such other persons as might thereafter be duly associated with them, and at this meeting of the stockholders in January, 1884, four of them were present, and the other incorporators mentioned in the charter were dead at that time. It appears from those minutes that, pursuant to the terms and stipulations of an act of the legislature of Tennessee, a meeting was [195] that day—*January 30, 1884—called of the incorporators of the Energetic Insurance Company of Nashville, and in response to that call four of such incorporators appeared. A moderator was selected and books were opened, or ordered to be opened, for subscriptions to the capital stock of the company, and it was resolved that the first directory should consist of five persons. Stock was then subscribed by the various persons, amounting to $100,000, and the stockholders thus subscribing being present either in person or by proxy, it was unanimously agreed by the incorporators present that the stockholders should go into an election for directors, and that the incorporators as such should adjourn. Thereupon, on the same day, it appears from the minutes that a meeting of the stockholders of the company was held and a board of directors elected, and the stockholders then voted to call a meeting of the directors for the same day. A meeting of the directors was then held, and a president, secretary, and treasurer of the company elected, and from that day (January, 1884) the organization of the corporation plaintiff in error was regular and continuous.

After its name was changed by the legislature to the Planters' Fire & Marine Insurance Company, and it was authorized to remove its *situs* to the city of Memphis, its stock was increased to $150,000, and it removed its place of business to Memphis, and bought out the assets and property of the Planters' Insurance Company and reinsured its risks. Since that time the defendant has regularly paid the commutation tax of ¼ of 1 per cent on each share of capital stock subscribed to the state of Tennessee, pursuant to the terms of the charter, up to the present time. By virtue of the general revenue laws of the state, the corporation plaintiff in error, or its stockholders, have been taxed upon the capital stock or shares of stock at a greater rate than that provided for in the 60th section of the act of incorporation, and the plaintiffs in error claim that by virtue of that 60th section they are entitled to exemption from all taxation, except that therein provided for.

Messrs. **T. B. Turley** and *L. E. Wright* for plaintiffs in error.

Messrs. **S. P. Walker**, *C. W. Metcalf*, and *F. T. Edmondson* for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The claim set up by plaintiffs in error is that the insurance company was duly incorporated as the Energetic Insurance Company of Nashville, under the act passed March 24, 1860; that it is the same company as therein incorporated, and entitled to all the benefits and immunities, among them that of exemption from taxation granted by that charter.

The defendants in error deny that claim, and assert the right to tax by virtue of the general revenue laws of the state. They assert that by reason of the failure to accept the charter and organize thereunder until after the lapse of twenty-four years the corporation did not acquire the right of exemption provided for in the 60th section of the charter because, at the time the company was organized in 1884, the Constitution of the state of Tennessee, adopted in 1870, was in full force, and by that Constitution any exemption of the property of the corporation, its capital stock or its shares of stock, was prohibited.

The plaintiffs in error answer that they are either a corporation organized under that charter or else there is no corporation, and the individuals assuming to act as such should be sued in their individual capacity, and if liable at all for any taxes whatever, they must be liable as individuals only. They further say that the state by its action herein recognizes them as a corporation, and if a corporation at all, they are such under the original charter abovementioned, and if they be a corporation under such charter, they are entitled to all the rights and privileges and immunities granted by that charter as a whole, and that they cannot be prosecuted as a corporation under that charter for the purpose of compelling them to *pay taxes and, at the same time, be de- [197 nied the right of exemption from such payment granted by that 60th section. They also allege that this action of the state is a collateral attack upon their charter by denying their immunity from taxation given by the 60th section, and therefore calling in question its existence as a corporation, and an action of that kind can only be maintained by the state by means of a quo warranto, either against the corporation itself for the exercise of powers not granted it, or against the individuals for assuming to exercise the corporate powers.

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For the purpose of effecting a dissolution of a corporation grounded upon some alleged forfeiture of its rights and powers, the state must act through its attorney general and by action in the nature of quo warranto. This is not such an action, and the dissolution of the corporation is not its object. The state in effect so far recognizes it as a corporation as to demand payment of taxes on its capital stock or on its shares of stock, and when as a defense to that action the corporation plaintiff in error, or its stockholders, set up its alleged right of exemption under the 60th section of the charter, the answer of the state is: You are not entitled to that exemption because at the time your charter was accepted, twenty-four years after it was granted by the legislature, the Constitution of the state prevented the grant of any exemption such as is claimed by you, to which the plaintiffs in error rejoin that in this action you cannot look at the time when the charter was accepted, but as the corporation is acting under the original charter, the 60th section remains in full force.

We think that even in this action it is proper for the state to inquire as to the time of the acceptance of the charter for the purpose of determining what powers were actually granted. If the charter had been accepted and the individuals organized under it prior to the adoption of the Constitution of 1870, then the exemption might have gone with it; but we think it entirely possible to hold that by the acceptance of the charter, assuming it to have been within a reasonable time, but after the Constitution was adopted, such acceptance (while subsequently recognized by the legisla-**198** ture in permitting it to *change its *situs*) must be taken in connection with the provisions of the Constitution existing at the time, and that while the incorporators might take all the other rights, powers, and privileges granted by the charter, so far as to give them the franchise to be a corporation and exercise the powers therein granted, the immunity of exemption would not pass under the grant. It might possibly have been held, in a direct attack of the state upon the charter, that there had been an unreasonable delay in accepting it, and that consequently there was in law no corporation under the charter. That course was not taken, and the legislature, after the assumed organization under the charter in 1884, passed an act changing the name of the corporation and permitting it to change its *situs*. It might therefore be claimed that it thereby recognized the existence of the corporation under the charter, but in subordination to the Constitution and laws existing at the time when the charter was accepted.

We think upon these facts the exemption from taxation did not pass to the corporation, and the assessments were in consequence legal and valid.

The judgment is therefore affirmed.

(NOTE.—No. 679, by stipulation, is to abide the event of this cause.)

HOME INSURANCE & TRUST COMPANY ET AL., *Plffs. in Err.*,
v.
STATE OF TENNESSEE, for the Use of the CITY OF MEMPHIS.

(See S. C. Reporter's ed. 198-200.)

Exemption from taxation.

An act giving a corporation all the "powers, rights, reservations, restrictions, and liabilities" of another company does not give an exemption from taxation which the latter may possess.

[No. 672.]

Argued and Submitted January 20-22, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree of that court in favor of the State of Tennessee for the use of the city of Memphis, plaintiff, against the defendants, the Home Insurance & Trust Company *et al.*, for the recovery of certain taxes. *Affirmed.*

See same case below, 95 Tenn. 212.

Statement by *Mr. Justice* **Peckham:**

The plaintiffs below sought by this bill to recover certain taxes against the Home Insurance Company, or its shareholders, under the general revenue laws of the state, at a greater rate than the plaintiffs in error claimed they are liable to pay. This case was also tried on an agreed statement of facts, by which it appears that on the 29th day of February, 1856, the legislature of Tennessee passed an act incorporating the Home Insurance Company. On March 20, 1858, the legislature passed an act, the 14th section of which provides "that the name of the Home Insurance Company of Memphis be changed to that of the Home Insurance & Trust Company, and said company may organize with all the forms, officers, terms, powers, rights, reservations, restrictions, and liabilities given to and imposed upon the Memphis Life & General Insurance Company, provided nothing herein contained shall in any wise be construed to release said company from any existing liability."

The present company organized under this charter. The Memphis Life & General Insurance Company, referred to in the above section, was chartered March 2, 1854, the 30th section of which reads: "That there shall be a state tax of ½ of 1 per cent upon the amount of the capital actually paid in." It is conceded that the Home Insurance Company has regularly paid this tax. The supreme court of

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

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Tennessee held that the shares of stock, the capital stock, the surplus and franchises of the company, were subject to taxation, and that the exemption from taxation claimed by it and its shareholders was not well founded. The court rendered a decree against the company under the stipulation, by which the company assumed the liability of its shareholders for taxes against them, from which decree plaintiffs in error have prosecuted this writ of error.

Mr. **Frank P. Poston** for plaintiffs in error.

Messrs. **S. P. Walker,** *C. W. Metcalf,* and *F. T. Edmondson* for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

It is quite questionable whether § 80 of the act incorporating the Memphis Life & General Insurance Company grants to that company an immunity from taxation. Without discussing or deciding that question, however, we think that, assuming the exemption to exist in favor of that company, it did not pass to the Home Insurance Company by virtue of the 14th section of the act of 1858, above quoted. We think the words contained in that section, referring to the Memphis Life & General Insurance Company, are of no broader significance than those referred to in the case of *Phœnix F. & M. Ins. Co.* v. *Tennessee,* 161 U. S. 174 [*ante.* 660].

Upon authority of that case, therefore, this judgment must be affirmed.

HOME INSURANCE & TRUST COMPANY and Bunn F. Price, *Plffs. in Err.,*
v.
STATE OF TENNESSEE and Shelby County.

[No. 673.]

IN ERROR to the Supreme Court of Tennessee.

Mr. Justice **Peckham** delivered the opinion of the court:

This case is precisely similar to the last preceding one, and must be governed by our decision in that.

Judgment is therefore affirmed.

DISTRICT OF COLUMBIA, *Plff. in Err.,*
v.
ISAAC S. LYON.

(See S. C. Reporter's ed. 200-208.)

Certificates of indebtedness—recovery upon.

1. Certificates of indebtedness are valid obligations of the District of Columbia when issued for paving and curbing done under a valid contract with the corporation of Washington, and that corporation and its successor, the District, have failed in the duty to make the required assessments for the payment of the same, although at the time the certificates are issued the assessments cannot be lawfully made because the title to the lots has passed to a bona fide purchaser.

2. A purchase in good faith at a void sale for nonpayment of assessments upon lots for paving and curbing, when made involuntarily and to protect the interests of the purchaser as the holder of certificates of indebtedness given by the District of Columbia to the contractor who did the work, and the surrender of the certificates for the purchase price of the lots on the sale, will not preclude such holder from recovering the amount paid by him on the sale from the District, as it was through its fault that the sale was void and the lots not subject to a lien for the assessments.

[No. 135.]

Argued and Submitted December 20, 1895. Decided March 2, 1896.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment of that court in favor of plaintiff, Isaac S. Lyon, against the District of Columbia, defendant, for the amount of certificates of indebtedness, and an additional amount paid upon the sale of lots. *Affirmed.*

See same case below, 20 D. C. 484.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action of assumpsit to recover from the District of Columbia the sum of $4,082.70, with interest from October 5, 1881, and was tried, by stipulation, without a jury, by the supreme court of the District of Columbia in general term. Judgment was rendered in plaintiff's favor, March 28, 1892, and thereupon this writ of error was sued out. The opinion of the court by James, J., is reported 20 D. C. 484.

Under the act of Congress of February 28, 1865 (13 Stat. at L. 434, chap. 48) the corporation of Washington had ample power and authority to make local improvements and to levy and collect taxes to pay for the same.

On November 2, 1869, the corporation of Washington passed an act for the improvement in question, as follows:

"Be it enacted . . . That the mayor be, and he is hereby, authorized and requested to cause the curbstones to be set and the footways and gutters paved on the north side of P street north, between Sixteenth street west and Rock Creek; the work to be contracted for and executed in the manner and under the superintendence provided by law; and to defray the expenses of said improvement, a special tax, equal to the cost thereof, is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865." Acts 67th Council, chap. 236, p. 116.

The act of October 12, 1865, referred to, extended prior acts of May 23 and 24, 1858, to special improvements thereafter made, and provided that the cost and expense of every local improvement, "unless otherwise provided for in the act or acts ordering the same,

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NOTE.—*As to payment voluntary and under protest; when money wrongfully and illegally exacted can be recovered back,*—see note to Bank of United States v. Bank of Washington, 8: 299.

As to failure of title, how far a defense to purchase price,—see note to Greenleaf v. Cook, 4: 172.

As to contracts; their interpretation and validity,—see note to Bell v. Bruen, 11: 89.

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202]shall be levied, assessed, collected, *and paid, and the payment thereof enforced," as provided in those acts. Webb, Dig. 360-362.

The act of May 23, 1853 (Webb, Dig. 155), provided for proposals for setting curbstones, etc.; petition for the improvement and plan of the property; superintendence by a commissioner of improvements with two assistants appointed from among those interested in the improvement; that the commissioner of improvements should proceed to execute the work "immediately after the expiration of forty days from the passage of any act laying a tax for the purpose of setting the curbstone and paving the footway on any avenue or street, . . . and according to the proper graduation in front of the lot or lots thereby taxed; and it is hereby understood that the said lot or lots shall alone be answerable for the amount taxed for such improvement," unless the owner shall do the work himself, "in which case the tax laid for the purpose shall become released;" that upon the completion of the work the commissioner "shall deposit with the register a statement exhibiting the cost of setting the curbstone and paving the footway in front of each lot or part of lot separately, and the amount of tax to be paid by each proprietor of said lots or parts of lots, and the register shall then, without delay, place in the hands of the collector of taxes a list of the persons chargeable with such tax, together with the amount due by each person; and the collector shall, within ten days after receiving such list, give notice in writing to each proprietor," . . . to pay within thirty days, and on default collect the tax, with 10 per cent interest, "in the same manner as other taxes upon real property are by law collected;" and that the work should be paid for by certificates of stock, commonly known as "paving stock," issued by the mayor and given to the contractors, and redeemable from time to time as the taxes were collected.

None of the provisions of the act of May 24, 1853, are important in connection with this case.

The act of June 10, 1867 (Webb, Dig. 467), provided for the appointment of a superintendent and inspector of paving of footways, etc., and enacted that "the said superintendent and 203]*inspector shall also be charged with the duty of making all assessments on lots or parts of lots bordering on any street, alley, or avenue, which shall have been paved."

A later act on the subject, that of October 28, 1867 (65th Council, chap. 6), provided "that from and after the passage of this act, all taxes assessed on private property . . . for the laying of foot pavements and gutters, curbing and paving alleys, shall be collected as follows: one fourth of such assessment within thirty days after the service of the notice by the collector of taxes, and the remaining three fourths in three equal annual payments, for which deferred payments it shall be the duty of the mayor to issue certificates of indebtedness bearing interest at the rate of 10 per cent per annum."

By act of Congress of February 21, 1871 (16 Stat. at L. 428, chap. 62, § 40), it was provided that "the charters of said cities (Washington and Georgetown) severally . . . shall be continued for the following purposes, to wit. "For the collection of all sums of money due to said cities respectively; . . . for the enforcement of all contracts made by said cities respectively, and all taxes, heretofore assessed, remaining unpaid; . . . for the collection of all just claims against said cities, respectively; . . for the enforcement of all legal contracts against said cities, respectively, . . . until the affairs of said cities, respectively, . . . shall have been fully closed;" . . . and (§ 41) "upon the repeal of the charters of the cities of Washington and Georgetown, the District of Columbia be and is hereby declared to be the successor of said corporations, and all the property of said corporations and of the county of Washington shall become vested in the said District of Columbia."

From the agreed statement of facts, supplemented on the hearing below by the addition of a single fact by consent of counsel for both parties, it appeared that one Henry Birch set the curbstone and paved the footway and gutter in front of lots 1 to 12, inclusive, in square 156, under a valid contract executed in 1870 with the corporation of Washington, covering the improvement in front of other lots as well; that the work was duly completed and accepted on or about *November 17, [204 1870, and that its cost, to be paid to Birch, was $2,054.10, no part of which had ever been collected or paid; that the municipal officers failed to comply with the requirements of law relating to assessment and notice; that the superintendent and inspector of paving and footways withheld the statement of the cost of the work from the register and the assessment from record until November, 1871, at "the sole request and procurement of the owner of said lots, whereby he, the owner, was enabled to sell and did sell said lots without any record notice of such assessment, to the purchaser," namely October 2, 1871. In the meantime and after the work was completed, the corporation of Washington had been succeeded by the government of the District of Columbia, and the offices under the corporation of Washington had been abolished, and the superintendent and inspector was without any authority to make the assessment against these lots, yet on or about November, 1871, "the records were erased and altered, whereby an assessment against lots was interpolated over and above the signatures already made of the mayor, ward commissioner, and other officers of the corporation, presumably to make it appear that they had approved the same, when as a matter of fact they had not."

It is explained in *Lyon* v. *Alley*, 130 U. S. 177 [32: 899], that the superintendent entered the work under Birch's contract with the proper proportionate charge against each lot, as to all other lots except those in question, and that the change in the record was made by an interlineation in red ink, signed by the officer, and reading "Entered November 17, 1870. This work was done at this date, but, by request of the owner, not entered until November, 1871."

March 9, 1872, the District of Columbia issued and delivered to Birch four certificates of

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indebtedness against these lots for the cost of the work, signed by the governor and register, and Birch sold and transferred them to plaintiff for value before maturity. The certificates stated that there was due from the corporation of Washington to Birch and his assigns the sums named, bearing interest from November 17, 1871, at 10 per cent, being issued under the 205] corporation *ordinance of October 28, 1867, for setting the curbstone and paving the footway in front of the lots in question, and that the principal and interest was to be paid "out of the special tax fund, agreeably to the terms of the above recited act." On June 7, 1874, these lots were advertised for sale by the collector of taxes for nonpayment of the assessment or certificates, whereupon the sale was enjoined at the instance of the then owner by a temporary restraining order of the court, but neither Birch nor plaintiff were made parties to said cause and neither of them had any knowledge of the order passed therein. The collector of taxes, upon the service of the temporary injunction, made no entry or memorandum thereof against these lots, but by mistake did so as to the same numbered lots in another square. October 5, 1881, the collector of taxes again advertised the lots for sale and sold them for the nonpayment of the assessment or certificates to plaintiff, and there was issued to him, upon his surrendering the certificates, which were canceled, and paying $3 in money, twelve tax sale certificates. At this time, to wit, October 5, 1881, plaintiff had no knowledge whatever of the restraining order or any of the proceedings in the case in which it was granted, and "neither he nor his assignor, Birch, were aware of any invalid proceedings connected with said assessment, and said purchase was involuntary on the part of plaintiff and made to protect his interest in said certificates of indebtedness and save the same from sacrifice." The certificates of indebtedness thus surrendered "were computed and accepted as valid by the District of Columbia at said sale at and for the sum of $4,079.70, which, with $3 paid in cash, made $4,082.70 as the purchase price paid for such lots on October 5, 1881, by this plaintiff."

It further appeared that John B. Alley, having become owner of the lots, filed a bill against plaintiff to set aside the tax sale, and that in February, 1885, the supreme court of the District of Columbia granted the relief prayed (*Alley* v. *Lyon*, 3 Mackey, 456), and that its decree was affirmed on appeal (130 U. S. 177 [32: 899]); and it was agreed that "the assessment was illegally levied, and the collector of taxes 206]was without authority and *jurisdiction to sell, and said sale was not made according to law and was void."

Plaintiff first learned of the invalid proceedings connected with said assessment and sale in the early part of 1882, and at once made application to defendant for a return of the certificates of indebtedness and the money accepted by the collector of taxes as the purchase price of said lots, tendering in return the certificates of tax sale, but his application was refused.

And it was stipulated that if the court should be of opinion that plaintiff was legally entitled to recover, it might give judgment in his favor for the amount paid by him at the sale, $4,082.70, with interest thereon from October 5, 1881.

Messrs. **Sidney T. Thomas** and **Andrew B. Duvall** for plaintiff in error.

Mr. **Isaac S. Lyon**, defendant in error, in person.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The supreme court of the District of Columbia held that the effect of the applicable acts "was to charge the municipality, not with a direct indebtedness for the work done under its ordinance, but with the duty to work out a payment therefor by seeing to it that the cost should be charged as a lien upon adjoining lots, and by enforcing this lien and collecting the special tax from the lot owners;" that the District "became invested with authority, and was charged with the duty, to secure such liens and collect and pay over to the contractor such taxes, in payment for work done under an ordinance of the city of Washington. This power could have been exercised and this duty could have been performed in the present case at any time before the 2d day of October, 1871, when it was cut off by the sale of the lots in question to an innocent purchaser;" that "if the resource of payment out of the special tax could have been secured by the District, and was lost *by its omission, a duty to pay the con- [207 tractor would fairly belong to the District, and an issue of certificates of indebtedness to him would not be a void act;" and these certificates were negotiable and were assigned for value to an innocent purchaser; that plaintiff acted in good faith in making the purchase at the tax sale; that the collector did not act as plaintiff's agent for the collection of the certificates, but in the exercise of public functions and for the District, and that as the District had received and retained the proceeds of the transaction, it had treated the sale as made on its account; and, in conclusion, that as the certificates were valid, and between the parties were purchase money, and as the sale gave nothing to the plaintiff, but the District retained and had disabled itself to return the certificates, it was liable for the amount thereof.

We concur in these views. The work was done in pursuance of a valid contract, and the city and the District received the benefit thereof. As the city, and then the District, failed to make the required assessments, the District became liable and the certificates of indebtedness were valid obligations. *Memphis* v. *Brown*, 87 U. S. 20 Wall. 289, 310, 311 [23: 264, 268]; *Hitchcock* v. *Galveston*, 96 U. S. 341 [24: 659]; *Chicago* v. *People*, 56 Ill. 327; *Kearney* v. *Covington*, 1 Met. (Ky.) 339; *Cumming* v. *Brooklyn*, 11 Paige, 596; *Reilly* v. *Albany*, 112 N. Y. 30; *Fisher* v. *St. Louis*, 44 Mo. 482; *Commercial Nat. Bank* v. *Portland*, 24 Or. 188; *Cole* v. *Shreveport*, 41 La. Ann. 839; *Morgan* v. *Dubuque*, 28 Iowa, 575; *Fort Worth City Co.* v. *Smith Bridge Co.* 151 U. S. 294, 302 [38: 167, 170].

The certificates admitted the indebtedness and postponed payment until the amount thereof could be realized from an assessment, which it turned out the District could not then lawfully make, though it could have been done

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prior to October 2, 1871; and there is no pretense that the particular means of payment failed through any laches or fault on the part of Birch or the plaintiff. The tax sale was void, but the agreed case shows that plaintiff purchased thereat involuntarily and in good faith to protect his interest in the certificates, and paid the full amount in these due-bills. 208]He was *not bound to take the risk of losing his money because of the invalidity of the assessment and the want of authority in the officer to sell, an officer not acting for him but for the District, and no adequate reason is perceived for cutting him off from reclaiming his certificates and recovering thereon, in view of this total failure of consideration without fault on his part.

Judgment affirmed.

SANTIAGO AINSA, Admr. with the Will Annexed of FRANK ELY, Deceased, ET AL., *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 208-234.)

Expediente—testimonio—Mexican grant, when not established—survey—quantity—appraisement and sale—juridical possession.

1. An expediente is a complete statement of every step taken in the proceedings for a Mexican grant, and a testimonio is the first copy of the expediente.
2. A Mexican grant of a specific quantity of land within exterior boundaries containing a larger quantity, which was not located prior to the Gadsden treaty of December 30, 1853, cannot be established under that treaty and the act of Congress of March 3, 1891, creating the court of private land claims, which does not provide for incomplete or imperfect claims unless the claimant had a right to make them perfect and they were such as the United States is bound to respect and permit to become complete and perfect upon the principles of public law or by the provisions of the treaty of cession.
3. The fact that a Mexican commissioner appointed to survey lands granted, with a specification of the quantity, made an estimate of a portion of his measurements, is not equivalent to stamping "more or less" on the transaction, or rendering the specified quantity not of its essence.
4. The quantity named in a grant of lands may be of decisive weight where there is uncertainty in the specific description, and is necessarily so if the intention is plain to convey only so much and no more.
5. An appraisement, advertisement, and sale of a specified quantity of land at the minimum price cannot be enlarged by the words "comprising the vacant public lands" in a certain locality, as used in a Mexican grant, while in other parts of the proceedings it is described as "contained in" or "comprised in" the vacant public lands.
6. That juridical possession had previously taken place cannot be inferred from a caution to the purchasers, in the final execution of a Mexican grant, "to restrict and limit themselves to the land, holdings, metes, and bounds particularly described in the hereinbefore inserted proceedings of survey."

[No. 429.]

Argued October 25, 28, 1895. Decided March 2, 1896.

APPEAL from a decree of the Court of Private Land Claims against the defendants, Santiago Ainsa, Administrator, *et al.*, in a proceeding on behalf of the United States to annul an alleged grant of Mexican land and to quiet the title. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a proceeding on behalf of the United States, instituted by direction of the Attorney General in the court of private land claims under act of March 3, 1891, § 8, cl. 3 (26 Stat. at L. 854, chap. 539). The petition alleged that defendants were asserting a claim to the premises in dispute under an alleged Mexican land grant by virtue of the treaty of December 30, 1853, known as the "Gadsden Purchase," and that the title of defendants and each of them was open to question in several particulars set out in the petition. And it was prayed that the defendants be *notified [209] to show cause why the alleged grant should not be declared null and void, and that the title to said land might be quieted and forever settled, and for general relief.

Separate answers were filed by Santiago Ainsa, administrator of Frank Ely, and by Juan Pedro Camou and George H. Howard. Defendants admitted that they claimed the land as tenants in common, and each set up and pleaded his title and asked confirmation of his claim. The New Mexico & Arizona Railroad Company claimed its right of way under them.

The answer of Camou and Howard stated, among other things:

"That, as appears and is shown from and in the said official survey, the minutes whereof are contained in the aforesaid testimonio, the form of the same was nearly square, the northern and southern boundaries conforming, of necessity, angularly with those of the Casita Rancho and the Tumacacori and Calabazas tracts; that within the bounds, natural objects, and monuments set forth and established by the said official survey, there is an excess of about ——, more or less, some 4,631 hectares, 21 ares, and 47 centiares, or about —— of such said excess, surplus, or demasias, being in that portion of grant lying and being in the state of Sonora, all of which is set forth in the resurvey of the grant and plot thereof had and made A. D. 1886, by the Mexican government upon the petition of your petitioner, Camou, to purchase the said demasias that lay within the Republic of Mexico; which said resurvey and plot thereof and the proceedings thereon, as well as the final sale and grants by the said Republic of Mexico —— petitioner Camou of the said demasias within the said Republic, and a final recognition, expressly considered and given, of the aforesaid original grant of ——, made A. D. 1843, by the treasurer general of

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NOTE.—*As to Missouri private land claims,*—see note to Les Bois v. Bramell, 11: 1051.

For dominion acquired over conquered or ceded territory as affecting vested rights of individuals to property; continuance of former laws until altered by the new sovereign,—see note to Delassus v. United States, 9: 71.

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the department of Sonora, are contained, shown, and set forth in the duly authenticated original testimonio, which was made and delivered unto the said Camou by the said Republic as complete and final evidence of title, a copy of which is filed herein and herewith, marked as 'Exhibit B.'"

Camou also filed an amended answer, which 210] alleged that *the tract in question had been duly located and recorded in the archives of Mexico, prior to the 25th of September, referred to in article 6 of the Gadsden treaty, and that his grantors and predecessors in interest, who were the owners of the grant at the time of the adoption of the treaty of Guadalupe Hidalgo and of the Gadsden treaty, were Mexicans and citizens of the Republic of Mexico, and further allege that the validity of the grant was examined into by the United States surveyor general for Arizona, who made a report thereon, a certified copy whereof, dated February 25, 1881, was made part of his answer. This report states that the grant was "for the exact quantity of 7½ square leagues and 2 short caballerias, notwithstanding the petition was for the vacant land lying between the northern boundary of Casita and the western boundary of rancho Tumacacori;" that the survey "fixed the quantity at exactly 7½ square leagues and 2 short caballerias;" and that "after survey every act in the proceeding up to and including the formal execution of the grant was upon the basis of the exact quantity ascertained by survey." The surveyor general called attention to the importance attached by the Mexican government to the quantity or area of grants of land as shown by the action of the procurator fiscal, hereinafter referred to, in correcting the error of the appraisers in omitting to value the two short caballerias, which being done, "the grant was executed for the definite quantity heretofore stated." In his opinion, as the petition showed that the petitioner wanted the vacant land bounded on the south by the Casita and northerly by the Calabazas without special reference to other boundaries, the claim should be made to bind those ranchos with the easterly and westerly lines so established as to include exactly 7½ square leagues and 2 caballerias, and he recommended confirmation of so much of the claim as should be found in Arizona on a survey made as thus indicated.

Upon the trial the court ruled that the object of the proceeding by the government was simply to bring in the parties in order that the claimants' title might be confirmed if it were found 211] *that their grant was valid; that moreover, the defendants had prayed for such confirmation; and that the burden of proof was upon the defendants. They thereupon offered in evidence a titulo of the land in question, entitled "Title to 7½ sitios and 2 short caballerias of land for raising cattle and horses, contained in the vacant public lands between the north boundary of the land of Casita and the west boundary of the mission of Tumacacori and Calabazas, in the upper Pima country, issued to Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, residents of the town of Imuris." From this it appeared, although the petition is not in the record, that May 6, 1841, Don José Elias and his parents applied "for the resurvey of the lands of the ranch of Casita, of which they are the owners and possessors, and which are situated in the jurisdiction of the town of Imuris, and also for the survey, appraisement, and publication of the vacant public lands which they say they need." This part of the application is also described in the proceedings as being "for the survey, appraisement, and publication, offer and sale of 7½ sitios and 2 short caballerias of land for raising cattle and horses, which comprise the vacant public lands situated between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, in the upper Pima country, in the district of San Ignacio." The application was granted by the superior board of the treasury of the department of Sonora, May 22, 1841, and a resurvey of the ranch Casita was ordered, as also a survey of the public lands sought to be purchased, and the order directed that separate expedientes should be made of both operations. This action of the board was certified to the superior chief of the treasury, May 26, 1841, who on that day commissioned Don Francisco Navamuel to make the surveys. He was directed to resurvey for Don José Elias and his parents the lands of Casita, "giving them the area or number of sitios that legally belong to them, with due separation of the sitios that result in excess within the lawful boundaries of said lands of Casita. And at the same time said *commissioner shall execute, in separate[212 expedientes, the proper survey, appraisement, and publication of the vacant public lands the parties in interest apply for, after the indispensable judicial information which said commissioner, under his own strictest responsibility, shall cause to be taken before a competent judge and shall aggregate to the original proceedings, and which shall be that of three impartial, capable, and upright witnesses of practical intelligence, by which it is legally and sufficiently proved that the parties in interest need such vacant public lands and have an abundance of stock to stock them with." The commissioner was required to act in strict compliance with the laws of Sonora of May 20, 1825, and July 11, 1834, and to adjust the sitio or sitios contained in the lands of Casita, their overplus, if any, and the vacant public lands, strictly by the regulations, giving to each sitio the area of 25,000,000 square varas, and he was cautioned as soon as the operations as to the excess or overplus resulting within the lawful boundaries of Casita were completed, that that excess should not be published, but appraised in accordance with article 2 of decree No. 51 of May 12, 1835. The commissioner procured evidence that Gonzalez and his wife had 4,000 head of cattle more or less, and proceeded to resurvey the ranch of Casita, and then to survey the vacant public lands. As to this survey he reported that he started at the north cross monument of Casita and directed himself "along the public road that goes toward the north to the presidio of Tubac," 840 cords (17,000 varas), "which ended on the high road, in a flat, where a wide canyon that comes down from the slope of the Pajarito mountains terminates," where he ordered a monument placed, "that of Calabazas being about a thousand steps further on on a high

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hillock which slopes down on the other side of said canyon. . . . Having asked the party how he wanted the land squared, he replied that he wanted 20 cords to the east; and thereupon they were measured for him 22 cords from the monument which is in the high road, in a straight line guided by the compass, to a hillock that has many oak trees on its slope, and on the summit a pile of stones was placed as a monu-
213]ment." *Having returned to the cross monument on the high road, the commissioner measured west 50 cords (2,500 varas), where he "reached very broken ground, which it was impossible to measure with the cord," when he "made a scrupulous estimate, together with my assistants, of 150 cords, until I arrived to where the Pajarito mountains turned to the north near the place they call Calaveras, said Pajarito mountains having been crossed and within the land surveyed, and there I ordered the party to place a pile of stones as a corner monument." He then returned to the place of beginning, and measured east 22 cords (1,100 varas), "which ended upon some hillocks at the trunk of an oak tree, where a pile of stones was placed," and from the same point he measured and estimated "in several stretches of rough ground, towards the west, 200 cords, which ended on a whitish ridge that has considerable pasture, near the so-called Planchas de Plata, which ridge divides the streams that flow towards the ranch of Agua Caliente and those that go towards Agua Zarca. Thus the south boundary was closed with another 222 cords and is limited there by the ranch of Casita. In this manner was terminated the survey of the vacant public lands, which include 7½ sitios, and the party, when it was made known to him, was satisfied and understood the area it encloses, and was warned to place, at the first opportunity, fixed monuments of stone and mortar." The land was then appraised, according to the state law of Sonora, at the minimum price of $15 per sitio, the amount being put at $112, 4 reals; and publication was ordered in accordance with that law for thirty consecutive days, by the public crier, "in solicitation of bidders who may make a better valuation." The last publication was on December 10, 1841, when proceedings were suspended, on account of the absence of Don José Elias, until November 28, 1842, when they were referred, as required by the law of Sonora, to the attorney general of the treasury, who reviewed the same, and reported thereon that the survey was 340 cords from the
214] *north to the south and 222 cords from east to west, which, reduced to varas and multiplied, gave 188,700,000 square varas, making "7½ sitios and 2 caballerias, a little short, for raising cattle;" that the appraisement made no account of the 2 short caballerias, which were of the value of 5 reals, 10 grains, at the rate of $15 per sitio, for which reason the total value should be $113, 1 real, and 10 grains; and recommended a sale "of said 7½ sitios and 2 short caballerias of public land for raising cattle and horses, included between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas," to the highest bidder on three public offers. This was so ordered January 5, 1843, and after three public offers, January 5, 6, and 7, sale was made to Don José Elias and his parents. The description of the land offered was in these words: "There are going to be sold, on account of the public treasury of the department, 7½ sitios and 2 short caballerias of land for raising cattle and horses, contained in the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country." In the third publication the translation uses, instead of the words "contained in the vacant public lands," the words "comprising the vacant public lands," and this difference of phraseology appears in several of the proceedings, that is, sometimes the 7½ sitios are described as contained in the vacant public lands, and sometimes as comprising the vacant public lands. The documents in Spanish were not sent up.

The titulo then recites the receipt of $113, 1 real, and 10 grains, and that in the provisional memorandum book of receipts for the current year the receipt of that sum, "being the value of 7½ sitios and 2 short caballerias of land for raising cattle and horses, contained in the vacant public lands between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country," was entered. Thereupon the treasurer of the department of *Sonora, at Arizpe, on January
215] 7, 1843, executed the grant as follows: "Therefore, by virtue of the authority which the laws, regulations, and superior orders that govern in the matter confer on me, by these presents, in the name of the Mexican nation, I grant, in due form of law, 7½ sitios and 2 short caballerias of land for raising cattle and horses, contained in the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, in the district of San Ignacio, to Don José Elias, and to his parents, Don Francisco Gonzalez and Doña Balvanera Redondo, residents of the town of Imuris, in said district, to whom I cede, give, and adjudicate said lands, by way of sale, and with all the requisites, stability, and permanence the laws establish, for themselves, their children, heirs, and successors, etc."

Appended to the titulo appeared the following certificate signed by the chief clerk, which was offered in evidence by the defendants as a part thereof: "By supreme resolution of this day, the adjudication of the land referred to in the title issued on the 7th of January, 1843, is approved, under the provisions of article 3 of the law of December 3, 1855, and it is therefore legally confirmed. And in witness thereof and for the purposes that may be necessary this indorsement is made in the department of public works, in Mexico, on the 7th of July, 1886."

A memorandum was introduced in evidence, showing that the Toma de Razon or record book of land titles of Sonora contained an entry that on January 7, 1843, there was issued a title of grant for 7½ sitios and 2 short caballerias of land for breeding cattle and horses, contained in or comprising the vacant public lands, situated between the north boundaries of ranch La Casita and the western boundary of the mission of Tumacacori and Calabazas, in favor of Don José Elias and his parents. It

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was admitted that certain field notes and a plat thereto attached were made in December, 1891, by a surveyor, now deceased, named Oury, and that, if living and present, he would testify that said field notes and plat contained a sur-
216] vey of the claim according to *the natural objects and other descriptions contained in the original survey, the total area being 78,868.34 acres, of which 25,899.09 were in the United States. These field notes and map were introduced in evidence.

The testimony on behalf of the United States tended to show that by accurate measurement commencing at the north cross monument of the ranch, La Casita, and measuring north along the Tubac road 340 cords of 50 varas each, the measurement would terminate in the Republic of Mexico 3.54 cords, something over 412 feet, south of the line between Mexico and the United States; and that according to Oury's survey there were within the exterior boundaries named in the titulo and within the boundaries of Mexico 12.21 sitios, or about 52,969.25 acres, and within the exterior boundaries and within the United States 5.96 sitios, making in the aggregate 18.17 sitios within the exterior boundaries, or 78,868 acres, and that 7½ sitios contained 32,744 acres.

There was also evidence to the effect, as sufficiently stated by counsel for the United States, that none of the monuments referred to in the titulo are now in existence, and that the monuments now found on the southern boundary of the grant, being the south cross monument, the southeast monument, and the southwest monument, have been recently constructed and are new monuments; that the so-called north cross monument consists of a mound of earth and pebbles about 18 inches high and 10 or 12 feet in diameter, on top of which is a stone 11 or 12 inches square, on which is marked "N de E N X," and has not the appearance of being a monument, but appears more like an ant hill, and about twenty steps from this is a similar mound, except the stone; and that the northeast monument is a recently constructed pile of stone, without mortar, about 4 feet in diameter, built in circular shape; that the southwest corner is not where it ought to be as described by the titulo, and that no such place as "Calaveras," named as one of the calls for the northwest corner, was known in that part of the country.

217] *The United States also offered in evidence a transcript of the expediente referred to in the answer of Camou and Howard, being the same proceedings resulting in the order of July 7, 1886, a certificate of which was indorsed on the titulo and introduced in evidence by all of the defendants.

From these proceedings it appeared that on August 11, 1882, Don José Camou, Jr., through whom defendants Camou and Howard and others claimed, presented to the district judge at Hermosillo a petition alleging that he was a Mexican citizen, and that he was the owner of the ranch known as Los Nogales de Elias, situated on the boundary line of Mexico and the United States, between the ranches "La Casita," "Tumacacori," and "Calabazas," the overplus of which he denounced and sought to purchase under article 8 of a general law of July 22, 1863, "with the understanding that if the other coproprietors of said ranch of 'Nogales' desire to share in this overplus, I do not object that the adjudication may be made in favor of all the owners thereof in the proportion to which they are entitled, provided they contribute to the expenses of the same." On August 17, 1882, it was ordered by the district judge of Sonora that the denouncement above referred to be admitted, and citizen Rosas was appointed as commissioner with instructions to resurvey the ranch called Los Nogales de Elias for the overplus so applied for, and he was required to report the true area of the ranch and the overplus of the same, if any, and was required to proceed under the law of July 20 and August 2, 1863. It was further recited that Rosas, in compliance with the order of the district judge, notified the parties in interest and the owners of the adjoining lands, and proceeded to a resurvey of the ranch according to its exterior boundaries as described in the titulo of the grant, and found within such exterior boundaries and monuments an excess within the Republic of Mexico of 4,631 hectares, 21 ares, and 47 centiares (or 2.64 sitios, being 11,443 73 acres) over and above the 7½ sitios sold in 1843. The report of this survey was made to the district judge and by him referred to the chief of the treasury acting as attorney general, who advised that said excess be adjudicated to José Camou, *Jr., subject[218 to the approval of the board of public works, to which the matter was referred. That board required further explanation of the survey, which was made by Rosas on January 15, 1886, and thereafter the district judge was directed to suspend "approval of the adjudication until it becomes known whether or not it prejudices the growing town of Nogales, and likewise until the validity and legality of the title under which it is pretended to hold said ranch is established," in respect of which there was reason to entertain doubt, because the titulo of ownership issued to Don José Elias in the city of Arizpe by the departmental treasurer of Sonora, January 7, 1843, disclosed the fact "that the origin of the property or the original title was vicious and null, as the sale was made and the title issued by a departmental treasurer, and in the year 1842, when the bases of Tacubaya were in force, that is, when the national government was not only central but dictatorial, which two circumstances give the title in question the character of manifest nullity."

The objections appear to have been obviated, among other things, by securing from the President of the Republic of Mexico the order of July 7, 1886, already referred to, and the whole matter being again remitted to the district judge the surplus was regularly adjudicated to José Camou, Jr., who paid therefor the value, fixed at $555.74, and costs.

The court of private land claims held that under the original proceedings the right of the grantees was limited to the specific amount of land mentioned in the proclamation of sale and the grant; that the grant was for a specific quantity, and by its express language the quantity was made the controlling matter of the description, and that the intent of the granting officer to reserve to the government the excess over the amount granted within the boundaries

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was as clearly manifested as it could have been made by a reservation in express language. And that even though a grant such as the court held this to be was unknown to the Mexican law, still, what was actually effected was to be determined by the language made use of, and that the power of the officers to do what they did do need not be inquired into; that while 219]a *parallelogram 340 cords in height and 222 cords in width, measured from the point designated by the commissioner as the cardinal point of survey, would be partly within the territory of Arizona and partly within the state of Sonora, yet that the grant was specific as to quantity but not as to location, and the only effect of the proceedings was to designate certain boundaries within which the quantity of lands granted was to be located; that, of necessity, the location was to be determined by subsequent action, but no action was ever taken. The conclusion was that, at the time of the treaty of cession, the grant had not been located within the meaning of that instrument, and hence by its express terms could not now be recognized as of any validity; and that it was not such a grant as by the terms of the treaty the United States was bound to recognize and confirm, which by the terms of the act creating the court was the test of the rights of the parties.

The court of private land claims entered a decree "that the defendants, or either or any one of them, take nothing by their claim of lands lying north of the international boundary line between the United States and Mexico, and that the claims of the various defendants as made in their answers are hereby declared without merit and are disallowed." From this decree an appeal was prosecuted to this court.

Some definitions and explanations may properly be added to the foregoing statement.

A vara equals 32.9927 inches; a cordel, 137.95 feet, or 50 varas; a sitio contains 4.338.464 acres; a caballeria, 105.75 acres; a hectare, 2.471 acres; a "sitio de ganado menor," or sheep ranch, 1,928.133 acres. An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant of final title papers is attached to the testimonio and delivered to the grantee as evidence of title, and entry is made at the time in a book called the Toma de Razon, which identifies the grantee, date of the grant, and property granted. The dictionaries define "Tomar razon," "to register, to take a memorandum of, to make a record of a thing," and "Toma de Razon," "memorandum book."

220] *The "Gadsden Purchase" added a strip along the southern boundary of the territory of New Mexico, and Arizona was detached and made a separate territory in 1863, within which strip and territory the land in controversy is situated.

Mr. **Rochester Ford** for appellants.

Messrs. **Holmes Conrad**, Solicitor General, **Matthew G. Reynolds**, and **Luman F. Parker** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

As remarked in *Astiazaran* v. *Santa Rita Land & Min. Co.* 148 U. S. 80, 81 [37: 376], a case involving title to the ranchos of Tumacacori, Calabazas, and Huevavi, undoubtedly private rights of property within ceded territory are not affected by the change of sovereignty and jurisdiction, and are entitled to protection, whether the party had the full and absolute ownership of the land or merely an equitable interest therein, which requires some further act of the government to vest in him a perfect title. And this is so by the law of nations, "with or without any stipulation to such effect" (*Strother* v. *Lucas*, 37 U. S. 12 Pet. 410, 436 [9: 1137, 1147]); but when stipulations exist, the terms in which the high contracting parties have expressed themselves are to be observed.

By article 8 of the treaty of Guadalupe Hidalgo, February 2, 1848, Mexicans established in territories previously belonging to Mexico and remaining for the future within the limits of the United States, as defined by the treaty, were free to continue where they then resided or to remove at any time to the Mexican Republic, "retaining the property which they possess in said territories, or disposing thereof, and removing the proceeds wherever they please;" and "in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy, with *respect to it, guaran-[221 ties equally ample as if the same belonged to citizens of the United States." 9 Stat. at L. 922, 929.

Article 6 of the Gadsden treaty, December 30, 1853, is as follows: "No grants of land within the territory ceded by the 1st article of this treaty, bearing date subsequent to the day —25th of September—when the minister and subscriber to this treaty on the part of the United States proposed to the government of Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory, which have not been located and duly recorded in the archives of Mexico." 10 Stat. at L. 1031, 1035.

The difference in language between the two treaties is readily seen. Grants previous to the cession, which have not been located, are by the terms of the latter treaty not to be respected or considered as obligatory, as matter of right, whatever the United States might see fit to do, as matter of grace, under particular circumstances. And grants which have not been located would seem manifestly to be grants of a specific quantity of land within exterior boundaries containing a larger quantity. This was a familiar class of Mexican grants, and is referred to by *Mr. Justice* Field in *Hornsby* v. *United States*, 77 U. S. 10 Wall. 224, 232 [19:900, 902], where, delivering the opinion of the court, he said: "As we have had occasion to observe in several instances, grants of the public domain of Mexico, made by governors of the department of California, were of three kinds: 1, grants by specific boundaries, where the donee was entitled to the whole tract described; 2, grants by quantity, as of one or

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more leagues situated at some designated place, or within a larger tract described by outboundaries, where the donee was entitled out of the general tract only to the quantity specified; and, 3, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence. The greater number of the grants which have come before this court for examination have belonged to the second class."

222] *The mode in which private rights of property may be secured, and the obligations imposed upon the United States by treaties fulfilled, belongs to the political department of the government to provide. In respect to California this was done through the establishment of a judicial tribunal, but in respect of the adjustment and confirmation of claims under grants from the Mexican government in New Mexico and in Arizona, Congress reserved to itself, prior to the passage of the act of March 3, 1891, creating the court of private land claims (26 Stat. at L. 854, chap. 539), the determination of such claims, enacting as to New Mexico "that the surveyor general for the territory, under the instructions of the Secretary of the Interior, should ascertain the origin, nature, character, and extent of all such claims, and for this purpose might issue notices, summon witnesses, administer oaths, and do all other necessary acts; and should make a full report on such claims, with his decision as to the validity or invalidity of each under the laws, usages, and customs of the country before its cession to the United States; and that his report should be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm bona fide grants, and to give full effect to the treaty of 1848 between the United States and Mexico." *Astiazaran* v. *Santa Rita Land & Min. Co.* 148 U. S. 80, 81 [37:376]; 10 Stat. at L. 308, chap. 103, § 8. And similarly as to the surveyor general of Arizona by the act of July 15, 1870. 16 Stat. at L. 304, chap. 292.

As to the claim in question, this officer made the report attached to one of the pleadings, but the claim was never confirmed. An authentic survey and final determination of the location and boundaries of such claims was contemplated in any event. *Stoneroad* v. *Stoneroad*, 158 U. S. 240 [39:966]. Then came the passage of the act of March 3, 1891, repealing the prior acts and creating the court whose decree is now under review.

By the 1st subdivision of § 13 of this act it is provided that "no claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the 223]states *of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at such date already complete and perfect." Here, again, there are significant differences between this phraseology and that used in the act of March 3, 1851, "to ascertain and settle the private land claims in the state of California" (9 Stat. at L. 631, chap. 41), which provided that the board of commissioners thereby created, the district court, and this court, in deciding on the validity of any claim brought before them, should "be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable,"—that is, the decisions theretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authority previous to the cession to the United States. *Frémont* v. *United States*, 58 U. S. 17 How. 542, 553 [15:241, 244].

But under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the court of private land claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States, and by the treaty no grant could be considered obligatory which had not been theretofore located.

It is contended on behalf of the United States that this grant was void because the departmental officers had no power, under the laws of Mexico in force when it purported to be made, to make it without the approval of the supreme government, which it is not claimed had been given; and also, if *otherwise [224 valid, that confirmation could not be accorded because the evidence failed to show that it was duly recorded in accordance with the requirements of the Mexican laws; but we need not enter upon the consideration of either of these propositions, since, assuming that this was a valid grant made by the proper officers and duly recorded, we concur with the court below that it was the grant of a specific quantity of land, and not of the entire 18 leagues contained within the exterior boundaries, and, not having been located at the date of the treaty, could not be confirmed.

It is to be noted that the petition of Don José Elias does not appear in the expediente, and its nonproduction is nowhere accounted for. The recitals in other parts of the proceedings as to the contents of such a petition were not considered in *United States* v. *Cambuston*, 61 U. S. 20 How. 59, 63 [15: 828, 830], as conclusive or even satisfactory evidence of that fact; and appellants' argument treats the exact terms of the application as of importance, since they insist it was a petition for all the vacant public lands between the north boundary of Casita and the west boundary of Tumacacori and Calabazas. But the most that can be claimed is that the petition was for 7½ sitios as what was needed for the cattle of Don Elias and his parents, and that Don Elias may have assumed that that number of sitios covered all the vacant lands. And as, in our judgment, the expediente shows that what was directed to be ap-

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praised, what was appraised, what was directed to be sold, what was sold, what was paid for and what was purported to be granted, was 7½ sitios and 2 short caballerias, while the alleged preliminary survey indicated general boundaries containing over 18 sitios, we think as the court of private land claims did, that the grant was of 7½ sitios and 2 scant caballerias within exterior boundaries, and that location was a prerequisite to any action by the court.

Appellants insist that the grant of a certain quantity of land situated at some designated place, or within a larger tract described by outboundaries, was not known to the "State of the West," made up of Sonora and Sinaloa, and 225] reference is made to *certain laws of May 20, 1825, and of July 11, 1834, as showing that lands in that state were to be surveyed before they were sold, and sold by metes and bounds as surveyed. The order of the superior board of the treasury of the department, set forth in the expediente, required compliance with the provisions of the law of July 11, 1834, and also with the regulations for surveying lands for raising cattle and horses made under the law of May 20, 1825, and as to any overplus within the lawful boundaries of Casita, required it not to be published but appraised in conformity with article 2 of decree No. 51 of May 12, 1835.

Article 30 of the law of 1825 provided that the owners of sitios should place at their boundary termini monuments of stone and mortar "as soon as possession thereof is given them; and if within three months from the date of the survey is concluded they do not do so," that a fine should be exacted from them and the monuments ordered constructed at their expense. Article 63 of the law of 1834 was to the same effect, and read: "It is the duty of owners of sitios to place upon the boundary lines of their estates landmarks of stone as ordered by the statutes, as soon as they are in possession of their estates; and if within three months, counting from the date that they receive their title, they have not complied with this regulation, they shall incur a penalty of $25, which they shall pay to the judge for the public funds, and moreover shall cause the said landmarks to be constructed at the cost of said proprietors."

And it is said that in Sonora (and as respects lands acquired under the Gadsden treaty), when public lands were parted with, the transaction constituted an executed contract of purchase rather than a grant. Conceding that the boundaries mentioned in these laws are not outboundaries but specific boundaries, they are boundaries ascertained by the authentic survey of specific tracts taken possession of as so delineated, and it does not follow that these proceedings were anything more than the court of private land claims found them in effect to be, namely, a grant of a specific quantity of land, which was to be afterwards located.

226] *Compliance with decree No. 51 of Sonora of May 12, 1835, with reference to the overplus in La Casita, was required, as we have said, and moreover the review of the proceeding by the attorney general of the treasury states that the commissioner proceeded "to the resurvey of the ranch of Casita, from which there resulted within this property the same 9 sitios the original surveyor, José Olave, measured and estimated on the 20th day of April, 1742, and 9,200,000 square varas more, which do not make half a sitio, and, even if they had reached that fraction, they should not be considered as overplus, under the provisions of the last clause of article 2 of decree No. 51 of the 12th of May, 1835, of the old state, and which is still in force."

That article is as follows:

"Art. 2. Those are likewise 'bona fide' owners who, under the descriptions given in their records of survey, occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement than that of paying for the excess in accordance with the quality of the land and the price which prevailed when the land was measured and appraised; and only in case the owner does not want the excess, or when such excess is very great in the opinion of the government, upon the report of the treasury, shall such excess be awarded to any one denouncing or soliciting it; and such person shall bear the expense of the resurvey, if the excess has not been ascertained. In lands measured by calculation (graduacion) none shall be regarded as excess that does not exceed half a sitio."

It thus appears that the resurvey of grants was provided for to ascertain the excess over the quantity intended to be granted, that unless the excess was more than half a sitio it might be disregarded, and that if it exceeded that, the owner of the original grant might be allowed to take it at the valuation. The application of Don José Elias was for a resurvey of the Casita in order that he might obtain the overplus lands therein on an appraisal, whereas if that ranch had been acquired by purchase *ad corpus*, that is to say, all the lands included by certain metes and bounds, possession delivered *and monuments set up, it is not appar-[227 ent how the necessity for having a resurvey could have existed; and so when in 1882 and 1886, the Mexican government was applied to by defendant Camou, under the law of July 22, 1863, his application proceeded upon the theory that the grant under consideration was a grant of a specific quantity within exterior limits, and what he sought and was accorded was an adjudication of the overplus on paying the value thereof "in conformity with the tariff in force at the time of the denouncement."

Certain articles of the law of July 22, 1863, treat of the ascertainment and disposition of excesses where the indicated boundaries are supposed to cover only a certain quantity of land which, when resurveyed, turns out to be much larger than as described in the titles; and such resurveys had been practised from an early day and were recognized by Don Elias himself in his application in respect of La Casita. Royal Decree, Oct. 15, 1754, § 7 (Reynolds, Spanish & Mexican Land Law, 54); Law of July 11, 1834, chap. 9, § 3 (Reynolds, Spanish & Mexican Land Law, 187); Law of July 22, 1863 (Hall, Mexican Law, 174).

In any view, whether treated upon the principles applicable to a voluntary grant or as a purchase and sale, appellants' contention that Don Elias and his parents took all the public lands north of Casita as one tract by metes and bounds could be sustained only on proof of a determination of such metes and bounds by

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actual survey and delivery of possession accordingly.

Navamuel was instructed to survey 7½ sitios of the vacant public lands "situated between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas," and to measure the land between the north boundary of one tract and the west boundary of another may be supposed to involve considerable difficulty. However, it is said that the mission of Tumacacori and Calabazas lay north of these lands, and the surveyor general of Arizona was of opinion that the claim should bind the ranchos of Casita and Calabazas, "with the easterly and westerly lines so established as to include exactly 7½ square leagues and 2 caballerias." The proceedings 228] *show that Navamuel understood that the sale was not to be of a particular tract for a sum in gross, but of a specific number of sitios at the upset price fixed by the appraisal of those sitios, and that he was not to survey the whole of an existing tract, but to delineate a tract containing the desired number of sitios. With that understanding he apparently attempted, partly by measurements and partly by conjecture, to survey a parallelogram of 340 cordels by 222 cordels, which would contain 7½ sitios, running a little over, and so far from intending to include all the public lands, he consulted the party "as to how he wanted the land squared," that is, the land to come to him, and acted on his reply.

Appellants deny that Navamuel laid out a parallelogram containing 7½ sitios, and insist that instead he designated the boundaries of a tract containing all the public lands, being somewhat over 18 sitios. They say that the northwest and southwest corners were arrived at partly by estimation; that the height of the grant as described was 449.82 cords and not 340 as stated; and that the distance from the north cross monument to the northwest corner was over 470 cords instead of 200 Navamuel did not visit the western boundary, and the southwest corner as claimed seems on the evidence not to be where that corner should be according to the titulo. As to the northwest corner, Oury, in December, 1891, could find no place called Calaveras and no monument 200 cords west of the north cross monument, but as he did find an old monument of loose rock 470 odd cords west at Calabazas pass, and because of Navamuel's reference to the Pajarito mountains in that connection, he concluded to accept that monument as the northwest corner; in other words, he fixed on a point 12½ miles west as the point Navamuel placed at 5 miles and a fraction. We fear that these speculations did injustice to Navamuel, but we think they made it quite clear that to apply the rules of metes and bounds to the entire tract of vacant public lands is quite inadmissible when taken with the other facts and circumstances.

In common-law conveyances the words 229]"more or less," while *sometimes having practically no effect, are frequently added to prevent the precise quantity named from being conclusive on the parties, and may operate to make a sale of land one in gross instead of by the acre, but the bare fact that Navamuel estimated a portion of his measurements was not equivalent to stamping "more or less" on the transaction or rendering the specified quantity not of its essence.

So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain.

These considerations need not be elaborated or the common-law cases cited examined, inasmuch as we are of opinion on this record that the number of sitios specifically named was controlling.

How much land was appraised and sold and paid for? The minimum price at which the land could be appraised and sold was $15 per sitio. The price paid was at that rate for exactly 7½ sitios and 2 caballerias. The commission to the appraisers was for the appraisement of 7½ sitios; the appraisement was for 7½ sitios; the procurator fiscal in his review of the proceedings pointed out that the appraisers had erred in taking no account of the 2 short caballerias, which he valued at 5 reals, and 10 grains, raising the total value from $112.50 to $113.15; the order for publication of notice referred to "the sitios surveyed for Don José Elias and Don Francisco Gonzalez" as "having now been appraised;" and the notices published were for the sale of "7½ sitios and 2 short caballerias of land appraised at $113, 1 real, and 10 grains." The order striking off and selling the property to the purchasers, after reciting the assembling of the board, stated that the crier having announced that the 7½ sitios and the 2 short caballerias of land were to be sold, and that thereupon the agent of Don José Elias and his parents came forward and again offered the $113, 1 real, and 10 grains, for which the land was *appraised, con-[230 tinued, "and the midday hour of 12 having sounded, for the last time the crier said: 'Going once, twice, three times; sold, sold, sold; may it do much good, good, good, to Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo.' In these terms this act was terminated, and there was publicly and solemnly sold the 7½ sitios and 2 short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas in the upper Pima country, in the jurisdiction of the town of Imuris, for the sum of $113, 1 real, and 10 grains, in which they were appraised." It is true that in the translation before us the words "comprising the vacant public lands" are used, while in other parts of the proceedings the specified quantity is described as "contained in" or "comprised in" the vacant public lands, as for instance in the execution of the grant the words are "contained in the public lands." But we do not think this difference, in translation, or if existing in the original, can operate to make this an appraisement, advertisement, and sale of all the public lands north of Casita, no matter what their extent, but that these proceedings and the grant were plainly an appraisement, advertisement, sale, purchase, and grant of the specific quantity of 7½ sitios and 2 caballerias scant. It is certain that the officers had no authority and

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did not intend to sell 78,868 acres for the purchase price of 32,744 acres; that in all the proceedings the transaction was limited to 7¼ sitios; that Navamuel determined what was needed by Elias as a cattle breeder, made his survey, approved the appraisement, and published for bids at "a better valuation," on that basis; and that the Mexican government has construed the grant in the same way in ordering a resurvey, and thereupon adjudicating the excess over 7¼ sitios.

This brings us to consider whether juridical possession was delivered to the grantee as asserted by appellants.

In *United States* v. *Pico*, 72 U. S. 5 Wall. 536 **231**] [18: 695], where there was *a concession by specific boundaries, and the words "in extent 12 square leagues" were added to the resolution of approval of the departmental assembly after the description of the tract ceded, it was held that these words did not create a limitation on the quantity granted, as they were evidently not used for any such purpose, but merely indicated a conjectural estimate of the quantity, and *Mr. Justice* Field observed that "when, in Mexican grants, boundaries are given, and a limitation upon the quantity embraced within the boundaries is intended, words expressing such intention are generally used," and that in case of doubt as to the intention to cede all the land within the designated boundaries, the doubt would be removed by the juridical possession delivered to the grantees, which "proceeding involved an ascertainment and settlement of the boundaries of the land granted by the appropriate officers of the government specially designated for that purpose, and has all the force and efficacy of a judicial determination."

In *Malarin* v. *United States*, 68 U. S. 1 Wall. 282, 289 [17: 594, 595], *Mr. Justice* Field again speaking for the court, in setting forth the act of juridical possession described in the expediente in that case, said: "Under the civil as at the common law, a formal tradition or livery of seisin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurements and segregation in such cases, therefore, preceded the final delivery of possession. By the Mexican law various regulations were prescribed for the guidance in these matters of the magistrates of the vicinage. The conditions annexed to the grant in the case at bar required the grantee to solicit juridical possession from the proper judge. In compliance with this requirement, within four months after the issuance of the grant, he presented the instrument to the judge of the district, and requested him to designate a day for delivering the possession. The judge designated a day, and directed that the adjoining proprietors be cited, and that measurers and counters be appointed. On the day desig-**232**]nated the proprietors appeared, and *two measurers and two counters were appointed and sworn for the faithful discharge of their duties. The line provided for the measurement was produced, and its precise length ascertained. The measurers then proceeded to measure off the land, the judge and the proprietors accompanying them. The measurement being effected, the parties went to the center of the land, and there the judge directed the grantee to enter into the possession, which he did, and gave evidence of the fact 'by pulling up grass and making demonstration as owner of the land.' Of the various steps thus taken, from the appointment of the day to the final act of delivery, a complete record was kept by the judge, and by him transmitted to the grantee after being properly entered upon the 'book of possessions.'"

In *More* v. *Steinbach*, 127 U. S. 70, 80, 81 [32: 51, 54, 55], the grant required the grantee to "petition the proper judge to be put in juridical possession by him in virtue of this document, by whom the boundaries shall be marked out, on the limits of which he shall place the proper landmarks. The land now granted is of the extent of 4 square leagues, more or less, as shown by the map which accompanies the expediente. The judge who shall give him possession shall have it measured in conformity with the evidence, the surplus that results remaining in the nation for its proper use." This requirement of the grant was not complied with, and this court said: "The grantees were not invested with such title, and could not be, without an official delivery of possession under the Mexican government, and such delivery was not had, and could not be had, after the cession of the country, except by American authorities acting under a law of Congress."

Appellants' counsel contends that "the juridical possession of 'said 7¼ sitios and 2 short caballerias of land, comprising the vacant public lands between the boundaries of Casita and those of Tumacacori and Calabazas,' was, on January 7, 1843, the date of the grant, delivered by Ignacio Lopez, the treasurer general of the department of Sonora, in the presence of the two witnesses, Antonio Teran y Peralta and Joaquin Urias, to the grantees, in pursuance of the *survey made November 24, [**233** 1841, and following days, in the presence of Marcello Bonilla, the coterminous owner, by which survey the land was segregated from the public domain."

But Ignacio Lopez was not a judicial officer, and had no authority to perform a judicial act; neither Lopez nor the attending witnesses nor the grantees were, on the 7th of January, 1843, upon the land, nor anywhere near it, but were at the city of Arizpe; the coterminous proprietors were none of them then called to give assent to the final act investing the grantees with title and possession, and there was, of course, no physical act on the part of the grantees accepting or taking possession of the grant. The attempt of counsel is to make out the act of juridical possession by reference to the date of the survey, which was more than a year before the land had been sold, bought, and paid for; nor was there at any time any pretense of the formal delivery of possession if it could have been done by anticipation. The application, it will be remembered, was for a resurvey of Casita, as well as for a survey of the public land sought to be acquired, and it appears from the expediente that the mission of Tumacacori and Calabazas was represented by Don Marcello Bonilla on that occasion. And Navamuel also says that "in this manner was

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terminated the survey of the vacant public lands, which include 7¼ sitios, and the party, when it was made known to him, was satisfied and understood the area it encloses and was warned to place, at the first opportunity, fixed monuments of stone and mortar." But it still remained for the property to be sold and purchased, and possession to be taken, and though the applicant had the preference at the price fixed by the appraisement, a higher bid would have taken the property.

Nor are we prepared to accede to the suggestion that because, in the final execution of the grant, the purchasers were cautioned "to restrict and limit themselves to the land, holdings, metes, and bounds particularly described in the hereinbefore inserted proceedings of survey," and to comply with the law as to monuments at their boundary termini, therefore it is to be inferred that the act of juridical 234] possession *had already taken place, though not disclosed by Navamuel's report.

The 7¼ sitios could undoubtedly have been located, juridical possession delivered, and monuments of stone and mortar put up, and the grantees would then have been limited to their metes and bounds thus ascertained; but the grantees did not do this, and, so long as these public lands remained in Mexico, were liable on resurvey to account for the excess over what they actually bought on such terms as the government imposed.

We have referred to the proceedings of 1882, 1886, in Mexico, as furnishing persuasive evidence of the proper construction of this grant under Mexican law, and it may be further observed that the adjudication of the overplus required the location of the 7¼ sitios, which location Mexico, as the granting government, assumed it had the right to make, and made, out of the land within its jurisdiction. In this way the grant was satisfied by the receipt of all that the grantees had bought and were entitled to under the Mexican law, the result as to the overplus inuring to Camou's cotenants by the terms of his petition.

In any view no reason is perceived for disregarding the construction thus put upon the titulo, and as the land purchased was not located at the date of the cession, the United States were not bound by the treaty to recognize the claim as of right, nor could the court of private land claims confirm it.

The fact that a parallelogram of 340 cordels by 222 cordels, making 7¼ sitios and 2 caballerias, if correctly measured from the initial point of Navamuel's survey, would be partly within the territory of Arizona, is immaterial.

Decree affirmed.

Mr. Justice **Peckham** was not a member of the court at the time this case was argued, and took no part in its decision.

CALEB W. DURHAM, *Appt.*, v. JOHN S. SEYMOUR, Commissioner of Patents.

(See S. C. Reporter's ed. 235-240.)

Jurisdiction of this court.

An appeal from a decree under U. S. Rev. Stat. § 4915, dismissing a bill to obtain a patent for an invention, cannot be taken to this court on the ground that "the validity of a patent" is involved, or that the matter in dispute has a money value exceeding $5,000, as it is not capable of being valued in money.

[No. 769.]

Submitted January 13, 1896. Decided March 2, 1896.

APPEAL from a decree of the Court of Appeals for the District of Columbia affirming a decree of the Supreme Court of that district dismissing a suit brought by Caleb W. Durham against the Commissioner of Patents to obtain a decree authorizing such commissioner to issue to him a patent. *On motion to dismiss. Dismissed.*

See same case below, 23 Wash. L. Rep. 273.

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill brought by Caleb W. Durham, under the provisions of U. S. Rev. Stat. § 4915, in the supreme court of the district of Columbia, to obtain a decree authorizing the Commissioner of Patents to issue a patent to him for an improved drainage apparatus for buildings. The supreme court adjudged on the evidence that Durham was not entitled to a decree, and dismissed the bill, whereupon he carried the case by appeal to the court of appeals for the District of Columbia, and that court affirmed the decision of the court below. From this decree an appeal was taken to this court, and a motion was made to dismiss the appeal for want of jurisdiction.

Section 4915 is as follows: "Whenever a patent on application is refused, either by the Commissioner of Patents or by the supreme court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with *the re- [236

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of the United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws, see note to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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quirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

Section 8 of the act establishing the court of appeals of the District of Columbia and for other purposes, approved February 9, 1893 (27 Stat. at L. 434, chap. 74) provides:

"Sec. 8. That any final judgment or decree of the said court of appeals may be examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

The act of March 3, 1885 (23 Stat. at L. 443, chap. 355), reads thus:

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000.

"Sec. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

Mr. **Levin H. Campbell** for appellee, in favor of motion to dismiss.

Messrs. **J. Nota McGill** and **Don M. Dickinson** for appellant, in opposition to motion.

237] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

Appeals to this court from the court of appeals of the District of Columbia are governed by § 8 of the act of February 9, 1893. It is essential to our jurisdiction that it should appear that the matter in dispute in the courts below was money to an amount exceeding $5,000, exclusive of costs, or some right, the value of which could be ascertained in money and exceeded that sum; or that the validity of a patent or copyright was involved; or that the validity of a treaty or statute of or an authority exercised under the United States was drawn in question. *United States* v. *Seymour* ("*South Carolina* v. *Seymour*") 153 U. S. 353 [38: 742], and cases cited.

The question here was whether Durham was "entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear." What Durham sought was to obtain an adjudication authorizing the Commissioner of Patents to issue a patent to him, and the matter in dispute was whether Durham was entitled to a patent as for a patentable invention.

Durham had presented his application for a patent, filed in due form, to the commissioner of patents in accordance with U. S. Rev. Stat. § 4888, which application was rejected by the Commissioner, and thereupon he appealed to the supreme court of the District of Columbia in general term, which affirmed the decision of the Commissioner. He then filed this bill in equity in accordance with U. S. Rev. Stat. § 4915, and although, as remarked by *Mr. Justice* Blatchford in *Gandy* v. *Marble*, 122 U. S. 432, 439 [30: 1223, 1224], it is "a suit according to the ordinary course of equity practice and procedure, and is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced upon the whole merits, yet the proceeding is, in fact and necessarily, a part of the application for the patent." Considered in this light it is clear that the validity of a patent was not involved. And we may add that it appears to us to be *quite inconsist- [238 ent with the intention of Congress for this court to take jurisdiction on appeal of applications for patents in view of the provisions in relation to appeals from the circuit courts of appeals under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517); *United States* v. *American Bell Teleph. Co.* 159 U. S. 548 [*ante*, 255].

The matter in dispute was not money, and the only remaining inquiry is whether it was a right capable of being ascertained in money and appearing to be of the requisite pecuniary value.

The answer to this inquiry requires the application of the settled and necessary principle that the matter in dispute is, as was said by *Mr. Justice* Field in *Lee* v. *Watson*, 68 U. S. 1 Wall. 337, 339 [17: 557, 558], "the subject of the litigation—the matter for which the suit is brought," and that matter here was the issue of a patent, that is, an application to the courts below to hold the alleged invention patentable and authorize a patent to be issued.

It is true that "the discovery of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires," and that an assignment may, under circumstances, be made, which will operate upon the perfect legal title which the discoverer had a lawful right to obtain, as well as upon the imperfect and inchoate interest which he may actually possess. *Gayler* v. *Wilder*, 51 U. S. 10 How. 477, 493 [13: 504, 510].

So rights growing out of an invention may be sold, whether the sale in any case carries with it anything of value or not. *Hammond* v. *Mason & H Organ Co.* 92 U. S. 724, 728 [23: 767, 769]. But "until the patent is issued there is no property right in it, that is, no such right as the inventor can enforce. At all events there is no power over its use, which is one of the elements of the right of property in anything capable of ownership." *Marsh* v. *Nichols*,

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128 U. S. 605, 612 [32: 538, 541]; *Brown* v. *Duchesne*, 60 U. S. 19 How. 193 [15: 598].

The right to apply for a patent was being availed of in this proceeding and the invention cannot be regarded for jurisdictional purposes as in itself property or a right of property having an actual value susceptible of estimation in money.

239] *Whether the alleged invention was patentable or not was the question, and that question had no relation to its value in money. If the invention were not patentable, Durham had suffered no loss; if the invention were patentable, it was not material whether it had or had not a money value.

The bill, properly enough, does not allege that any sum of money was in dispute, although there are averments that the value of the invention is generally recognized, and that sundry persons are deriving large profits in making the device sought to be patented. Evidence of that kind, though not controlling, is sometimes introduced in suits on patents as indicative of invention in the production of new and beneficial results, but it is not relevant here, nor are the affidavits presented on the question of value if the patent were granted. The matter in dispute must have actual value, and that cannot be supplied by speculation on the possibility that, in a given case, an invention might be held patentable.

In *Sparrow* v. *Strong*, 70 U. S. 3 Wall. 97 [18: 49], jurisdiction was sustained on the ground that a mining claim acquired under mining rules and customs recognized by the laws of the territory of Nevada, though the land where it had existed had never been surveyed and brought into market, might be the subject of estimate in money; that the claim might perhaps have existed under the former governments of Spain or Mexico, and that, moreover, mining interests apart from the fee simple rights in the soil existed before the act of Congress of February 27, 1865, under the implied sanction of the Federal government. The distinction between that case and the one before us is obvious.

We are of opinion that the matter in dispute in this case was not capable of being valued in money, and that the appeal must be dismissed.

It is suggested that jurisdiction was entertained in *Gandy* v. *Marble*, 122 U. S. 432 [30: 1223]; *Hill* v. *Wooster*, 132 U. S. 693 [33: 502]; and *Morgan* v. *Daniels*, 153 U. S. 120 [38: 657], to the contrary of the conclusion at which we have arrived. But *Morgan* v. *Daniels* and *Hill* v. *Wooster* were appeals from circuit courts taken before the passage of the judiciary act of March 3, 1891, and when U. S. Rev. Stat.

240] § 699, was in force, which *allowed appeals from those courts irrespective of the sum or value of the matter in dispute in cases "touching patent rights," and while we admit that a patent right does not exist while the proceeding to obtain it is pending, yet we think that such a proceeding constituted a case touching patent rights within § 699. And *Gandy* v. *Marble* was an appeal from the supreme court of the District of Columbia taken before the passage of the act of March 3, 1885, and when the final decrees of that court could be revised by this court on appeal in the same manner and under the same regulations as decrees of circuit courts. U. S. Rev. Stat. § 705; D. C. Rev. Stat. § 846.

Appeal dismissed.

HERMANN R. BALTZER, *Plff. in Err.*, *v.* STATE OF NORTH CAROLINA.

(See S. C. Reporter's ed. 240-246.)

Impairing obligation of contract—decision of state court.

1. The repeal of a constitutional provision which gave the court jurisdiction to hear claims against the state, and making the decision merely recommendatory to the legislature, and denying the right to an execution thereon, does not impair the obligation of a contract with persons holding claims against the state.
2. An erroneous decision to the effect that a constitutional provision giving a court power to hear claims against the state has been repealed does not impair the obligation of a contract, if that would not be impaired by the actual repeal of the provision.

[No. 93.]

Argued February 3, 4, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment of that court dismissing a suit brought by Hermann R. Baltzer, plaintiff, against the state of North Carolina, for the recovery of the amount of coupons of bonds issued under the ordinance of the Constitutional Convention of 1868. *Affirmed.*

The facts are stated in the opinion.

See same case below, 104 N. C. 265.

Mr. **Simon Sterne**, for plaintiff in error:

It was error for the supreme court of North Carolina to construe the constitutional amendment as a limitation or withdrawal of jurisdiction from that court and to thereby defeat the consideration of plaintiff's claim and his procuring such judgment and limited power of enforcement as the Constitution of the state of North Carolina had secured to him.

Baltzer v. *State*, 104 N. C. 265; *Horne* v. *State*, 84 N. C. 362.

The adoption of this constitutional amendment is not an exercise of the right of a state, being a sovereignty, to prescribe the conditions under which it can be sued, or to withdraw altogether its consent to be sued in its own courts; and it was error for the state court to construe the enactment of the constitutional amendment to be an instance of the exercise of such right.

Beers v. *Arkansas*, 61 U. S. 20 How. 527 (15: 991); *Re Ayers*, 123 U. S. 443 (31: 216).

NOTE.—*As to contracts, their interpretation and validity*, see note Bell v. Bruen, 11: 89.

As to what laws are void, as impairing obligation of contracts, see note to Fletcher v. Peck, 3: 162.

As to when new statute of limitations impairs obligation of, see note to Koshkonong v. Burton, 23: 886.

That impairing remedy impairs obligation of contracts, see note to Louisiana v. New Orleans, 23: 123.

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Immunity from suits can be secured without impairing the obligation of contracts.

Poindexter v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 270 (29: 185); *Hans* v. *Louisiana*, 134 U. S. 1 (33: 842); *North Carolina* v. *Temple*, 134 U. S. 22 (33: 849).

The amendment to § 6, art. 1, of the Constitution of North Carolina impairs the obligation of contrac's, is in conflict with the Constitution of the United States, and is therefore totally null and void, and it was error for the state court to hold it otherwise.

Green v. *Biddle*, 21 U. S. 8 Wheat. 1, 84 (5: 547, 568); *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 (11: 143); *Planters' Bank* v. *Sharp*, 47 U. S. 6 How. 311 (12: 451).

Any law passed by a state withdrawing from its officers the power of carrying out the contract embraced in its bonds and coupons or certificates of indebtedness is unconstitutional as impairing the obligation thereof.

Louisiana v. *Jumel*, 107 U. S. 711 (27: 448); *Antoni* v. *Greenhow* (107 U. S. 769 (27: 468); *Hartman* v. *Greenhow*, 102 U. S. 672 (26: 271); *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 270 (29: 185).

The provision of the Federal Constitution regarding the impairment of the obligation of contracts applies equally to contracts by state and to contracts by individuals.

Hagood v. *Southern*, 117 U. S. 52 (29: 805); *Hans* v. *Louisiana*, 134 U. S. 1 (33: 844); *United States* v. *New Orleans*, 108 U. S. 358 (26: 396).

It is against the rules both of law and of reason to admit by implication in the construction of a contract a principle which goes in destruction of it.

Murray v. *Charleston*, 96 U. S. 432 (24: 716); *De Vignier* v. *New Orleans*, 16 Fed. Rep. 11; *United States*, *Foote*, v. *Howard County Ct.* 2 Fed. Rep. 1; *New England Mortg. Secur. Co.* v. *Wader*, 28 Fed. Rep. 265.

In this case the remedy furnished by the state against itself was incorporated into the state Constitution by the same constitutional convention that authorized the issue of plaintiff's bond.

Any attempted amendment to the Constitution, therefore, which either directly or by inference takes away this remedy, impairs the obligation of the contract.

Memphis & C. R. Co. v. *Tennessee*, 101 U. S. 337 (25: 960); *South & North Ala. R. Co.* v. *Alabama*, 101 U. S. 832 (25: 973).

This court will construe for itself the provisions of a state constitutional or statutory enactment which is claimed to be in conflict with the Federal Constitution, and will not follow the decisions of the state courts on a question of such construction.

McGahey v. *Virginia*, 135 U. S. 662 (34: 304); *Delmas* v. *Merchants' Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20: 757).

The only question before this court is whether the North Carolina constitutional amendment does or does not conflict with the Federal Constitution.

DeSaussure v. *Gaillard*, 127 U. S. 216 (32: 125); *Eustis* v. *Bolles*, 150 U. S. 361 (37: 1111).

The amount involved, or value of the matter in dispute, is not a jurisdictional fact in this case.

Buel v. *Van Ness*, 21 U. S. 8 Wheat. 312 (5: 624).

Messrs. **James E. Shepherd, Charles M. Busbee,** and *F. I. Osborne*, Attorney General of North Carolina, for defendant in error:

This is an attempt on the part of the plaintiff in error to obtain a decision of this court as to the validity of the state constitutional amendment in respect to its prohibition upon the legislature to levy taxes to pay any portion of a certain class of state bonds, which embraces the claim of the plaintiff without a vote of the people. No such question was decided by the state supreme court. It simply decided that its recommendatory jurisdiction, as to such claims, had been taken away.

Beers v. *Arkansas*, 61 U. S. 20 How. 527 (15: 991).

The construction and interpretation of a state supreme court of its own Constitution and laws is binding upon this court and therefore, unless some Federal question is involved, the decision of the supreme court of North Carolina that the said constitutional amendment did deprive it of its recommendatory jurisdiction in this case is not the subject of review in this court.

De Saussure v. *Gaillard*, 127 U. S. 216 (32: 125).

The real and only point before this court is whether it was competent for the state to withdraw its permission to be sued as provided by the clause conferring recommendatory jurisdiction upon its supreme court.

Memphis & C. R. Co. v. *Tennessee*, 101 U. S. 337 (25: 960); *North Carolina* v. *Temple*, 134 U. S. 22 (33: 851); *Hans* v. *Louisiana*, 134 U. S. 1 (33: 844); *South & North Ala. R. Co.* v. *Alabama*, 101 U. S. 832 (25: 973); *Re Ayers*, 123 U. S. 443 (31: 216).

The said amendment contains no provision which impairs the contract embraced within its terms.

Edwards v. *Kearzey*, 96 U. S. 595 (24: 793); *Louisiana* v. *New Orleans*, 102 U. S. 203 (26: 132); *United States* v. *Quincy*, 71 U. S. 4 Wall. 535 (18: 403).

The obligation of a contract is the law which binds the parties to perform their agreement.

Sturges v. *Crowninshield*, 17 U. S. 4 Wheat. 122 (4: 529); *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 218 (6: 607); *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 (4: 629); *Walker* v. *Whitehead*, 83 U. S. 16 Wall. 314 21: 357).

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Mr. Justice* **White delivered the [241 opinion of the court:

By an ordinance of the Constitutional Convention of the state of North Carolina, held in 1868, certain bonds were authorized to be issued in aid of the Chatham Railroad. Whilst there was some question raised on the subject, in the discussion at bar, it may be, for the purposes of this case, conceded that at the time the ordinance authorizing the bonds was passed, section 11, article 4, of the Constitution of North Carolina, adopted in 1868, was in existence, and was as follows:

"*Claims against the state.*—The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory. No process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action."

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In 1879 an amendment to the Constitution of North Carolina was submitted by the legislature of that state to the people thereof, and this amendment was ratified by a popular vote in 1880. It is as follows:

"Nor shall the general assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, nor any debt or bond incurred or issued by the legislature of the year 1868, either at the special session of the year 1868 or at its regular sessions of the years 1868-69 and 1869-70, except the bonds issued to fund the interest on the old debts of the state, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the state at a regular election held for that purpose."

After the incorporation of this amendment in the Constitution of the state, the plaintiff in error commenced in the supreme court of North Carolina an action against that state for the recovery of the amount of interest due on coupons forming part of certain bonds which had been issued under the ordinance of the Con-
242] stitutional Convention of 1868, *above referred to. The attorney general of the state, reserving all its rights to plead to the jurisdiction, answered, denying both the existence and validity of the bonds and coupons declared on, and pleading the statute of limitations of three and ten years. Thereupon a motion was made by the attorney general on behalf of the state to dismiss the action for want of jurisdiction. This motion prevailed, the court referring, as its grounds for dismissing the suit, to the reasons assigned by it in the previous cases of *Horne* v. *State*, 84 N. C. 362, and *Baltzer* v. *State*, 104 N. C. 265. The cases thus referred to held that the power of the court to recommend claims to the favorable consideration of the legislature had—*quoad* claims identical in legal nature with the coupons sued on—been repealed by the constitutional amendment to which we have referred, and that the court was without jurisdiction to render judgment of recommendation on a claim against the state when its validity was denied by the state Constitution. To the judgment thus rendered this writ of error is prosecuted.

In *Memphis & C. R. Co.* v. *Tennessee*, 101 U. S. 337 [25: 960], this court was called upon to determine whether the repeal, by a state, of a statutory provision authorizing itself to be sued in its own courts, but which gave no power to the courts to enforce their judgments, and which enacted that when such judgments were rendered the money could only be obtained through an appropriation by the legislature, was an impairment of the obligation of a contract entered into by the state whilst the authority conferred by the statute was unrepealed. In speaking on this subject this court, by *Mr. Chief Justice* Waite, said:

"The question we have to decide is not whether the state is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a state cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the state had withdrawn its consent to be sued, and the only question now to be determined is whether that withdrawal *impaired the [243 obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative so far as this suit is concerned, and the original consent remains in full force for all the purposes of the particular contract or liability here involved.

"The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract.

"Here the state has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the state the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the state has been judicially ascertained, but there the power of the court ends. The state is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the state to rely on for their fulfilment. The courts are powerless. Everything after the judgment depends on the will of the state. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty.

"It is clear, therefore, that the right to sue, which the state of Tennessee once gave its creditors, was not, in legal effect, *a judicial [244 remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given."

Subsequently, in the case of *South & North Ala. R. Co.* v. *Alabama*, 101 U. S. 833 [25: 973], the same question was presented on a state of facts somewhat stronger in favor of the contention that there was a contract right than that which had been considered in the foregoing case. There the facts were that the statute of the state existing at the time the contract was made not only authorized a judgment to be rendered against the state, but provided (we quote from the opinion) "'that if judgment should be rendered against the state, it was the duty of the comptroller, on the certificate of the clerk of the court, together with

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that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount, but no certificate could issue until six months after the recovery of the judgment.' Code 1867, § 2536. It was also the duty of the treasurer to pay all warrants drawn on him by the comptroller under the authority of law (Code, § 442); but the Constitution in force then and now provided in express terms that no money should be drawn from the treasury but in consequence of appropriations made by law. Const. 1831 and 1870, art. 2, § 24." Upon these facts, speaking through *Mr. Chief Justice* Waite, this court again said:

"We are unable to see any substantial difference between this case and that of *Memphis & C. R. Co.* v. *Tennessee, supra.* Under both the Tennessee and Alabama statutes the courts are made little else than auditing boards. If the funds are not voluntarily provided to meet the judgment, the courts are not invested with the power to supply them. In Alabama, a warrant for the payment may be secured, but the state may stop payment by withholding an appropriation. Perhaps the judgment creditor may take one step further towards the collection in Alabama than he can in Tennessee; but both states may refuse to pay, that is, may refuse to make the necessary appropriation, **245**] and the courts are powerless to *compel them to do so. In neither state has there been granted such a remedy for the enforcement of the contracts of the sovereignty as may not, under the Constitution of the United States, be taken away."

The statute of North Carolina which we now consider, and which gave the courts of that state power to examine and recommend claims against it to the legislature, is much more restrictive than were the statutes of Tennessee and Alabama passed on in the cases just cited. Applying to this case the reasoning of this court in those cases expressed, it becomes clear that the authority given by the state of North Carolina to its court not being a part of the contract on which the plaintiff in error had a right to rely, its repeal did not impair the obligations of his contract in the sense conveyed by those words when used in the Constitution of the United States. This proposition so necessarily results from the authorities and is so self-evident in reason that it was not denied in the discussion at bar. Indeed, it was frankly conceded that the exercise by a state of the power to repeal a grant of authority to its courts to audit claims against itself would not in any manner violate the obligations of contracts which had been entered into by the state at a time when the power existed. Yet, whilst this concession was made, it was asserted that the impairment of the obligation of the contract, here claimed to have been accomplished, arises from the fact that the state court erroneously held that the amendment to the state Constitution repealed the court's authority to examine and recommend the claim presented to it, when in fact such repeal had not taken place. In other words, it was argued that although the right to have the claim examined and recommended was existing and unrepealed, the state court had impaired the obligations of the contract by holding that such right was nonexisting because repealed by a subsequent provision of the state Constitution. But this is mere reasoning in a vicious circle, for the concession that the right could be taken away without violating the contract clause of the Constitution necessarily implied that the decision of the state court as to repeal *vel non* in no way involved rights protected from impairment *under the Constitution of [**246** the United States. It is apparent that no rights under the Constitution of the United States arose in favor of the claimant from the provision conferring on the courts of the state the authority to examine and recommend, since all the benefits resulting therefrom could admittedly be withdrawn without violating the contract. To give effect to the contention of the plaintiff in error, we should be obliged to announce the contradictory proposition that where there were no rights under the Constitution of the United States to be impaired, yet a decision of the state court had impaired such rights. We should also be obliged to hold that although the state could at its will take away the right without impairing the contract, yet a decision by the court of last resort of the state, that the right had been taken away, was an impairment of the contract. The fallacy contained in the argument results from overlooking the fact that the moment it is admitted that the repeal of the right to have the claim examined and recommended is no impairment of the obligation of the contract secured under the Constitution of the United States, the question whether or not such right has been repealed becomes purely a question of state law to be determined by the state courts.

Judgment affirmed.

HERMANN R. BALTZER and WLLIAM G. TAAKS, *Plffs. in Err.*,

v.

STATE OF NORTH CAROLINA.

(See S. C. Reporter's ed. 246, 247.)

Argued Feb. 3, 4, 1896. Decided March 2, 1896

Baltzer v. *North Carolina*, 161 U. S. 240 [*ante*, 684] followed.

[No. 52.]

IN ERROR to the Supreme Court of the State of North Carolina.

The facts are stated in the opinion.

Mr. **Simon Sterne** for plaintiffs in error.

Messrs. **James E. Shepherd, Charles M. Busbee,** and *F. I. Osborne*, Attorney General of North Carolina, for defendant in error.

Mr. Justice* **White delivered the [**247** opinion of the court:

The claim presented in this case to the supreme court of the state of North Carolina differs somewhat from that relied on in that court in the case of *Hermann R. Baltzer* v. *State of North Carolina*, No. 93 of the docket of this court. The question of the power in the state court to give the relief prayed for was by it decided adversely to the plaintiffs in error upon grounds identical with those considered by us in the case just decided. Our reasons for affirmance there expressed are conclusive of the issues here, and consequently *the judgment is affirmed.*

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JANE LYNCH, *Appt.*,
v.
CHRISTEINA MURPHY, Executrix, ET AL.

(See S. C. Reporter's ed. 247-256.)

Constructive notice—bona fide purchaser—effect of judgment.

1. Constructive notice is not given by the record of an instrument which is not executed with the formalities required by law in order to entitle it to be recorded,—as, where there is no certificate to the official character of the officer before whom the power of attorney to execute the instrument was acknowledged in another state.
2. Reconveyance of land to the grantor under a decree annulling a conveyance for fraud makes him a bona fide purchaser of the property for value with respect to the liens of third persons claiming under the grantee, of which the grantor did not have either actual or constructive notice.
4. A judgment canceling a conveyance in a suit to which all the persons known to the plaintiff as claiming an interest in or encumbrance on the property are made parties is effectual to devest the interest, not legally recorded, of a person who is not a party but who claims under the grantee, and of which the plaintiff had no actual or constructive notice.

[No. 129.]

Argued December 18, 19, 1895. Decided March 2, 1896.

APPEAL from a decree of the Supreme Court of the District of Columbia affirming the decree of the Special Term of that Court decreeing a deed of trust to be null and void, and that the fund in the registry of the court belongs to the estate of Peter Pippert and under his will passed to the complainant, Christeina Murphy, and the defendants Edwin Marsh and Florence Marsh. *Affirmed.*

Statement by *Mr. Justice* **White:**

The complainant below was Christeina Mur-
248] phy, who sued *in her own right and as executrix and trustee under the will of Peter Pippert, her deceased father. By her bill, complainant sought the cancelation of a deed of trust upon certain land in the city of Washington, devised by her father to complainant and to two of the defendants named in the bill, or, in the alternative, the reinstatement of a deed of trust for the benefit of said Pippert which had been canceled by a judicial decree as hereinafter stated. The deed of trust attacked by the bill purported to have been executed in August, 1874, by Elizabeth English, to one Bean, to secure payment of four notes for $1,000 each, payable to the order of James Lynch. It was averred, in substance, that at the time of the execution of the deed of trust the legal title to the land was in Elizabeth English and Andrew Schwartz, Sr., by virtue of a conveyance from Pippert, made July 27, 1874, and the land which it embraced was encumbered by a deed of trust to Pippert given to secure the unpaid purchase money, $10,890.42. It was also alleged that the deed from Pippert to English and Schwartz was annulled by a decree of the supreme court of the District of Columbia, in a suit instituted by Pippert to cancel his conveyance on the ground of alleged fraud practised upon him in the transaction. At the time of the institution of said suit the Bean deed of trust had been placed by Mrs. English on her three-fourths interest in the property, bought by herself and Schwartz from Pippert, and it was on the land records of the District of Columbia. Neither Lynch nor his trustee Bean were made parties to the suit.

Relief was sought as to the Bean deed of trust upon the ground that it was executed on behalf of Mrs. English by her husband, who had no proper or competent authority in law to execute the same; and it was urged at the trial, among other objections, that the power of attorney under which English assumed to execute the deed of trust was defective and was not entitled to record, because of the absence therefrom of a certificate of the official character of the officer before whom, in Michigan, Mrs. English acknowledged the instrument. It was further urged in the bill as ground of relief that the notes to Lynch were made without consideration, *and that the transaction was [**249** part and parcel of a scheme by which English attempted to defraud Pippert, as alleged in the suit of Pippert hereinbefore referred to, and that the defendant Jane Lynch, claiming to be the owner of the notes secured by said deed of trust, and the heirs at law of Bean, the deceased trustee, were threatening to enforce the deed of trust by advertising the premises for sale thereunder.

The controversy in this court being confined to the question of the validity of the apparent deed of trust to Bean, numerous allegations contained in the bill are unnecessary to be referred to.

Of the pleadings filed on behalf of the various defendants, only that of Jane Lynch requires notice. In her answer she set up her ownership of the notes referred to in the Bean deed of trust, claiming that she received them from her husband on the day the notes bore date. She denied any knowledge of the suit to cancel Pippert's conveyance to Mrs. English and Schwartz, and averred that she had no knowledge of the decree in Pippert's suit until very recently, and further averred that her deceased husband parted with full consideration for the notes, and that the transaction was not fraudulent.

While averring that English did have proper and competent authority in law to execute the said deed of trust as the agent of his wife, Mrs. Lynch coupled such averment with the claim that the property purchased from Pippert was in fact paid for by the money of Alexander English, who kept his property in his wife's name so as to be out of the reach of his creditors, and that said English was the real principal, and in giving the deed of trust for the benefit of Lynch he was pledging his own property, though in the name of his wife, for a debt due by him and for which he received the consideration. We quote the following statements in the answer:

"Defendant further says that she is advised and believes and therefore charges that while the said deed of trust is not technically sufficient in law to constitute a valid deed of trust, yet that it was on the part of said English a pledge of property of which he was the real and equitable owner, for a just debt which he owed

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250] the said James Lynch; and that the *said deed of trust constitutes an equitable mortgage upon the said premises, which this defendant has the right to have enforced; and that the said Peter Pippert had notice thereof in his lifetime and before the filing of the suit by him hereinbefore referred to; that the complainant herein is not a purchaser thereof, but a mere volunteer, having taken the property as a gift and without paying any value therefor and with full notice of this defendant's claim; and this defendant says that complainant took the land subject to all the equities of this defendant and all other persons whomsoever. Defendant says that the said notes have never been paid, and that it is true that she threatened to enforce the said trust by a sale of said real estate because of the nonpayment thereof."

After the cause was at issue, a decree was entered by consent of all parties, appointing a trustee to make sale and ordering a sale of the property affected by the bill. The following provision is contained therein:

"And whereas the said Jane Lynch, in consideration of the provision hereinafter made, is willing to consent to the decree of sale, now it is further ordered, adjudged, and decreed that said John C. Heald, immediately upon the completion of such sale, shall pay into the registry of this court the sum of $8,000 of the proceeds of said sale, and that the same shall be invested and reinvested under the direction of the court and held until the final determination of this cause in the court of last resort, and that said sum of $8,000 and the notes, securities, or property in which the same shall from time to time be invested and the increase thereof, as to all parties interested in said real estate, shall stand in the place and stead of said real estate, and that if in this proceeding it shall ultimately be decided that the defendant Jane Lynch had a valid lien upon said real estate at the time the bill in this case was filed, for the sum of $4,000, with interest as aforesaid, or only part thereof, then said sum of $8,000 and the increase thereof, or so much thereof as shall be necessary, shall be applied for the satisfaction of such lien."

251] A *sale of the property was had and the fund representing the Lynch claim was paid into the registry of the court.

After the taking of testimony the cause came on for hearing, and, on May 13, 1891, the court at special term entered a decree adjudging the deed of trust to Bean to be null and void; that the fund in the registry of the court belonged to the estate of Peter Pippert, and under his will passed to the complainant and the defendants Edwin Marsh and Florence Marsh. On the appeal of Jane Lynch, the general term, on May 31, 1892, affirmed the judgment of the special term.

Thereupon Mrs. Lynch took an appeal to this court.

Messrs. **Wm. G. Johnson** and **Calderon Carlisle** for appellant.

Messrs. **A. S. Worthington, Henry E. Davis,** and *J. C. Heald* for appellees.

Mr. Justice **White** delivered the opinion of the court:

The question for our determination is whether or not appellant had a valid lien, legal or equitable, upon the real estate in question, at the time the bill of complaint was filed.

We will premise that the decree in the equity cause of *Pippert* v. *English et al.* was not void because English and his wife were not personally served with process. Constructive service by publication was authorized by § 787 of the Revised Statutes relating to the District of Columbia. *Hart* v. *Sansom*, 110 U. S. 151 [28: 101], relied upon as supporting the proposition that the rights of Mr. and Mrs. English in the land could not be affected by such constructive notice, and that the decree rendered thereon was not entitled to recognition in a Federal court, does not support the contention. The *Hart Case* was explained in *Arndt* v. *Griggs*, 134 U. S. 316 [33: 918], in *which last case it was held that the duty [252 of determining unsettled questions respecting the title to real estates was local in its nature, to be discharged in such mode as might be provided by the state in which the land was situated, where such mode did not conflict with some special inhibition of the Constitution and was not against natural justice; and we held (pp. 327, 328 [921, 922]) that nothing inconsistent with this doctrine was decided in *Hart* v. *Sansom*.

From the evidence contained in the record, we are satisfied that when Pippert instituted the action to annul his conveyance to Mrs. English and Andrew Schwartz, Sr., he did not have actual knowledge that Mrs. English or any one claiming to represent her had encumbered or attempted to encumber the land. The question then presents itself: Was the record of the alleged deed of trust to Bean constructive notice to Pippert? We are relieved from extended discussion in answering this question by the admissions made in the answer of defendant Lynch and in the brief of her counsel.

In the bill of complaint it is charged that Alexander English was without any proper or competent authority in law to execute said deed of trust. This refers to the authority of English to execute the deed of trust, as the attorney of his wife. This allegation is admitted by the answer, for while it is averred therein, "upon information and belief, that said Alexander English did have proper and competent authority in law to execute the trust to said William W. Bean," it proceeds to aver in connection with this allegation that "the true facts in relation thereto" were, in substance, that the payment made by English when the property was purchased from Pippert was made with money belonging to English personally, that he had personally received the benefit of the consideration from Lynch, and that the said deed of trust, "while not technically sufficient in law to constitute a valid deed of trust, . . . was on the part of said English a pledge of property of which he was the real and equitable owner for a just debt which he owed to said James Lynch, and that the said deed of trust constitutes an equitable mortgage upon the said premises, which this defendant has the right to have enforced."

*In the brief of counsel for appellant the [253 matter is thus stated: "The only remaining objection to the Lynch trust is the defective character of the instrument. It is admitted in

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the answer that the instrument is inartificially drawn and as a mortgage is technically defective." And the argument then proceeds to maintain that the evidence clearly established a good equitable mortgage in favor of appellant.

In the face of these concessions it becomes unnecessary to determine what were the particular defects rendering the writing in question legally invalid.

Having concluded that the deed of trust was inoperative as a legal instrument, we recur to the question whether or not its spreading upon the land records of the District constituted constructive notice. As said by Pomeroy in § 652 of his work on Equity Jurisprudence:

"The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved, so as to entitle it to be recorded. The statutes generally require, as a condition to registration, that the instrument should be legally executed, and that it should be formally acknowledged or proved, and a certificate thereof annexed. If a writing should be placed upon the records with any of these preliminaries entirely omitted or defectively performed, such a record would be a mere voluntary act, and would have no effect upon the rights of subsequent purchasers or encumbrancers."

Story, Eq. Jur. (13th ed.), § 404, states the doctrine thus:

"The doctrine as to the registration of deeds being constructive notice as to all subsequent purchasers is not to be understood of all deeds and conveyances which may be *de facto* registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud."

It follows that the recording of the instrument 254] under *consideration was a mere nullity in a jurisdiction such as the District of Columbia (D. C. Rev. Stat. § 440), where particular formalities are required to authorize the recording. To the cases referred to by the authors first cited may be added *Dohm* v. *Haskin*, 88 Mich. 144, and *Musgrove* v. *Bonser*, 5 Or. 313, 315, 316, 20 Am. Rep. 737, the defect in the recorded instrument, in both cases, being the absence of a certificate as to the official character of the officer before whom a deed was acknowledged. See also 3 Washb. Real Prop. *592; Wade, Notice, §§ 124-126.

The effect of the decree in Pippert's suit, annulling his conveyance to Schwartz and English, was that Pippert, as the consideration of such cancelation, surrendered the benefit of his vendor's lien and the security of the deed of trust. When this result was accomplished the unpaid purchase money amounted to $10,390.42, and was in fact but $500 less than the entire consideration for the sale, and practically represented the full value of the property. By the reconveyance to him, under the decree, Pippert stood in the position of a bona fide purchaser of the property for value; and, as we have found he did not have actual or constructive notice of the real or supposed equity of Mrs. Lynch, there would seem to be no ground upon which to base the claim that at the time of the institution of this suit Mrs. Lynch had an equitable mortgage or lien upon the property. Let us assume, for the sake of the argument, that, as claimed by counsel for the appellant, Alexander English should be regarded in equity as having been the real owner of the property at the time of the transaction with Lynch, though the legal title was in his wife; that Lynch paid to English full consideration for the cash paid and notes delivered by English, and that Lynch accepted the notes on the faith of the security of the property in question. As against English it is clear, under the authorities, that from the nature of the transaction, upon the hypothesis we have stated, a lien would have arisen in equity against English's interest in the land. Jones, Mortg. §§ 162, 163, 166, 168, 169; Story, Eq. Jur. §§ 1020, 1231; *Peckham* v. *Haddock*, 36 Ill. 38; *McClurg* v. *Phillips*, 49 Mo. 315; *Gale* v. *Morris*, [255 29 N. J. Eq. 222, 224. But a bona fide purchaser for value of property subject to an equitable mortgage, without notice of such mortgage, takes the property free of the equitable mortgage. Jones, Mortg. § 162, p. 139, citing *Watkins* v. *Reynolds*, 123 N. Y. 211. *Watkins* v. *Reynolds* was a case where a *cestui que trust* for life executed a mortgage in fee on the trust estate, and after her death the remainderman in fee executed, under seal, an unattested paper covenanting for sufficient consideration that the mortgage should continue to be a lien on the land. Afterwards he sold and conveyed to another, who paid a sum in cash and contracted to assume certain mortgages and pay certain debts of the vendor to third persons, equal in amount to the remainder of the purchase price. The cash payment and part of these debts were made before the purchaser had actual notice of the agreement to continue the mortgage lien. Upon this state of fact the court, speaking through Peckham, J., held that since the purchaser's agreements were made before notice, and remained in full force after notice, there was no equitable lien against the property in favor of the mortgagee for the purchase money unpaid at the time of such notice.

That notice to Pippert, actual or constructive, was an element essential to the survival of the lien as against Pippert, is admitted in the answer of Mrs. Lynch, expressed by the averment that Pippert had notice of the existence of the supposed deed of trust. As that allegation was not established by the evidence, but the contrary was proved, it follows that the claim of a lien or mortgage upon the property in favor of Mrs. Lynch has not been made out. And this conclusion inevitably results from the following additional considerations:

Pippert instituted and prosecuted his suit for cancelation of his conveyance against all persons known to him as claiming an interest in or encumbrance on the property. He did what the law required in order to make his judgment binding upon all the world, and when the court devested Mrs. English of all her interest in the property, appellant's alleged rights, acquired through her, not having

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been legally recorded before judgment, were devested by the decree as effectually as if ap-
256]pellant* had been a party. There being no actual notice, and the recording of the defective deed not operating as constructive notice, the alleged equitable lien is wholly inoperative against those holding under the decree.

The decree of the general term of the supreme court of the District of Columbia must be affirmed.

Mr. Justice **Brewer**, not having heard the argument, took no part in the decision of this cause.

JOSEPH F. HAMILTON ET AL., *Plffs. in Err.*,
v.
J. T. BROWN ET AL.

(See S. C. Reporter's ed. 256-275.)

Escheat—effect of judgment—quieting title—due process of law—obligation of contract.

1. Judgment declaring that land has escheated to the state, when rendered on a petition containing the proper allegations and when no person is in possession of it, is conclusive evidence of the state's title in the land, not only against any tenants or claimants having had actual notice by scire facias or having appeared and pleaded, but also against all other persons interested in the estate and having had constructive notice by publication.
2. Provisions in a judgment vesting title to land in the state on proceedings for escheat are distinct and severable from provisions for a sale and conversion into money, of the land, after the title has vested in the state, and may stand good though the latter provisions are invalid.
3. The legislature may provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants and notice by publication to all other persons.
4. Notice necessary for due process of law in determining the right to the succession of real estate, whether by ordinary administration proceedings or by proceedings in escheat, is afforded by actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown.
5. The obligation of a contract in a grant, whether from the state or from a private person, is not

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NOTE.—*As to alienage, effect of, as to title to real estate*, see notes to Governeur v. Robertson, 6: 488, and Griffith v. Godey, 28: 934.

Escheat of property to the state; what property escheats; conveyance of escheated land; how enforced; lands held by trustee or subject to mortgage; practice.

Originally escheat was the determination of the tenure or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means, in which case the land reverted to the original grantor or lord of the fee. 2 Bl. Com. 245, 272; Hughes v. State, 41 Tex. 10; Burgess v. Wheate, 1 W. Bl. 123.

In modern law escheat denotes a falling of the estate into the general property of the state, either because the tenant is an alien, or because he has died intestate without lawful heirs to take his estate by succession. 3 Washb. Real Prop. 443; Hughes v. State, 41 Tex. 17.

Attainder of treason cannot disinherit in England except during the life of the offender. Stat. 3 & 4 Wm. IV. chap. 106, enlarging 54 Geo. III. chap. 145. In the United States there can be no forfeiture except for treason, and attainder of treason works corruption of blood during the life of the person attainted only. U. S. Const. art. 3, § 3; Bigelow v. Forrest, 76 U. S. 9 Wall. 339 (19: 606); Page v. United States, 78 U. S. 11 Wall. 268 (20: 135).

Lands held in trust to be sold or conveyed for the benefit of aliens do not escheat or become forfeited. Taylor v. Benham, 46 U. S. 5 How. 233 (12: 130); Ludlow v. VanNess, 8 Bosw. 178; Anstice v. Brown, 7 Paige, 448; Com. v. Martin, 5 Munf, 117; Leggett v. DuBois, 5 Paige, 114, 28 Am. Dec. 413.

Defect of heirs is the most important cause of escheat. 4 Kent, Com. 426, 428; 3 Washb. Real Prop. 444; Sewall v. Lee, 9 Mass. 363.

Lands of intestate bastards dying without issue escheat, where the rule is not changed by statute. Doe, Crawle, v. Bates, 6 Blackf. 538.

The lands of a lunatic or madman escheat on his death without heirs, though previously granted by him by deed of bargain and sale. *Re* Desilver, 5 Rawle, 111, 28 Am. Dec. 645.

Land abandoned by the owner was held to escheat. Holliman v. Peebles, 1 Tex. 673.

In some states escheated property goes into the school fund. State, Roberts, v. Reeder, 5 Neb. 208; State, Atty. Gen., v. Meyer, 68 Ind. 33; Hinkle v. Shadden, 2 Swan, 46; Parchman v. Charlton, 1 Coldw. 381.

In North Carolina escheated property goes to the State University. North Carolina University v. Foy, 2 Hayw. 310; North Carolina University v. Harrison, 90 N. C. 385. In Illinois to the county. Cothran's Ill. Ann. Stat. chap. 49, § 1.

In England escheats went generally to the King. 1 Bl. Com. 302; In Maryland before the Revolution to the lord proprietary. Thomas v. Hamilton, 1 Harr. & M'H. 190. The Massachusetts and Plymouth colonies claimed escheats as incident to the sovereignty they exercised over the lands in their patents. 3 Washb. Real Prop. 446; 3 Dane, Abr. 140.

In America escheats for defect of heirs belong universally to the state or some corporation thereof as the ultimate proprietor. 4 Kent, Com. 424; 1 Cooley's Bl. Com. 302 *note*; People v. Folsom, 5 Cal. 373.

Before 54 Geo. III. chap 155, and 3 & 4 Wm. IV. chap 106, § 10, escheat for corruption of blood by attainder attached to estates coming by descent after the attainder, as well as to estates held at the time. 2 Bl. Com. 253, 254.

The following escheated: A fee simple; an estate-tail where the tenant-in-tail has in himself the reversion in fee, otherwise the estate would pass to the reversioner, and a copyhold estate. The following things do not escheat, *viz.*: gavelkind, *propter delictum tenentis*; a rent charge; a right of common, free warren or, indeed, any kind of inheritance which does not lie in tenure, because they rather become extinct; an equity of redemption. Whart. Law Lex. *Escheat*; 2 Bl. Com. 84.

A vested remainder in fee dependent on a life estate escheats though the life estate has not terminated. People v. Conklin, 2 Hill, 67; Com. v. Naile, 88 Pa. 429.

Under the feudal system movables did not escheat, but the modern statutory rule is otherwise. 4 Kent, Com. 426 *note*; Com. v. Blanton, 2 B. Mon. 393; State v. Reeder, 5 Neb. 203.

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impaired by a statute providing for escheat on the death of the owner intestate and without heirs, to be declared in proceedings of which actual notice is given to all known claimants, and notice by publication to all others.

[No. 241.]

Submitted November 2, 1894. Decided March 2, 1896.

IN ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment of that court for the defendants, in an action brought by Joseph F. Hamilton *et al.* against J. T. Brown *et al.* to recover land in the county of Fayette. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an action brought April 12, 1890, in the circuit court of the United States for the western district of Texas by Joseph F. Hamilton, a citizen of Missouri, Lewis Hamilton, and Mary A. Post, joined by her husband George Post, citizens of Illinois, Walter B. Hamilton and Elizabeth Fulton, joined by her husband, John G. Fulton, citizens of Kansas, and John F. Hamilton, a citizen of Colorado, against J. T. Brown and twenty-five others, all citizens of Texas, and living in the county of Fayette, within the western district of Texas, to recover land in that county.

The petition alleged that the land consisted of one league, described by metes and bounds, granted to Walter F. Hamilton by the republic of Mexico on April 30, 1831; that on April 13, 1888, the plaintiffs were the owners in fee simple of the land, and entitled to the possession thereof; and that the defendants on that day unlawfully entered thereon and dispossessed the plaintiffs, and had ever since withheld the possession from them.

Trust estates, on the death of the trustee without heirs, escheated, and the lord took the estate freed from the trust; but, by statute, it is now otherwise. 4 Kent, Com. 425, 426; 1 Chitty, Gen. Pr. 279; O'Hanlin v. Den, VanKleeck, 20 N. J. L. 31; Den, Van Kleek, & O'Hanlon, 21 N. J. L. 582.

On the death of the *cestui que trust* without heirs, the title remains in the trustee for his own benefit. Burgess v. Wheate, 1 W. Bl. 123, 1 Eden, 177; Matthews v. Ward, 10 Gill & J. 443; Wood v. Mather, 38 Barb. 473; Com. v. Naile, 88 Pa. 429.

It seems that the state takes by escheat only the interest of the decedent subject to all encumbrances and debts due by the decedent. Watson v. Lyle, 4 Leigh, 236; Casey v. Inloes, 1 Gill, 430, 39 Am. Dec. 658; Farmer's Loan & T. Co. v. People, 1 Sandf. Ch. 139; Brown v. State, 36 Tex. 282; 3 Washb. Real Prop. 185.

At common law, on the dissolution of a corporation, the real estate belonging to it reverted to the grantor, and the personal property escheated to the crown or state. Fox v. Horah, 1 Ired. Eq. 358, 36 Am. Dec. 48; Coulter v. Robertson, 24 Miss. 278, 57 Am. Dec. 168; 2 Bl. Com. 256.

Where the title to escheated lands vests in the state without office found, it may convey its interest at once; and where title does not vest before inquest of office, it may give a valid release of its claim to a party in possession. Ettenheimer v. Heffernan, 66 Barb. 374; McCaughal v. Ryan, 27 Barb. 376; Re Malone, 21 S. C. 435; Rubeck v. Gardner, 7 Watts, 455; State, Atty. Gen., v. Tilghman, 14 Iowa, 474; Den, Colgan, v. McKeon, 24 N. J. L. 566.

Where the title of the state is not complete before office found, its conveyance before such time to one not in possession probably passes on interest in the escheated lands. Wilbur v. Tobey, 16 Pick. 177; Jackson, Smith, v. Adams, 7 Wend. 367; Fairfax v. Hunter, 11 U. S. 7 Cranch, 603 (3: 453); Jones v. Badley, 4 Md. Ch. 167; Casey v. Inloes, 1 Gill, 430, 39 Am. Dec. 658; Com. v. Hite, 6 Leigh, 588, 29 Am. Dec. 226; Nettles v. Cummings, 9 Rich. Eq. 440. After the lapse of many years escheat proceedings may be presumed. Vickery v. Benson, 26 Ga. 582.

To complete title by escheat, it was necessary that the lord make entry on the lands and tenements escheated, or sue out a writ of escheat.

Any act which amounted to an implied waiver, as accepting rent or homage, barred the escheat. 2 Bl. Com. 245; Kelly v. Greenfield, 2 Harr. & M'H. 121. The assessment of taxes on escheated property, and the sale thereof to pay the same, have been held not to be a waiver of the state's right to assert title by escheat. Reid v. State, Thompson, 74 Ind. 252.

Possession of lands under void deed by persons of color incapable of holding title continued after the incapacity was removed, the state never having escheated the lands, is good as against all others. Beatty v. Benton, 73 Ga. 187.

By grant and warranty the state may estop itself to claim lands as escheated on account of alienage. Com. v. André, 3 Pick. 224.

Inquest of office or office found is still deemed necessary to vest the title in some states. People v. Folsom, 5 Cal. 373; Wilbur v. Tobey, 16 Pick. 177; Bradstreet v. Oneida County Supers. 13 Wend. 546; Jackson, Smith, v. Adams, 7 Wend. 367; Com. v. Hite, 6 Leigh, 588, 29 Am. Dec. 226; Fairfax v. Hunter, 11 U. S. 7 Cranch, 603 (3: 453); Taylor v. Benham, 46 U. S. 5 How. 233 (12: 130).

In Indiana title vests without information found unless some one is in possession, when the state must first establish its title. Reid v. State, Thompson, 74 Ind. 252; People v. Cutting, 3 Johns. 1; Catham v. State, 2 Head, 553.

The burden of proof is on the state, and without proper proof that the lands are subject to escheat, it cannot succeed, even as against a mere occupant. Hammond v. Inloes, 4 Md. 138; People v. Cutting, *supra;* North Carolina University v. Harrison, 90 N. C. 385.

An inquisition that does not find the death of the tenant intestate and without heirs is a nullity. Ramsey's Appeal, 2 Watts, 228, 27 Am. Dec. 301; North Carolina University v. Harrison, *supra;* State v. Teulon, 41 Tex. 249.

For the practice in various states, see Congregational Church v. Morris, 8 Ala. 182; Bradley v. Dwight, 62 How. Pr. 300; Com. v. North American Land Co. 57 Pa. 102; Olmsted's Appeal, 86 Pa. 284; *Re* Malone, 21 S. C. 435; Wiederanders v. State, 64 Tex. 133; Hall v. Claiborne, 27 Tex. 217; Reed v. State, Thompson, 74 Ind. 252.

Where the occupant has been long in possession, and there are no heirs, distributees, or creditors, the public escheator only, not an administrator, can recover the premises. Smith v. Gentry, 16 Ga. 31.

The weight of authority is, however, that the title vests at once upon the death of the tenant without office found, and parties in possession may be dispossessed by appropriate proceedings. White v. White, 2 Met. (Ky.) 185; Stevenson v. Dunlap, 7 T. B. Mon. 134; Fry, Vaughan, v. Smith, 2 Dana, 33; Farrar v. Dean, 24 Mo. 16; State, Roberts, v. Reeder, 5 Neb. 203; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Montgomery v. Dorion, 7 N. H. 475; Den, Colgan, v. McKeon, 24 N. J. L. 566; Den, Van Kleek, v. O'Hanlon, 21 N. J. L. 582; O'Hanlin v. Den, Van

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The defendants, in a supplemental answer, "say that plaintiffs ought not to have or maintain this action against them, because they say that on the 30th day of March, 1861, one Edward Collier, at that time the lawful district attorney of what was then the first judicial district of Texas, acting for and under authority of the state of Texas, filed, in the name and by the authority of the state of Texas, a petition and began a suit in the district court of Fayette county, Texas, the object and purpose of which suit were to have said district court of Fayette county declare and adjudge that the league of land described in plaintiff's petition in this suit had escheated to the state of Texas, and to have the title to the same devested out of the said Walter Hamilton and his heirs, and have it vested in the state of Texas: that in said petition plaintiff alleged that Walter Hamilton, late a resident of Fayette county, in said state, died on the — day of ——, ——, intestate, and without heirs, and that no letters of *ad- [258 ministration have ever been granted upon said decedent's estate in Fayette county in which succession should according to law have been opened; that said decedent died seised and possessed of the league of land which is described in the petition of plaintiffs in this suit and which is fully described in said petition; that said Walter Hamilton was the last person seised and possessed of said land; that there are no tenants upon said tract of land, and no person is either in actual or constructive possession of said tract of land or any part thereof, nor is there any person, claiming the estate in and to said tract of land, known to petitioner; that no person has paid the taxes on said land or any part thereof; that the estate in and to said tract of land has escheated to the state of Texas, and praying for the grant of writ of possession in and to said tract of land to said state; that afterwards, to wit,

Kleeck, 20 N. J. L. 31; Hinkle v. Shadden, 2 Swan. 46; Puckett v. State, 1 Sneed, 355; Sands v. Lynham, 27 Gratt. 291, 21 Am. Rep. 348; Haigh v. Haigh, 9 R. I. 26; McCaughal v. Ryan, 27 Barb. 376.

Ejectment has displaced the writ of escheat. Bliss, Anno. Code of N.Y. § 1977.

Generally conveyances of escheated lands cannot be made under provisions for the conveyance of vacant lands. Straub v. Dimm, 27 Pa. 36; Hughes v. State, 41 Tex. 10; Armstrong v. Bittinger, 47 Md. 108.

A grant by the state while heirs of the original grantee are living passes nothing. Hall v. Gittings, 2 Harr. & J. 112.

One of four owners of real estate died, and it escheated. After partition proceedings, the state conveyed an undivided fourth interest in the land. Held, that the grantee was not bound by the partition proceedings, the state not having assented thereto. Holmes v. Pattison, 25 Pa. 484.

A legislative act, directing the possession and appropriation of the land, is equivalent to office found. United States v. De Ropentigny, 72 U. S. 5 Wall. 211 (18: 627).

Until office found, an alien is competent to hold land against third persons. No one has a right to complain, in a collateral proceeding, if the sovereign does not enforce his prerogative. Osterman v. Baldwin, 73 U. S. 6 Wall. 116 (18: 730); Fairfax v. Hunter, 11 U. S. 7 Cranch, 603 (3: 453); Jones v. McMasters, 61 U. S. 20 How. 8 (15: 805); Phillips v. Moore, 100 U. S. 208 (25: 603); Craig v. Radford, 16 U. S. 3 Wheat. 594 (4: 467).

The Virginia act of 1779 secured from escheat all the interest acquired by aliens to real property in that state, previous to the issuing of a patent therefor, though it left the rights acquired by them under a patent to be determined by the principles of the common law. Governeur v. Robertson, 24 U. S. 11 Wheat. 332 (6: 488).

The only ground of escheat practically known to our laws is where the owner dies intestate, leaving no inheritable blood, in which case the lands escheat to the people, or fall back into the common ownership of the state. People v. Conklin, 2 Hill, 67; Wallace v. Harmstead, 44 Pa. 501; Matthews v. Ward, 10 Gill & J. 443; Jackson v. Jackson, 7 Johns 214; Scott v. Cohen, 2 Nott & McC. 298; M'Caughal v. Ryan, 27 Barb. 376; Nettles v. Cummings, 9 Rich. Eq. 440; Montgomery v. Dorion, 7 N. H. 475; Donovan v. Pitcher, 53 Ala. 511, 25 Am. Rep. 634; Sands v. Lynham, 27 Gratt. 291, 21 Am. Rep. 348.

The state takes, not as heir, but because there are no heirs. State v. Ames, 23 La. Ann. 69.

Generally a process known as an "inquest of office," or "of office found," must be instituted and carried on in the name of the state, in order to complete its title to the escheated lands. And the state takes the title which the party had, and none other, and takes in the plight and extent by which he held it. 4 Kent, Com. 424; Den, Van Kleek, v. O'Hanlon, 21 N. J. L. 582; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Borland v. Dean, 4 Mason, 174.

If a *cestui que trust* dies intestate, without heirs, the trustee will hold an absolute estate in the property, discharged of the trust. Matthews v. Ward, 10 Gill & J. 443.

When the owner of the real estate dies intestate without heirs capable of inheriting it, the title thereof devolves by operation of law upon the state, but, to make its title available, it must be established by a judicial proceeding, in the proper court, in the name of the people. Wallahan v. Ingersoll, 117 Ill. 123.

The right of action to recover lands escheats to the state upon the death of the owner without heirs or next of kin. Johnston v. Spicer, 107 N. Y. 185.

A proceeding by the attorney general, brought in behalf of the state of California to obtain a decree declaring that the property of an alien dying intestate had escheated to the state, is premature if commenced within five years after the death of the intestate. People, Atty. Gen., v. Roach, 76 Cal. 294.

The question of escheat of a decedent's property for nonexistence of heirs can be determined only by the method provided by the statute, and cannot be determined in a proceeding by an heir for an injunction to restrain the escheator from proceeding with his action for escheat. Muir v. Thomson, 28 S. C. 499.

The penalty of escheat is removed, although the act imposing it is not repealed in terms, when, before any inquisition is taken, a statute has declared that the land should be held "indefeasibly as to any right of escheat" in the commonwealth. Com. v. New York, L. E. & W. R. Co. 132 Pa. 591, 7 L. R. A. 634.

Proceedings to escheat the estate of an intestate without heirs or kindred may be traversed by any person, including his administratrix, in whose possession the estate is found. Com. v. Crompton, 137 Pa. 138.

The interest of the state in lands of one dying without heirs, upon which was a prior mortgage on foreclosure of which the state was not made party, consists only of the right to enforce its equity of redemption by an equitable action to redeem from the mortgage. Croner v. Cowdrey, 139 N. Y. 471.

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on the 18th day of May, 1861, the said district court of Fayette county, Texas, made an order in said suit and caused it to be enrolled in the minutes of the said court, commanding the publication for four successive weeks in a newspaper printed in the state of Texas of a notice setting forth the substance of the allegations of said petition and requiring all persons interested in the estate of said Walter Hamilton to appear and show cause at the next term of said court why the said league of land should not be vested in the state of Texas; that pursuant thereto a notice setting forth at length said order and the substance of said petition was issued by the clerk of said court and published, as required by law, for four successive weeks in a weekly newspaper called the New Era, printed and published in La Grange, in Fayette county, Texas; that sundry persons intervened in said suit, and set up claims to parts of said league of land; that said suit was continued from term to term of said court until the July term thereof in 1871, when there was a trial had, and judgment entered there to the effect that the league of land in controversy in this suit is escheated unto the state of Texas, and the title thereto is devested out of the said Walter Hamilton and his heirs, and forever vested in the state of Texas. A true and correct copy of said judgment, certified to 259] under the hand and *seal of the clerk of the district court of Fayette county, Texas, is hereto attached and is made a part hereof.† That said judgment has never been reversed or vacated, but now remains in full force and effect; that by and because of said judgment the said Walter Hamilton, and all persons claiming through or under him, are estopped and barred of the right to have or maintain this action for the recovery of said land.

"And these defendants further say that afterwards, to wit, on the 7th day of August, 1872, pursuant to the commands of said judgment, the clerk of the district court of Fayette county, Texas, issued and delivered to the sheriff of Fayette county, Texas, an order of sale, commanding him to seize the said league of land, and sell it in manner as directed in the said judgment, and make disposition of the proceeds arising from the sale as provided therein; that said land was so seized and sold by said sheriff, and that these defendants and those under whom they claim became the purchasers of the parts of said league claimed by 260] them at such sale, paid the amounts *of their respective bids to the said sheriff, and received from him deeds conveying the same to them; that for this reason, also, these defendants say that said plaintiffs are estopped from and barred of the right to have or maintain this action."

The plaintiffs, by an amended supplemental petition, demurred generally to this answer as insufficient in law, and also specially excepted to it as follows:

1st. "The escheat proceedings and final judgment obtained therein, set out in defendants' said answer, were begun and prosecuted under and by virtue of an act of the legislature of the state of Texas, entitled 'An Act to Provide for Vesting in the State Escheat Property,' passed March 20, 1848, there being at the date of the filing of said escheat proceedings no other law or statute authorizing escheats; which said act was repealed and annulled by the Constitution of the state of Texas of 1869, long prior to the date when the escheat judgment, pleaded and relied upon by defendants to defeat plaintiff's title, was obtained; in this, that the law of 1848, § 11, provides that the sheriff of the proper county shall seize the real estate escheated to the state, and sell the same in the manner therein provided, while Const. 1869, art. 4, § 20, provides that the comptroller of the state 'shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury and of all lands escheated to the state,' which provisions are contradictory and conflicting."

2d. If the act of 1848 was not repealed and annulled entirely, then § 11 thereof was repealed and annulled by that provision of the Constitution of 1869, "and, there being no other provisions in said act by which compensation is made to the heirs of the intestates whose property has been escheated, the balance of the said act is not self-acting, and is one of confiscation, and therefore in violation of the 5th Amendment of the Constitution of the United States and § 14 of the bill of rights of the Constitution of 1869," by which "no person's property shall be taken or applied to public use without just compensation being made, unless by consent of such person."

*3d. The act of 1848, if not repealed by 261] the Constitution of 1869, "was and is in contravention and violation of U. S. Const. art. 1, § 10, which provides that 'no state shall pass any bill of attainder or law impairing the obligation of contracts,' in that said law impairs the obligation of the contract between the state of Texas and Walter F. Hamilton and his heirs by virtue of the grant under which they hold said land, and seeks to forfeit or confiscate the private property of said Hamilton, the land, by appropriating it to the com-

†The judgment annexed was as follows: "It is thereupon ordered, adjudged, and decreed by the court that the league of land described and set forth in plaintiff's petition as follows, to wit [giving the description by metes and bounds] be, and the same is hereby, declared escheated unto the state of Texas, and the title thereto is hereby devested out of the said Walter Hamilton, his heirs and assigns forever, and vested in the state of Texas. It is further ordered by the court that the clerk of this court do issue a writ, directed to the sheriff of Fayette county, Texas, commanding him, the said sheriff, to seize and sell the above-described league of land as under execution, without appraisement, for cash in United States currency, on the first Tuesday in some month, after giving notice of sale as the law directs, in lots of not less than 10 nor more than 40 acres, and turn over the proceeds of said sale, after deducting therefrom the expenses and costs of the same, to the comptroller of public accounts for the state of Texas, taking therefor his duplicate receipt, one of which he shall file among the papers of this cause. It is further ordered by the court that the plaintiff, the state of Texas, do have and recover of the interveners herein, to wit, J. G. Brown, J. J. Short, Wm. Short, and —— Short, her costs of suit in this behalf had and expended, for which execution may issue. It is further ordered that the costs incurred herein by the plaintiff be taxed against the state of Texas, and certified by the clerk of this court to the comptroller of public accounts, to be paid by the treasurer upon the warrant of said comptroller."

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mon fund without making due compensation therefor."

The court overruled the general demurrer and the special exceptions to the answer, and, upon the plaintiffs' declining to introduce any evidence to support their cause of action, rendered judgment for the defendants.

The plaintiffs tendered and were allowed a bill of exceptions to the rulings and judgment of the court, and sued out this writ of error.

Messrs. **H. E. Barnard,** *Floyd McGown,* and *West & Cochran* for plaintiffs in error.

Messrs. **S. R. Fisher,** *T. W. Gregory, Brown, Lane, & Jackson,* and *Phelps & Willrich* for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action to recover land in the county of Fayette and state of Texas.

The petition alleged that the land was granted in 1831 by the Republic of Mexico to Walter F. Hamilton, and that on April 13, 1888, the plaintiffs were the owners in fee simple and entitled to the possession thereof, and the defendants then ousted them.

The defendants, in their answer, relied on proceedings in escheat commenced in 1861, and in which judgment was rendered in 1871.

In those proceedings, as set forth in the an-[262] swer, the attorney *for the state alleged that Walter Hamilton died intestate and without heirs, seised and possessed of this land, and that the estate in the land escheated to the state of Texas; the court ordered publication of notice to all persons interested in the estate of Walter Hamilton to appear and show cause why the land should not be vested in the state; after due publication of the order of notice, sundry persons intervened in the suit, and set up claims to parts of the land; the case was continued from term to term until July term, 1871, when a trial was had, and judgment entered that the land be, and the same is hereby, declared escheated unto the state of Texas, and the title is hereby devested out of the said Walter Hamilton, his heirs and assigns forever, and vested in the state of Texas."

The answer alleged that that judgment had never been reversed or vacated, but remained in full force; and that, because of such judgment, Walter Hamilton, and all persons claiming through or under him, were estopped and barred of the right to maintain this action.

The answer further alleged that in 1872, pursuant to the commands of that judgment, the sheriff sold the land by auction, and the defendants and those under whom they claimed became purchasers of parts of the land at such sale, and paid the amounts of their respective bids to the sheriff, and received from him deeds conveying the land to them; and that, for this reason also, the plaintiffs were estopped and barred to maintain this action.

Although it is not directly stated, either in the petition or in the answer, that the plaintiffs claimed the land as heirs of Walter Hamilton, or Walter F. Hamilton, yet it is evident that it was so understood and intended. If the plaintiffs did not claim in his right, then, on the one hand, the Mexican grant to him in 1831, upon which they relied, both in the petition and in the exceptions to the answer, was immaterial; and, on the other hand, neither the judgment in escheat in 1871, nor the sheriff's sale in 1872, set up in the answer, would meet the allegation in the petition that the plaintiffs owned the land in 1888. And it is assumed, in the briefs of both *parties, that [263] the Walter F. Hamilton named in the petition and the Walter Hamilton named in the answer were the same person; and that the question to be decided is whether the judgment in escheat, or the sheriff's sale under that judgment, bars the plaintiffs claiming as his heirs.

By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign lord; but the King's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. *Atty. Gen. of Ontario* v. *Mercer*, L. R. 8 App. Cas. 767, 772; 2 Bl. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the King, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse, in the nature of a plea or defense to the King's claim, and not in the nature of an original suit. Lord Somers, in *The Bankers' Case*, 14 How. St. Tr. 1, 83; *Ex parte Webster*, 6 Ves. Jr. 809; *Ex parte Gwydir*, 4 Madd. 281; *Re Parry*, L. R. 2 Eq. 95; *People* v. *Cutting*, 3 Johns. 1; *Briggs* v. *The Upper Cedar Point*, 11 Allen, 157, 172. The inquest of office was a proceeding *in rem;* when there was a proper office found for the King, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the King's favor. Bayley, J., in *Doe, Hayne,* v. *Redfern*, 12 East, 96, 103; 16 Vin. Abr. 86, pl. 1.

In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state. 4 Kent, Com. 424; 3 Washb. Real Prop. (4th ed.) 47, 48.

By the Constitution of 1836 of the Republic of Texas, art. 4, § 13, it was provided that the legislature should, "as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in *their judgment, may require." [264] 2 Charters & Constitutions, 1757. And by the statutes of Texas, from the time of its existence as an independent republic, the common law of England, so far as not inconsistent with the Constitution and laws of Texas, has been declared to be, together with such Constitution and laws, the rule of decision, and to continue in force until altered or repealed by the legislature. Tex. Stat. Jan. 20, 1840 (Pasch. Dig. (4th ed.) art. 978); Rev. Stat. of 1879, § 3128; *Courand* v. *Vollmer*, 31 Tex. 397; *Barrett* v. *Kelly*, 31 Tex. 476.

By the Constitution of the state of Texas of

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1845 it was provided, in art. 4, § 10, that the district court should have original jurisdiction "of all suits in behalf of the state to recover penalties, forfeitures, and escheats;" and in art. 13, § 4, as follows: "All fines, penalties, forfeitures, and escheats which have accrued to the Republic of Texas under the Constitution and laws shall accrue to the state of Texas; and the legislature shall by law provide a method for determining what lands may have been forfeited or escheated." 2 Charters & Constitutions, 1773, 1781.

By the settled course of decision in the supreme court of the state, no proceedings for escheat can be had, except under and according to an act of the legislature. *Jones* v. *McMasters*, 61 U. S. 20 How. 8, 21 [15: 805, 810]; *Hancock* v. *McKinney*, 7 Tex. 384, 456; *Wiederanders* v. *State*, 64 Tex. 133.

The legislature, on March 20, 1848, passed a statute, entitled "An Act to Provide for Vesting in the State Escheated Property." General Laws of Texas of 1847-48, chap. 145, p. 210 (Pasch. Dig. arts. 3657-3674).

By § 1 of that statute (Pasch. Dig. art. 3657) "if any person die seised of any real or possessed of any personal, estate, without any devise thereof, and having no heirs, or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest to the state." The purpose and import of the 2d clause of this section, concerning an owner absent for seven years and not known to exist, have been declared by the su-[265] preme court of the *state to be "that proof of absence of one who is not known to exist for the length of time mentioned is presumptive evidence of his death. It is not, therefore, a ground for escheat of itself, but evidence of one of the elements of title by escheat." *Hughes* v. *State*, 41 Tex. 10, 20. This is only important by way of explaining the scope of the statute, since, in the present case, both parties assume and rely upon the death of the former owner.

By § 2 (3658) when no letters testamentary or of administration appear to have been granted upon the estate of a person who has died without heirs, it is made the duty of the district attorney to file in the district court of the county "where such succession is required to be opened," which is as much as to say where his estate would be administered, a petition setting forth "a description of the estate, the name of the person last lawfully seised or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim, and the facts and circumstances in consequence of which such estate is claimed to have escheated; praying for a writ of possession for the same, in behalf of the state."

Section 3 (3659) requires scire facias to be issued to all persons named in the petition as in possession of or claiming the estate, requiring them to appear and show cause why it should not be vested in the state. Section 4 (3660) further requires an order of notice to be published four weeks in a newspaper printed within the state, stating briefly the contents of the petition, and requiring "all persons interested in the estate" to appear and show cause why it should not be vested in the state. The order of notice by publication to all persons interested in the estate is essential to the jurisdiction of the court; and, if no such notice is shown by the record, a judgment for the state will be reversed on writ of error, even if sued out by parties who were named in the petition and appeared and pleaded in the cause. *State* v. *Teulon*, 41 Tex. 249; *Wiederanders* v. *State*, 64 Tex. 133; *Hanna* v. *State*, 84 Tex. 664, 667.

*By § 5 (3661) "all persons named in [266] such petition as tenants or persons in actual possession or claimants of the estate" may appear and plead and traverse the facts stated in the petition or the title of the state; "and any other person claiming an interest in such estate may appear and be made a defendant and plead, by motion for that purpose, in open court." By § 6 (3662), if no person, after notice as aforesaid, shall appear and plead, judgment shall be rendered by default for the state. By § 7 (3663), "if any person appear and deny the title set up by the state, or traverse any material fact in the petition, issue shall be made up and tried as other issues of fact." By § 8 (3664), "if after the issue and trial it appears, from the facts found or admitted, that the state hath good title to the estate, real or personal, in the petition mentioned, or any part thereof, judgment shall be rendered that the state shall be seised or possessed thereof, and, at the discretion of the court, recover costs against the defendants." By § 9 (3665), "if it appear that the state hath no title in such estate, the defendant shall recover his costs, to be taxed and certified by the clerk; and the comptroller of public accounts shall, on such certificate being filed in his office, issue a warrant therefor on the treasury of the state, which shall be paid as other demands on the treasury." And by § 10 (3666), "when any judgment shall be rendered that the state be seised or possessed of any estate, such judgment shall contain a description thereof, and shall vest the title in the state."

By § 11 (3667) "a writ shall be issued to the sheriff of the proper county, commanding him to seize such estate, vested in the state;" and "he shall dispose thereof at public auction, in the manner provided by law for the sale of property under execution." By § 12 (3668) a copy of the record and account of sale, exemplified under the seal of the court, is required to be deposited in the office of the comptroller of public accounts, and another copy recorded in the office of the recorder of the county; "and such record shall preclude all parties and privies thereto, their heirs and assigns."

By § 13 (3669) "any party who shall have appeared *to any proceeding, and the dis- [267] trict attorney on behalf of the state, shall have the right to prosecute an appeal or writ of error upon such judgment."

Section 14 (3670) requires that "the comptroller shall keep just accounts of all moneys paid into the treasury and of all lands vested in the state under the provisions of this act."

Sections 15 (3671) and 16 (3672) provide that "if any person appear after the death of the testator or intestate, and claim any money paid

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into the treasury under this act," as heir, devisee, or legatee, he may, by petition in the district court for the county in which the estate was sold, and after notice to the district attorney, and proof that the petitioner is an heir, devisee, legatee, or legal representative, obtain an order directing the comptroller to issue his warrant on the treasurer for payment thereof.

Section 17 (3673) simply relates to the duty of the district attorney to obtain from the clerk of any probate court moneys or title papers to land, not claimed by any heir, devisee, or legal representative of a deceased person.

By § 18 (3674) "all property escheated under the provisions of this act shall remain subject to the disposition of the state, as may hereafter be prescribed by law."

Tex. Rev. Stat. 1879, §§ 1770–1785, re-enact substantially and almost verbally the provisions of the statute of 1848, except by requiring the publication of the order of notice for eight weeks, instead of four weeks as in § 4, by omitting §§ 12 and 17, and by inserting the words "the proceeds of" at the beginning of § 18.

These proceedings for the escheat of the estate of a deceased person for want of heirs or devisees, like ordinary proceedings for the administration of his estate, presuppose that he is dead; if he is still alive the court is without jurisdiction, and its proceedings are null and void, even in a collateral proceeding. *Griffith* v. *Frazier*, 12 U. S. 8 Cranch, 9, 28 [3: 471, 475]; *Scott* v. *McNeal*, 154 U. S. 34 [38: 896]; *Hall* v. *Claiborne*, 27 Tex. 217; *Withers* v. *Patterson*, 27 Tex. 491, 497, 86 Am. Dec. 643; *Martin* v. *Robinson*, 67 Tex. 368, 375; *Caplen* v. *Compton*, 5 Tex. Civ. App. 410. And [268] if the death *of the former owner, intestate and without heirs, is not alleged in the petition, or is not proved at the trial, a judgment for the state is erroneous and reversible by appeal or writ of error. *Hughes* v. *State*, 41 Tex. 10; *Wiederanders* v. *State*, 64 Tex. 133; *Hanna* v. *State*, 84 Tex. 664.

But the whole object in proceedings for escheat, as in proceedings of administration, is to ascertain who are entitled to the estate of a deceased person; in proceedings of administration, to distribute the assets, after payment of debts, among those who come forward and prove themselves to be next of kin; in proceedings for escheat, to ascertain and determine, once for all, so far as concerns the title in the land itself, whether the former owner left no heirs or devisees, that being the single question on which depends the issue whether or not the land has escheated to the state.

Consequently, when (as is admitted in the present case) the former owner was dead; and in the proceedings for escheat (as shown by the record on which the defendants rely) the petition describes the land, gives the name of the former owner, and alleges that he died intestate and without heirs, that no letters of administration upon his estate had been granted, that there is no tenant or person in actual or constructive possession of the land, nor any person known to the petitioner claiming an estate therein, and that the land has escheated to the state of Texas; and an order of notice to all persons interested in the estate has been published, as required by the statute; and, after a hearing of all who appear and plead, judgment is entered, describing the land, and declaring that it has escheated to the state,—the judgment is conclusive evidence of the state's title in the land, not only against any tenants or claimants having had actual notice by scire facias, or having appeared and pleaded, but also against all other persons interested in the estate and having had constructive notice by publication.

That such is the effect of the judgment in favor of the state is clearly shown by the decision in *Wiederanders* v. *State*, above cited, in which the reasons for holding that, if the notice required by the statute to all persons interested in the estate *had not been pub- [269] lished, the court had no jurisdiction to enter judgment, even against persons who actually appeared and contested the claim of the state, were stated by the court as follows:

"The purpose for which proceedings of this character are instituted is to have a judicial declaration in the form of a solemn judgment made by a court having jurisdiction of the subject-matter, and of the persons in interest in so far as publication can give it, that the facts exist which, under the law, cast title upon the state to property with which, at some former time (in case of lands), it had clothed a person with title. . . . The law now in force must be deemed to be a law providing a method for giving effect to escheats. Rev. Stat. 1770–1788. . . . We are of the opinion that the publication of notice, required by the statute, is made necessary to the exercise of the general jurisdiction conferred, and that without it the district court had no jurisdiction to try the case. The object of such a proceeding is not simply to have a decree declaring the escheat, and vesting the title in the state; but by and through process, to be issued under the judgment, to devest, not only the title of persons entitled to take the property of the deceased as his heirs, if perchance any such there be, but also by a sale to devest the title of the state, and to start and confer upon the purchaser a new title deraigned directly from the sovereignty of the soil. Rev. Stat. 1777–1780.

"The proceeding, while not strictly a proceeding *in rem*, has many of its characteristics; yet the statute does not direct a seizure of the thing, which, in some cases, has been held to support a judgment strictly *in rem*. It applies to personalty, as well as realty. The mere institution of the proceeding creates no presumption that there is no one capable of taking the estate under the rules regulating the descent of estates of deceased persons—the presumption is to the contrary; and the effect of the judgment, if rendered after all persons interested in the estate are notified of the pendency and purpose of the proceeding, in the only manner in which they can be, if unknown, is to destroy that presumption and to make the title of the state clear. *From the time the [270] property is sold under a valid decree, the claim of the person who might have taken it as heir, devisee, or legatee is against the proceeds of the property, which must be paid into the state treasury (Rev. Stat. 1780–1785), and to recover even that he is driven to a suit. It certainly is not the intention that the purchaser

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of escheated lands shall be subjected to the peril of losing them after they have been regularly escheated and sold, if an heir, devisee, or legatee shall subsequently make claim; nor that personalty which, from day to day, changes hands, shall be subject to the claim of such persons, however valid such claim may have been if asserted in proper time and place. Yet such results would follow if the jurisdiction of the court is not so brought into exercise, by a substantial compliance with the requisites of the statute as to clothe it with power, by its judgment, to conclusively settle the title to the property as against all persons." 64 Tex. 135-138.

The like opinion was expressed by Chief Justice Shaw upon the effect of proceedings under a similar statute of Massachusetts, in a case in which it was held that a conveyance of real estate of a citizen dying intestate and without heirs could not be made by the commonwealth until the rendition of judgment in its favor upon an inquest of office. The Chief Justice said: "Where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is that he had heirs, and this presumption will be good against the commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs can be ascertained, and if this fact is established in favor of the commonwealth, it rebuts the contrary presumption, and the commonwealth, by force of the judgment, and of the statute before cited, becomes seised in law and in fact. In such cases, therefore, the court are of opinion that an inquest of office is necessary, and that the commonwealth cannot be deemed to be seised without such inquest. *Jackson* v. *Adams*, 7 Wend. 367; *Doe, Hayne*, v. *Redfern*, 12 East, 96. So far as this depends upon general principles, it seems to be a rule highly reasonable in [271] *itself, and tends greatly to the security and regularity of titles. By the mode of taking inquests, prescribed by the law of this commonwealth (Stat. 1791, chap. 13, § 2), general notice is to be given of the claim of the commonwealth, any person is admitted to traverse it, a trial by jury is to be had, and costs are given to the prevailing party. These are highly reasonable and equitable provisions, and it is manifestly for the quiet of the commonwealth and the security of the citizen, that they should be pursued, before the common wealth shall be permitted to take into its own custody and dispose of estates, upon a claim which, if not doubtful, is at least not apparent." *Wilbur* v. *Tobey*, 16 Pick. 177, 180.

The Constitution of Texas of 1866, art. 4, § 6, contained a provision similar to that of the Constitution of 1845, as to the jurisdiction of the district court over escheats; and contained no other provision on the subject of escheats. 2 Charters & Constitutions, 1789. That Constitution, as was admitted by the plaintiffs, did not take away the power of the legislature over the subject, or affect the statute of 1848 or proceedings under it.

But it was strenuously contended that this statute was repealed by the Constitution of 1869, which, while embodying, in art. 5, § 7, the provision of the former Constitutions as to the jurisdiction of the district court over escheats, and repeating in art. 4, § 20, the provision of art. 5, § 23, of the Constitution of 1866, establishing the office of comptroller of public accounts, to be elected by the qualified voters of the state for the term of four years, also defined the comptroller's duties as follows: "He shall superintend the fiscal affairs of the state; give instructions to the assessors and collectors of the taxes; settle with them for taxes; take charge of all escheated property; keep an accurate account of all moneys paid into the treasury, and of all lands escheated to the state; publish annually a list of delinquent assessors and collectors, and demand of them an annual list of all taxpayers in their respective counties, to be filed in his office; keep all the accounts of the state; audit all the claims against the state; draw warrants upon the treasurer in favor of the public *creditors; and perform such [272] other duties as may be prescribed by law." 2 Charters & Constitutions, 1794, 1809, 1811.

This definition of the duties of the comptroller in the Constitution of 1869 nearly follows the words of the statutes existing at the time of its adoption. Pasch. Dig. arts. 5414, 5424, 5426, 3670, 5194, 5416, 5418, 5420. The principal difference is in substituting for the words of § 14 of the act of 1848, requiring the comptroller to "keep just accounts of all moneys paid into the treasury, and of all lands vested in the state, under the provisions of this act," the words, "take charge of all escheated property; keep an accurate account of all moneys paid into the treasury, and of all lands escheated to the state."

As the Constitution of 1869 repeats, in so many words, the provision of former Constitutions by which the district court is vested with original jurisdiction of all causes in behalf of the state to recover escheats, and as the statute of 1848 made it the duty of the comptroller to keep accounts, not only of all moneys paid into the treasury, but also of all lands vested in the state, under its provisions, it is difficult to see how the insertion of the general words "take charge of all escheated property," in the definition of the comptroller's duties in the Constitution of 1869, either increased his powers, or diminished those of the district court, in relation to escheats.

The whole object of inserting in the Constitution a definition of the principal duties of the comptroller would seem to have been to fix by the fundamental law a matter which would otherwise have been subject to the discretion of the legislature.

The only doubt thrown upon this arises out of the opinion delivered in *Hughes* v. *State*, above cited, in which Mr. Justice Moore said: "Whether this statute had not been repealed by the provision in the Constitution of 1869, which we have cited, may, we think, admit of serious question; but as it is not necessary to the determination of the present case, we are not called upon at present to determine it. We think, however, that it is quite evident this section of the Constitution is in conflict with, and therefore revokes, the authority conferred *by the statute of 1848 upon the court [273] to order the sale of escheated land, if such, indeed, can be held to be the proper construction

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of this statute in view of the conflicting provisions of its different sections." 41 Tex. 18, 19.

But the weight of that suggestion is much lessened, if not wholly counterbalanced, by several considerations. The decision in that case was put upon the distinct ground that the petition and the proof were both insufficient. In another case, decided at the same term, in which the opinion was delivered by the same judge, as well as in an earlier case of a writ of error to review the very judgment now pleaded, and in at least two later cases, above cited, in each of which this proposition, if sound, would have been decisive, it was not even mentioned. *State* v. *Tewlon*, 41 Tex. 249; *Brown* v. *State*, 36 Tex. 282; *Wiederanders* v. *State*, 64 Tex. 133; *Hanna* v. *State*, 84 Tex. 664. And after the Constitution of 1869 had been in force for ten years, the legislature, in revising and codifying the statutes of the state, re-enacted all the material provisions of the act of 1848, both as to obtaining a judgment declaring the land to have escheated, and as to a subsequent sale of the land by the sheriff, and clearly manifested its understanding and intention that the provisions for such a sale did and should remain in force, by prefixing the words "the proceeds of" to the last section, which had directed "all property escheated in accordance with the provisions of" the act to "remain subject to the disposition of the state, as may hereafter be prescribed by law." Rev. Stat. of 1879, § 1785.

The plaintiffs somewhat relied on art. 10, § 6, of the Constitution of 1869, which provides that "the legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same and in lots not exceeding 160 acres." 2 Charters & Constitutions, 1816. But this evidently relates only to legislative grants of land, and not to judicial proceedings to declare and enforce escheats.

Even if the suggestion in *Hughes* v. *State*, above cited, that art. 4, § 20, of the Constitution 274] of 1869, relating to the *comptroller of accounts, "is in conflict with, and therefore revokes, the authority conferred by the statute of 1848 upon the court to order the sale of escheated land," should be considered as well founded, it would affect only § 11 of the statute, authorizing the sale, and so much of the subsequent sections as concern that subject; and would leave unaffected the preceding sections, providing for a judgment to be rendered, upon due allegation and proof, and after notice to all persons interested, ascertaining and declaring that the land has escheated to the state, and vesting in the state the title to the land. The provisions looking to a judgment vesting title to the land in the state are distinct and severable from the provisions for a sale, and a conversion into money, of the land after it has vested in the state; and if the latter provisions are for any reason invalid, they may be considered as stricken out, and the former provisions stand good. *Field* v. *Clark*, 143 U. S. 649 [36: 294]; *Zwernemann* v. *Von Rosenberg*, 76 Tex. 522. And the judgment set up in the answer in this case, so far as it determined that the title of the land had vested by escheat in the state, was valid, even if the order for a sale of the land was not. *Ludlow* v. *Ramsey*, 78 U. S. 11 Wall. 581 [20: 216].

It follows that, if the sale and conveyance by the sheriff to the defendants were invalid and vested no title in them, the previous judgment, ascertaining and declaring the escheat, vested a good title in the state of Texas against all persons claiming as heirs or devisees of the former owner; and that judgment, although it does not prove the title to be in the defendants, proves it to be out of the plaintiffs, and affords a complete defense to this action. *Love* v. *Simms*, 22 U. S. 9 Wheat. 515, 524 [6: 149, 151]; *Christy* v. *Scott*, 55 U. S. 14 How. 282, 292 [14: 422, 426]; *Doswell* v. *De La Lanze*, 61 U. S. 20 How. 29, 33 [15: 824, 826].

As to personal property, indeed, a judgment *in rem* after notice by publication only might not bind persons who had no actual notice of the proceedings, unless the thing had been first seized into the custody of the court. *The Mary*, 13 U. S. 9 Cranch, 126, 144 [3: 678, 684]; *Scott* v. *McNeal*, 154 U. S. 34, 46 [38: 896, 901]; *Hilton* v. *Guyot*, 159 U. S. 113, 167 [*ante*, 145, 151]. But it was within the power of the legislature of Texas to provide for determining and quieting the *title to real estate [275 within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons. *Phillips* v. *Moore*, 100 U. S. 208, 212 [25: 603, 604]; *Arndt* v. *Griggs*, 134 U. S. 316 [33:918]; *Hardy* v. *Beaty*, 84 Tex. 562, 569.

When a man dies the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the state or from a private person.

Judgment affirmed.

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CHARLES DAVIS, *Plff. in Err.*,
v
ELMIRA SAVINGS BANK.

(See S. C. Reporter's ed. 275-290.)

Preference by insolvent national bank.

A preference, under the New York law, of the debt of an insolvent national bank for a deposit by a savings bank, is invalid under U. S. Rev. Stat. §§ 5236, 5242, which require a ratable distribution of the assets of insolvent national banks, and prohibit preferences made in contemplation of or after committing an act of insolvency.

[No. 415.]

Argued January 13, 14, 1896. Decided March 2, 1896.

IN ERROR to the Court of Appeals of the State of New York to review a judgment of that court establishing a preference to the plaintiff, the Elmira Savings Bank, in the payment of a debt due it from the Elmira National Bank and the receiver thereof on the insolvency of the latter bank and the distribution of its assets, in the hands of Charles Davis, the receiver thereof, defendant, by virtue of the law of the state of New York. *Reversed, and case remanded with instructions to dismiss the action.*

See same case below, 142 N. Y. 590, 25 L. R. A. 546.

Statement by *Mr. Justice* **White:**

276] *In March, 1893, the Elmira National Bank, a banking association organized under the laws of the United States, and doing business in the state of New York, suspended payment, and the Comptroller of the Currency of the United States appointed Charles Davis, plaintiff in error, the receiver thereof. The Elmira Savings Bank, which was incorporated under the laws of the state of New York, from November, 1890, kept a deposit account with the Elmira National Bank, and at the time of the appointment of the receiver of the latter corporation there was to the credit of this account of the savings bank the sum of $42,704.67. The opening of the deposit account by the savings bank was sanctioned by the general banking laws of the state of New York as expressed in §§ 118 and 119, which were as follows:

2 N. Y. Laws 1892, p. 1898. "Sec. 118. Available Fund for Current Expenses, How Loaned.—The trustees of every such corporation (savings bank) shall, as soon as practicable, invest the moneys deposited with them in the securities authorized by this article; but for the purpose of meeting current payments and expenses in excess of the receipts, there may be kept an available fund not exceeding 10 per centum of the whole amount of deposits with such corporation, on hand or deposit in any bank in this state organized under any law of this state or of the United States, or with any trust company incorporated by any law of the state; but the sum so deposited in any one bank or trust company shall not exceed 25 per centum of the paid-up capital or surplus of any such bank or company."

2 N. Y. Laws 1892, p. 1898. "Sec. 119. Temporary Deposits.—Every such corporation may also deposit temporarily in the banks or trust companies specified in the last section the excess of current daily receipts over the payments, until such time as the same can be judiciously invested in the securities required by this article."

In the process of liquidating the affairs and realizing the assets of the national bank all its circulating notes were provided for, and the receiver had on hand in cash for distribution among its creditors a sum exceeding the amount due as *aforesaid to the savings bank. [277 Thereupon the latter demanded of the receiver payment of the sum to the credit of its deposit account in preference to the other creditors of the national bank, basing its demand on a provision of the general banking law of the state of New York, which is as follows:

2 N. Y. Laws 1892, p. 1903. "Sec. 130. Debts Due Savings Banks from Insolvent Banks Preferred.—All the property of any bank or trust company which shall become insolvent shall, after providing for the payment of its circulating notes, if it has any, be applied by the trustees, assignees, or receiver thereof, in the first place, to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized to be so deposited by the provisions of this chapter, and subject to any other preference provided for in the charter of any such trust company."

The receiver, under the authority of the Comptroller of the Currency of the United States, declined to accede to this demand, predicating his refusal on the provisions of U. S. Rev. Stat. §§ 5236, 5242, which are as follows:

"Sec. 5236. From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"Sec. 5242. All transfer of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees *in its favor; all deposits of [278 money, bullion, or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets

NOTE.—*As to bankrupt and insolvent laws of state; constitutionality of; laws of United States suspend state bankrupt laws; discharge in foreign country no bar,*—see note to Sturges v. Crowninshield, 4: 529.

As to assignments for benefit of creditors with preferences, when valid, when not, see note to Marbury v. Brooks, 5: 522.

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in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

In consequence of this refusal the savings bank brought an action in the supreme court of the state of New York to enforce the payment by preference, which action was resisted by the receiver. Ultimately the case was taken to the court of appeals of the state of New York, where the claim of preference asserted by the savings bank was maintained. The case is reported in 142 N. Y. 590, 25 L. R. A. 546. To that judgment the present writ of error is prosecuted.

Mr. **Edward Winslow Paige** for plaintiff in error.

Messrs. **James C. Carter** and **Edward G. Herendeen** for defendant in error.

Mr. Augustus S. Hutchins filed a brief for the Metropolitan Savings Bank.

283] **Mr. Justice* **White** delivered the opinion of the court:

National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

The question which the record presents is, Does the law of the state of New York on which the savings bank relies conflict with the law of the United States upon which the Comptroller of the Currency rests to sustain his refusal? If there be no conflict, the two laws can coexist and be harmoniously enforced, but if the conflict arises the law of New York is, from the nature of things, inoperative and void as against the dominant authority of the Federal statute. In examining the question it is well to put in juxtaposition a summary statement of the Federal and state statutes. The first directs the comptroller "from time to time, after full provision has been made for the refunding to the United States of any deficiency in redeeming the notes of such association, . . . to make a ratable dividend of the money paid over to him . . . on all such claims as may have been proved." The second, the state law, directs "the trustee, assignee, or receiver" of "any bank or trust company which shall become insolvent" to apply the assets received by him, "in the first place, to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized" by law.

It is clear that these two statutes cover exactly the same subject-matter. Both relate to insolv-**284]** ent banks; both ordain *that the right of preference on the one side and the duty of ratable distribution on the other shall only result from insolvency; both cover the assets of such banks coming, after insolvency, into the hands of the officer or person authorized to administer them. It is equally certain that both statutes relate to the same duty on the part of the officer of the insolvent bank; the one directs the representative to make a ratable distribution; the other requires, if necessary, the application of the entire assets to payment in full, by preference and priority over all others, of a particular and selected class of creditors therein named. We have therefore, on the one hand, the statute of the United States directing that the assets of an insolvent national bank shall be distributed by the Comptroller of the Currency in the manner therein pointed out, that is, ratably among the creditors. We have, on the other hand, the statute of the state of New York giving a contrary command. To hold that the state statute is operative is to decide that it overrides the plain text of the act of Congress. This results, not only from the fact that the two statutes, as we have said, cover the same subject-matter and relate to the same duty, but also because there is an absolute repugnancy between their provisions, that is, between the ratable distribution commanded by Congress, and the preferential distribution directed by the law of the state of New York.

The conflict between the spirit and purpose of the two statutes is as pronounced as that which exists between their unambiguous letter. It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. This public aim in favor of all the citizens of every state of the Union is manifested by the entire context of the national bank act.

In *Cook County Nat. Bank* v. *United States*, 107 U. S. 448 [27:538], speaking through *Mr. Justice* Field, the court said: "We consider that act as constituting by itself a complete system for the establishment and government of national *banks. . . . Everything **[285** essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their assets,—are fully provided for."

In *First Nat. Bank* v. *Colby*, 88 U. S. 21 Wall. 613, 614 [22:688], the court said:

"As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank. . . . The 52d section, further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or 'with the view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void.' There is in these provisions a clear manifestation of a design on the part of Congress: 1,

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to secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2, to secure the assets of the bank for ratable distribution among its general creditors. This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings."

Nearly twenty-five years ago (in September, 1871), the Secretary of the Treasury submitted to the Attorney General of the United States the question of whether the ratable division provided for in the act of Congress deprived the United States, as a creditor of an insolvent national bank, of the power to avail of the preference given by the statute which provides that the United States shall be preferred out of the effects of an insolvent debtor. 1 Stat. at L. 515. The opinion of the Attorney General was that the ratable distribution required, when read in connection with other [286] *sections of the national bank law, deprived the United States of all preference, except that given for the payment of the notes issued by such banks. 13 Ops. Atty. Gen. 528.

This construction has been the rule administered by the comptrollers of the currency in the liquidation of national banks from that date, and was directly sustained in *Cook County Nat. Bank* v. *United States*, 107 U. S. 448 [27:538], where *Mr. Justice* Field, as the organ of the court, said the sections directing ratable distribution "provide for the distribution of the entire assets of the bank, giving no preference to any claim, except for moneys to reimburse the United States for advances in redeeming the notes." After holding that the United States could not exercise as a creditor the preference in its favor created by a general law of the United States, the conclusion is thus summed up: "These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed, as directed, by ratable dividends to all holders of claims, that is, to all creditors." Thus, although for many years in the administration of the act, under a construction given by the Attorney General of the United States, sanctioned by the decisions of this court, the ratable distribution provided by the act of Congress has been deemed so important as to repeal, in so far as it prevented ratable distribution, the general preference given the United States by its own statute, the contention now advanced maintains that this ratable distribution is of so little consequence that it can be overthrown and rendered nothing worth by the provisions of a general insolvent statute of the state of New York. In other words, that the statute of the state of New York operating upon the national bank law is more efficacious than would be a statute of the United States.

Nor is it an answer to say that the *ratio decidendi* of the ruling in *Cook County Nat. Bank* v. *United States*, *supra*, was the fact that the statute provided that the United States should take security for the debts to become due her by a national bank. In the case presented by the Secretary of the *Treasury to the Attor-[278 ney General for consideration the security in favor of the United States was inadequate, and therefore the question which arose was the right of the United States to collect an unsecured claim in disregard of the rule of ratable division. And such was the state of facts contemplated by the opinion of this court in the *Cook County Case*. This makes it evident that the controlling thought which gave rise to the interpretation sanctioned by this court was the fact that to have allowed the preference in favor of the United States ordained by one of its statutes would have destroyed the rule of ratable distribution established as a protection to and for the benefit of all the creditors of a national bank.

It is certain that, in so far as not repugnant to acts of Congress, the contracts and dealings of national banks are left subject to the state law, and upon this undoubted premise, which nothing in this opinion gainsays, the proposition is advanced that the deposit here considered of the savings bank with a national bank imported a contract to pay the claim of the former with the preference allowed by the New York statute. But this overlooks the plain terms of the New York law. That statute does not profess to deal with the bank and its relations as a going concern; it wholly and exclusively undertakes to regulate the distribution of the assets after insolvency. Insolvency, and insolvency alone, is made the criterion from which the preference is to arise. Indeed, the statute, in terms, directs its mandate to discharge the claim with preference, not to the bank *eo nomine*, but to the assignee, trustee, or agent charged with administering its effects after insolvency has become flagrant. The claim of contract, therefore, conflicts with the very terms of the statute upon which it is based, and there is therefore no room for implying a contract. If such implication, however, could be invoked, it must rest on the contention that inasmuch as the state statute gave a savings bank making a deposit the right to be preferred in case of insolvency, therefore the general state law must be presumed to have entered into the contract of the parties, and hence also engender the presumption that in *case of insolvency such deposit should [288 be preferred. If the law of the state is to be read into the contract, then, of course, the law of Congress should also be read into it. We should thus have to consider all the deposits as made with an implication that they were subject to the Federal law, and hence the conflict between the two laws would become evident, and the Federal law, being paramount, would prevail.

The New York statute does not profess, however, to change the legal relation which results from a deposit made in a bank. The deposit of money by a customer with his banker is one of loan, with a superadded obligation that the money is to be paid when demanded by a check. *Scammon* v. *Kimball*, 92 U. S. 362 [23: 483]; *Marine Bank* v. *Fulton County Bank*, 69 U. S. 2 Wall. 252 [17: 785]. The argument, therefore, of implied contract, not only is contrary to the letter of the New York statute, but also destroys the very

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essence of the legal relation resulting from the dealings between the parties. Nor is the repugnancy between the state statute and the act of Congress removed by the contention that inasmuch as ratable distribution applies only to that which belongs to the bank, therefore there is no conflict between the state statute and the act of Congress. This argument can only mean that the effect of the state statute is to make the savings bank, in the event of insolvency of the national bank, the owner of a sum equivalent in amount to the sum of money which was by it deposited. But to say this aggravates the conflict between the state law and the act of Congress. If the state statute is to be read as saying that whenever the persons named therein deposit money with a national bank they shall be treated as the owners of an equal sum of the assets of the bank when it becomes insolvent, then the state statute precludes, in a most flagrant way, the possibility of the ratable distribution ordered by the act of Congress. True it is that where, by state law, a lien is made to result from a particular contract, that lien, when its existence is not incompatible with the act of Congress, will be enforced. True also, where a particular contract is made by a national bank which from its nature gives rise at the time of the contract to a claim on a specific fund, such **289**] claim, if not violative *of the act of Congress, will be allowed. To that effect are the authorities relied on.

Thus it was said by this court in *Scott* v. *Armstrong*, 146 U. S. 499 [36: 1059], when dealing with the question of set-off: "The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank." So, in the case of *San Diego County* v. *California Nat. Bank*, 52 Fed. Rep. 59, it was decided that the funds received by a national bank, which the party depositing had no authority of law to deposit, were not part of the assets to be "ratably distributed," but must be returned in full to the rightful owner. And again in *Massey* v. *Fisher*, 62 Fed. Rep. 958, which was a case where an indorser paid the amount of a note to a bank and took a receipt, but before he took the note from the bank the bank failed, the substance of the decision was that the money did not belong to the bank, but was held by it in trust; and, of course, in that case, it was not part of its assets.

None of these cases are apposite here. On the contrary, by an affirmative, pregnant with a negative, they deny the preference which is now advanced. This clearly results from the context of the opinions in these cases. They all reason to demonstrate that from the particular facts stated the relation was not that of an ordinary creditor, but was one giving rise to a specific lien or right resulting from the contract, and which was in being before the insolvency took place. Here there is no such condition; there is simply an ordinary creditor asserting the right to a preference arising from an insolvent law. This distinction is well illustrated by *Scott* v. *Armstrong*, *supra*, cited and relied on in the opinion of the court below. In that case the facts as to the set-off which was allowed are thus stated: "The credits between the banks were reciprocal and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credit, and the principle applicable to mutual credits applied."

The difference between *Scott* v. *Armstrong* and the *present case is this: There this [**290** court was called on to determine whether a claim which had been extinguished by operation of law prior to the insolvency was still due after the insolvency, but here the question is whether a claim existing at the time of the insolvency and up to that date unsecured shall, by the operation of an insolvent statute, be converted after the insolvency into a preferred claim to be paid by preference over all other creditors. This distinction between the two questions was clearly stated in *Scott* v. *Armstrong*, where, speaking through *Mr. Chief Justice* Fuller, this court said: "The state of case where the claim sought to be offset is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the objects of these provisions [the act of Congress]. The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed. *Venango Nat. Bank* v. *Taylor*, 56 Pa. 14; *Colt* v. *Brown*, 12 Gray, 233."

Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation. Much was said in argument as to the public policy embodied in the law of the state of New York and the wisdom of upholding it. Our function is judicial and not legislative. Did we, however, consider motives of public policy, we should not be unmindful of the wise safeguard in favor of all the people of the United States resulting from the provision which secures to every one dealing with a national bank a ratable distribution of the assets thereof, thereby stimulating confidence and uniformity of treatment.

Judgment reversed and case remanded to the court of appeals of the state of New York, with instructions to remit the cause to the court in which it originated, with directions to dismiss the action.

ALVIN C. LEIGHTON, *Appt.*, [**291**
v.
UNITED STATES ET AL.

(See S. C. Reporter's ed. 291-297.)

Reopening the case—Indian depredations—hostilities—liability.

1. The reopening of a case by a claimant under the act of Congress of March 3, 1891, after a determi-

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* —see note to Worcester v. Georgia, 8: 483.

As to construction and operation of treaties, see note to United States v. The Amistad, 10: 826.

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nation by the Secretary of the Interior, cannot be partial and limited to the mere question of the amount; but if the claimant elects to reopen, then the whole case, including the question of liability, will be open for examination.

2. The provision that the court shall determine in each case the value of the property taken or destroyed, made in § 5 of the act of Congress of 1891, giving jurisdiction to the court of claims in case of Indian depredations, does not establish liability in every case in which jurisdiction exists, but merely states the duty of the court when liability is established.

3. Hostilities for a special purpose—to wit, resisting the opening of a military road—may be sufficient to prevent a tribe of Indians from being in amity with the United States, within the meaning of the Indian depredation act.

4. A treaty stipulation by a tribe of Indians, individually and collectively, "to cease all hostilities against the persons and property" of the citizens of the United States, does not create a liability on the part of the Indians to pay for damages caused by hostilities in violation of the treaty, unless there is an express provision creating such liability.

[No. 413.]

Argued November 12, 13, 1895. Decided March 2, 1896.

APPEAL from a judgment of the Court of Claims dismissing the petition of Alvin C. Leighton, claimant, to reopen a claim against the United States. *Affirmed.*

See same case below, 29 Ct. Cl. 288.

Statement by *Mr. Justice* **Brewer:**

This case is before us on appeal from a judgment of the court of claims, dismissing the claimant's petition. The amended petition on which the case was tried, after stating the facts of the depredation, the citizenship of the claimant, and the amity of the Indian tribe, alleged that the claim had been filed in the Interior Department, allowed on December 5, 1873, for $3,025, and reported to Congress March 27, 1874; and again on November 29, 1887, allowed for $2,500, and reported to Congress. It further alleged that the property was worth $5,005, and for that sum prayed judgment.

After the commencement of the suit in the court of claims the claimant filed this election to reopen:

"Now comes the claimant, Alvin C. Leighton, and elects to reopen the claim set forth in the petition in this cause and try the same before the court.

"And he avers that the allowance made in 292] said claim was *erroneous in this respect, that the Commissioner of Indian Affairs and the Secretary made an allowance of $2,500 by fixing the value of the mules on account of which claim is made in said petition, at $125, and of the horses at $100 each, whereas the allowance should have been for $5,005, the value of the mules being $255 each and of the horses $185 each.

"And the claimant refers to the evidence taken under the rules of this court as well as that presented to the Interior Department in support of this allegation of error.

"The claimant does not seek to disturb the findings or award of the Commissioner of Indian Affairs and Secretary of the Interior in any other respect than as above set forth, but admits that the same are correct in all other respects."

This was done under authority of the last part of § 4 of the act of March 3, 1891 (26 Stat. at L. 851), which reads: "All unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, . . . shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses, and the documentary evidence, including reports of department agents therein, may be read as depositions and proofs."

The United States having filed a traverse, the case was submitted to the court of claims, by which court findings of fact were made, and among them that the property was taken and carried away by Indians belonging to the Ogallalla band of the Sioux tribe; that at this time the Ogallalla band "was in separate treaty relations with the United States, under treaty dated October 26, 1865, proclaimed March 17, 1866 (14 Stat. at L. 747), and were receiving annuities thereunder;" and that such band "under its principal chief, Red Cloud, was at the time of said depredation in armed hostility against the United States in resisting the military authorities in the opening of a military road, and the establishment thereon of military posts, and maintaining the same along what was known *as the 'Boazman Road,' ex- [293 tending from Fort Laramie, in Wyoming, to Fort Smith, in Montana," and was "not in amity with the United States."

Messrs. **William B. King,** *Charles King,* and *John B. Sanborn* for appellant.

Mr. **Charles B. Howry,** Assistant Attorney General, for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The first matter to be considered is the effect of the claimant's election to reopen the case. On his part it is contended that it only permitted a new inquiry as to the amount and value of the property taken and carried away; that the liability of the government had been settled by the award and allowance of the Secretary of the Interior, and was no longer a matter of dispute. On the other hand, it is claimed by the government that it opened for consideration and judgment both the amount of the depredation and the fact of liability, precisely as though there had been no action on the part of the Secretary of the Interior. We think the contention of the government is correct. The statute gives either the claimant or the United States the right to reopen the case and try the same before the court—not a part, but the whole, of the case. If neither party had elected to reopen, the claimant would have been entitled to a judgment for the amount of the allowance, such judgment to be paid as ordinary judgments of the court of claims. He would not have been required to furnish any further proof than the action of the secre-

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tary, which action would have been sufficient, both as to the liability of the government and the amount of the loss. But when he elected to reopen it was not within his power to reopen the case only partially, and, accepting the determination of the secretary as conclusive upon the question of liability, ask simply an inquiry 294] as to the amount of his loss and *judgment for a larger sum. There is no suggestion in the statute and no warrant therein for a partial reopening of the case. When reopened it stands a new case, to be considered and determined by the court. Of course, it is for the interest of the claimant to consider the question of liability settled and have the case opened only as to the amount of the loss. So, on the other hand, it might, in any case, be for the interest of the government to have the amount concluded by the action of the secretary, and the question of liability only opened for examination, but no such limitation is named in the statute. The case when opened is opened as a whole, and the only difference between this and any new case which has never been filed in the department and considered by the secretary is that the party electing to reopen has the burden of proof.

Counsel for claimant further contend that the 2d clause of the 1st section of the act of 1891 gives jurisdiction to the court of claims of cases which have been "examined and allowed by the Interior Department;" that by § 5 it is provided: "The court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified." No other measure or condition of liability is named. Hence, given a case of which the court of claims has jurisdiction (and a claim allowed by the Interior Department is one), the only duty of the court is to ascertain the amount of the loss, the tribe of Indians by whom the wrong was committed, and render judgment against the United States and such wrongdoing tribe. In other words, the fact of jurisdiction determines the question of liability.

We cannot assent to any such construction. The anomaly which would be created thereby demonstrates its incorrectness, for the effect would be that, if the claim had never been filed in the department, it would be subject to the con-295] ditions *specified in the 1st clause of the section defining jurisdiction. If it had been filed and was either allowed or pending for examination on the 3d of March, 1885, none of such conditions of liability would exist, and the simple inquiry would be as to the amount of the loss. In other words, the mere act of the claimant in filing his claim in the department establishes the liability of the government. Of course, this is impossible. Further, by § 4, and that applies to every case, the attorney general is required to "file a notice of any counterclaim, set-off, claim of damages, demand, or defense whatsoever of the government or of the Indians in the premises." Under this, every defense is open to the government. The clause quoted from § 5 does not determine the rule of liability, but only the duty of the court when the liability has been established. What, then, is the condition of liability in the case of an allowed claim, which either party shall elect to reopen? It must be found in some act of Congress, and is either that prescribed in the 1st clause of the 1st section of this act, or in some other statute.

The condition of liability prescribed in the 1st jurisdictional clause of the 1st section does not exist, because, by the finding, the Indians who committed the depredation did not belong to a tribe "in amity with the United States." It is true, counsel suggest that the Indians were carrying on hostilities for only a special purpose, to wit, resisting the opening of a military road. We fail to appreciate the argument that because hostilities were carried on for only a single purpose, and not for the mere sake of fighting generally, the tribe engaged in such hostilities was nevertheless still in amity. Indeed, beyond the fact of hostilities, the treaty between the different tribes of Sioux, including the Ogallalla band, executed by said band on May 25, 1868, and proclaimed February 24, 1869 (15 Stat. at L. 635), implies the existence of war, for it commences with this declaration: "From this day forward all war between the parties to this agreement shall forever cease."

Neither do we find in the legislation prior to the act of 1891 anything which binds the government to the payment of this *claim. [296 The act of June 30, 1834, § 17 (4 Stat. at L. 731), and U. S. Rev. Stat. § 2156, which provide for compensation for depredations by Indians, each contains the limitation found in the 1st jurisdictional clause of the act of 1891 of "amity with the United States." The act of May 29, 1872, § 7 (17 Stat. at L. 190), carried into the Revised Statutes as §§ 445 and 466, contemplates a report by the Secretary of the Interior of the nature, character, and amount of claims presented "under laws or treaty stipulations for compensation." The laws in force, as we have seen, mention only depredations by Indians belonging to a tribe "in amity with the United States." The last treaty with the Ogallalla band of Indians, prior to these depredations, was that of October 28, 1865 (14 Stat. at L. 747), which contained, on the part of the Indians, an engagement that they were subject to the exclusive jurisdiction and authority of the United States, and also bound and obligated "themselves individually and collectively . . . to cease all hostilities against the persons and property of its citizens." Now, if this treaty was not entirely superseded by hostilities which actually existed between the Ogallalla Indians and the United States, as is undoubtedly the rule when war arises between absolutely independent nations, it still is far from a promise on the part of the Indians to pay for damages caused during any such hostilities. While a breach of a contract similar to this between individuals might very likely give rise to an action for damages, yet no such rule can be enforced in reference to obligations created by a treaty. It is a promise on the part of the tribe to keep the peace, and not a promise to pay if the peace is not kept. Especially should this be

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the construction in view of the fact that many of the treaties between the United States and Indian tribes contain, not only a promise to abstain from hostilities, but also a specific stipulation that, in case of a breach of such promise, compensation shall be made out of the tribal funds, or otherwise. The absence of any such express provision in this treaty, the Indians being under the care of the United States and its wards, renders it improper to hold that by its terms the tribe had bound itself to pay for all damages which it might cause 297] during a period *of actual hostilities. Nor is this a matter in which the government is uninterested. In case of an award by the court of claims the United States become in fact, if not in form, the primary and a solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate.

It follows, therefore, that though, under the terms of the 2d jurisdictional clause, the court of claims had jurisdiction over this claim, yet, the case having been reopened by the claimant, the court of claims properly proceeded to inquire into its merits, and correctly found that there was no law or treaty upon which to base a liability of either the United States or the Indians.

The judgment is affirmed.

SAMUEL MARKS, HYMAN WOLLENBERG, and B. J. SIDEMAN, Partners as Marks & Wollenberg, *Appts.*,

v.

UNITED STATES and the BANNOCK AND PIUTE TRIBES OR NATIONS OF INDIANS.

(See S. C. Reporter's ed. 297-306.)

Claim under Indian depredation act—filing claim.

1. An Indian tribe engaged as a tribe in actual hostilities with the United States is not in amity with the United States, within the meaning of the Indian depredation act of March 3, 1891, although a treaty between them has never been formally abrogated by any declaration of war on either side.

2. A claim not filed in the Interior Department on or before March 3, 1885, is not within the jurisdictional clause of the Indian depredation act of March 3, 1891.

[No. 352.]

Argued November 12, 1895. Decided March 2, 1896.

APPEAL from a judgment of the Court of Claims in favor of the defendants in an action brought by Samuel Marks *et al.* against the United States *et al.* to recover the value of personal property taken and destroyed by the Bannock and Piute Indians. *Affirmed.*

See same case below, 28 Ct. Cl. 147.

Statement by *Mr. Justice* **Brewer:**

On July 8, 1891, appellants, as claimants, filed their petition in the court of claims under the act of March 3, 1891 (26 Stat. at L. 851), to recover the sum of $11,800, the value of certain personal property charged to have been taken and destroyed by the Bannock and Piute Indians during the month of June, 1878, in Happy Valley, in the state of Oregon. Subsequently they filed an amended petition. In that it was alleged that the Bannock and the Piute Indians were "in amity with the United States" at the time of the taking and destruction of the property; that they were "chargeable for said depredation and under an obligation to pay for the same by reason of the provisions of the treaty of July 3, 1868, between the United States and the Shoshone (Eastern Band) and the Bannock tribe of Indians;" and, further, that petitioners "presented their said claim to the Hon. Commissioner of Indian Affairs, No. 4915, July 27, 1888, for payment, but the same has not been returned or paid for." A traverse having been filed by the government, the case was submitted to the court, which, on February 27, 1893, made a finding of facts, and thereon entered judgment dismissing the petition. 28 Ct. Cl. 147. The seventh finding of fact was as follows:

"From these facts the court finds the ultimate fact, so far as it is a question of fact, that the tribes or bands of Piute and Bannock Indians were not in amity with the United States at the time the depredations complained of were committed."

From the judgment thus entered in favor of the defendants the claimants duly appealed to this court.

Messrs. **Charles A. Keigwin, A. H. Garland,** *Wm. B. Matthews,* and *R. C. Garland* for appellants.

Mr. **Charles B. Howry,** Assistant Attorney General, for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

This case, like that of *Johnson* v. *United States,* 160 U. S. 546 [*ante,* 529], recently decided, involves a construction of the Indian depredation act of March 3, 1891. The particular language to be considered is that found in the first clause of the act, which grants to the court of claims jurisdiction over claims for property "destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States." The seventh finding negatives the existence of amity, and if this stood alone there would be no room for discussion. But, as appears from its terms, it is based upon a series of facts stated in detail in prior findings, and it is also to be taken in connection with the treaty entered into between the United States and the Bannock tribe of Indians of July 3, 1868 (15 Stat. at L. 673), which contains, among other provisions, the following:

"If bad men among the Indians shall commit a wrong or depredation upon the person or

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* —see note to Worcester v. Georgia, 8: 483.

As to construction and operation of treaties, see note to United States v. The Amistad, 10: 826.

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property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor."

300] *Turning to the prior findings, it is stated in the second that "the Bannock and Piute Indians made a raid" in which the property in controversy was destroyed, and also that "the Indians numbered between five hundred and six hundred, and were in a body or band moving in concert, having the form of an Indian military organization." Other findings (which consist largely of telegrams and reports from various officers of the army and other officials, narrating at length a series of military operations during the years 1877 and 1878, which documents are by § 4 of the act of 1891 made competent evidence, and which are too voluminous to be copied into this opinion) show that what was done by the Indians was done by them as tribes, and not by a single individual, or a few in opposition to the will of the tribes. They show that these Indians were actually engaged in hostility, and that they were finally conquered and captured only by the military forces of the United States. Indeed, counsel for the claimants practically admit this, for in their brief it is stated "that at various times in the spring of 1878 small bands left the reservation for the sake of obtaining food, until finally the majority of the tribe were absent; that in the month of June, 1878, the absentees began killing white people, after which date the several bodies of Indians carried on a raid over a large area in Idaho and Oregon, which was finally checked by the efforts of troops of the United States; that the troops were more or less actively engaged in suppressing the outbreak until the latter part of August, 1878; and that the Indians were captured and returned to their reservation shortly after the last-named date."

Their contention is rather that actual hostilities may exist without war between two nations; that war is a political status, and to be determined by the political department of the government, by matter of record, and never by oral testimony; that it is not pretended that there was ever any formal declaration of war by either the Bannock tribe of Indians or the United States government; that therefore the political relations established by the treaty of 1868 continued during all these hostilities, and the tribe was "in amity with the United *States;" and, further, that subject and [301 dependent people, like the Bannock Indians, are not capable of making war with the United States. In support of this contention is cited a number of declarations of publicists and decisions of courts, such as the following from Chancellor Kent: "But, though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. War, says Vattel, is at present published and declared by manifestoes. Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them. As war cannot lawfully be commenced on the part of the United States without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration." 1 Kent, Com. 55. And this from *People* v. *McLeod*, 1 Hill, 377, 407, 37 Am. Dec. 328: "A state of peace and the continuance of treaties must be presumed by all the courts of justice till the contrary be shown; and this is *presumptio juris et de jure* until the national power of the country in which such courts sit officially declares the contrary."

Without questioning these declarations and decisions as applied to the relations between independent nations, we think they avail but little in the solution of the question here presented. That question is, What limitation did Congress intend by the words "in amity with the United States?" The word "amity" is not a technical term. It is a word of common use, and such words, when found in a statute, must be given their ordinary meaning unless there be something in the context which compels a narrower or a different scope. Webster defines it: "Friendship, in a general sense, between individuals, societies, or nations; harmony; good understanding; as, a treaty of amity and commerce." The last part of this definition shows that the phrase "in amity" is not the equivalent *of "under treaty." A "treaty" [302 implies political relations; "amity" signifies friendship, actual peace.

The phrase "in amity with the United States" is one of frequent use in the legislation of Congress in reference to Indians. In the early act of May 19, 1796 (1 Stat. at L. 469), it appears twice, the 6th section reading as follows:

"That if any such citizen, or other person, shall go into any town, settlement, or territory belonging to any nation or tribe of Indians, and shall there commit murder by killing an Indian or Indians belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death."

It is found again in the act of March 3, 1799 (1 Stat. at L. 747), that of March 30, 1802 (2 Stat. at L. 143), June 30, 1834 (4 Stat. at L. 731), and elsewhere; appearing in the statutes, as stated by counsel, some fifty or sixty times.

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The frequent use of this phrase in connection with the same subject-matter during all the legislative history of this country suggests, of course, a single and settled meaning. And, as said by Nott, J., in *Love* v. *United States*, 29 Ct. Cl. 332, 340: "What did it mean, in 1796, when the law declared it to be murder to kill an Indian of a tribe 'in amity with the United States?'" If that particular section had been in force during these hostilities it would not seriously be contended that the killing of a hostile Bannock by one of the soldiers of our army, even if done within the limits of the Bannock reservation, would have been murder, on the ground that the Bannock tribe was still under treaty relations, and therefore in amity with the government.

Further, there are obvious reasons why Congress did not use this phrase in any different sense than as theretofore used. At the time of the passage of the act nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government. It is said by counsel that there appear in the statutes prior to the act of March 3, 1871 (16 Stat. at L. 544, 566), declaring against further treaties, 666 treaties with Indian tribes. And it is a matter of history that all along our western 303] frontier *there has been a succession of Indian wars, with great destruction of life and property, and yet seldom has there been a formal declaration of war on the part of either the government or the Indians. If the contention of the claimants was sustained, it would be practically tantamount to holding that by this language Congress had for the government assumed responsibility for all depredations committed by Indians domiciled within the territorial limits of the United States, subsequently at least to the year 1865, and given to the court of claims jurisdiction to determine and finally adjudicate the amount thereof.

If such had been its intent, it seems as though it would have expressed itself in different language, and not by a phrase so suggestive from past use of a more limited purpose.

Again, as often affirmed in the decisions of this court, the Indians are, in a certain sense, the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit. The act of 1891 contemplates that in the same suit the tribe by which, or members of which, the depredation is charged to have been committed, may be made a party defendant. In § 5 it is provided that the court, after determining the value of the property, "shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified." Section 6 reads as follows:

"The amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe other than appropriations for their current and necessary support, subsistence, and education; and, fourth, if no such annuity, fund, or *appropriation is due or available, then [304 the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe."

If this act requires the construction claimed, it is obvious to any one familiar with the history of the Indian, and even independently of what is said by counsel to be the record as to the multitude and amount of the claims presented, that the outcome would be, as to most if not all of these tribes, that every dollar of annuity, if not every dollar of fund, would be swept away in satisfaction of these claims. We do not think this legislation is to be thus construed, and are of the opinion that all that Congress intended was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of citizens of the United States, such depredation might be investigated and the amount of the loss determined and adjudicated by the court of claims. This is in harmony with the language of many of the treaties between the United States and the Indians, and, among others, that of the treaty between the United States and the Bannock tribe, heretofore quoted, which reads: "If bad men among the Indians shall commit a wrong or depredation," etc.

In the light of this conclusion, it may be said that when the petition filed in the court of claims alleges that a depredation was committed by an Indian or Indians belonging to a tribe in amity with the United States, it becomes the duty of that court to inquire as to the truth of that allegation, and its truth is not determined by the mere existence of a treaty between the United States and the tribe, or the fact that such treaty has never been formally abrogated by a declaration of war on the part of either, but that the inquiry is whether, as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States. If so, and the *depredation was [305 committed by a single individual or a few individuals without the consent and against the knowledge of the tribe, the court may proceed to investigate the amount of the loss and render judgment therefor. If, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the court of claims must be that the allegation of the petition is not sustained, and that the claim is not one within its province to adjudicate. It is doubtless true that the existence of a treaty implies a state of peace, and, if no other evidence were produced, the court might properly infer therefrom that the tribe was in amity with the United States; but, after all, it is a question of fact, to be determined by the

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testimony which may be introduced. That question was investigated by the court of claims in this case, and its conclusion, justified by the facts as shown by the various reports and documents in evidence, was undoubtedly correct. The Bannock tribe was not, at the time of these depredations, in amity with the United States, and therefore the court of claims properly refused to adjudicate upon the amount of the loss, or render judgment therefor against the United States.

Neither does this case come within the 2d jurisdictional clause of the act of 1891, for this was not a claim which had been examined and allowed by the Interior Department, or one which on March 3, 1885, had been filed and was pending in said department for examination. *Johnson v. United States*, 160 U. S. 546 [*ante*, 529]. The conclusion reached in that case in reference to the scope of this 2d clause has been challenged, and it has been said that such 2d clause should be construed in connection with this language in § 2: "No claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior, or other officer or department of the government;" and that so construed neither the time nor the fact of filing in the Interior Department is material. No such construction can be sustained. It would, in effect, make the statute read as granting jurisdiction over all cases which on March 3, 1885, had been examined and allowed 306] by the Interior Department, and *over all then filed in that department but not yet examined and allowed, with a proviso that it is immaterial whether the claim was ever filed in the department. The antagonism between the grant and the proviso is fatal to such a construction. The act of March 3, 1885, defines claims not by their nature, but by their status as filed and allowed or simply filed. And to say that filing is immaterial when filing is the descriptive matter is to destroy the significance of the clause. Full scope can be given for the operation of these words in § 2 by connecting them with the 1st jurisdictional clause, which is a general grant of jurisdiction over all claims for property of citizens taken or destroyed by Indians in amity with the United States.

These are the only matters requiring consideration, and, *no error appearing in the conclusions reached by the court of claims, its judgment is affirmed.*

JOHN H. DURLAND, *Plff. in Err.*, *v.* UNITED STATES.

SAME *v.* SAME.

(See S. C. Reporter's ed. 306-315.)

U. S. Rev. Stat. § 5480—indictment—unlawful use of the mail—refusal to quash—scheme to defraud—multifariousness.

1. A scheme or artifice to defraud, within the meaning of U. S. Rev. Stat. § 5480, as amended by the act of March 2, 1889, respecting unlawful use of the mails, may be devised through mere representations and promises as to the future, although no misrepresentation as to an existing fact is made, where there is an attempt thereby to entrap the unwary and to secure money from them on the faith of the scheme, which is glittering and attractive in form, yet unreal and deceptive in fact and known to the person devising it to be such.
2. An omission in an indictment for unlawfully mailing letters intended to defraud, to state the names of the parties intended to be defrauded and the names and addresses on the letters, is satisfied by the allegation, if true, that such names and addresses are to the grand jury unknown.
3. A partial identification of letters by the time and place of mailing and the charge that they were placed in the postoffice by the defendant "intending in and for executing such scheme and artifice to defraud" is a sufficient description of the letters, in an indictment for unlawful use of the mails, when attacked by motion to quash. If defendant desires further identification he can secure it by demanding a bill of particulars.
4. Refusal to quash an indictment is not generally assignable for error.
5. It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it, deposits in the postoffice letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor.
6. The objection that the indictment is multifarious because it includes many offenses, when not taken until after the verdict, is too late.

[Nos 528, 529.]

Argued October 29, 1895. Decided March 2, 1896.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a conviction of John H. Durland for a violation of U. S. Rev. Stat. § 5480, as amended by the act of March 2, 1889. Two cases of the same title and character are considered together. *Judgment in each case affirmed.*

Statement by *Mr. Justice* **Brewer:**

These cases have so much in common that they may be considered together. Each is the record of the conviction of the plaintiff in error in the district court of the United States for the eastern district of Pennsylvania of a violation of U. S. Rev. Stat. § 5480, as amended by the act of March 2, 1889. 25 Stat. at L. 873. In neither record is preserved the testimony given on the trial, or the charge to the jury. The only questions for consideration are those which arise on the indictments. In the first, the indictment charged that defendant "did knowingly, wilfully, and falsely devise a scheme and artifice to defraud, that is to say, by divers false pretenses and subtle means and devices to obtain and acquire for himself of and from divers persons to this grand inquest unknown, a large sum of money, to wit, the sum of $50 each, and to cheat and defraud each of the said divers persons thereof by then and there representing, among other things, that the Provident Bond & Investment Company would, upon the payment of a certain sum of money, to wit, the sum of $10, and a further sum of $5 monthly thereafter, by each of the

NOTE.—*As to obstructing the mail; what constitutes the offense,*—see note to United States v. Kirby, 19: 278.

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said divers persons, issue to each of the said divers persons a bond in the words and manner following, to wit."

Giving a copy of the bond, the indictment proceeded:

"And that the said bonds would mature in ac-
308] cordance with *paragraphs 3d, 4th, 5th, 6th, 7th, and 8th of said bond hereinbefore set out, and that the redemption value of the said bond when called and the sum of money payable therefor to the said divers persons by the said Provident Bond & Investment Company would be the sum specified and at the time named, and upon the payments of the sums of money named in the circular issued by the said Provident Bond & Investment Company, which is in the words and matter following, to wit:

A Nut for Lottery Cranks to Crack.

We give below our graduatory scale of redemption values, which is a complete refutation of the charge that a 'lottery' element enters into the methods of the Provident Bond & Investment Company. It will be observed that a steadily increasing cash value applies to every bond in force from its issue to redemption. That every bond of equal age has the same cash value.

It is a further fact that every bond is nonforfeitable and interest bearing, having both 'cash surrender' and loan values. Where does the lottery element come in?

Redemption Scale.

Scale of current redemption values under the current system of tontine investment, showing profit over total cost upon each $1,000 bond from date of issue to face value; $500 bonds, one half of said amounts, both cost and profit."

After this followed the scale referred to in the last clause, which, commencing—

No. of months in force.	Cost to holder, including premium.	Cash paid by Co. for redemption.	Profits over cost.	Per cent of profit.
1	$15 00			
2	20 00			
3	25 00	$30 00	$5 00	20
5	30 00	40 00	10 00	33
5	35 00	50 00	15 00	42.8
6	40 00	60 00	20 00	50

309] *—ran up to and included ninety-one months. After the scale appears the balance of the circular, as follows:

Such is the legitimate operation of 'the current system of tontine investment,' of which the Provident Bond & Investment Company is the exponent and its president is the author.

N. B.—The basic principle of the above table is copyrighted. Infringements without due authority of the author will be prosecuted."

And then the indictment, in its first count, closed with these words:

"Whereas in truth and in fact the said John H. Durland, being then and there the president of the said Provident Bond & Investment Company, did not intend that the said bonds would mature in accordance with paragraphs 3d, 4th, 5th, 6th, 7th, and 8th of the said bond, and that the redemption value of the said bond when called and the sum of money payable therefor to the said divers persons by the said Provident Bond & Investment Company, would be the sum specified at the time named and upon the payments of the sums of money named in the circular issued by the said Provident Bond & Investment Company, as he, the said John H. Durland, then and there well knew, and the said John H. Durland intended then and there by said false representations to obtain for his own use the sum of money paid by each of the divers persons for said bond, to wit, the sum of $50 each, which said scheme and artifice to defraud was to be effected by him, the said John H. Durland, opening a correspondence and communication with each of the said divers persons by means of the postoffice establishment of the United States and by inciting such divers persons to open communication with him, the said John H. Durland, so devising and intending; and he, the said John H. Durland, did heretofore, to wit, upon the day and year aforesaid, so devising and intending in and for executing such scheme and artifice to defraud and attempting so to do, place and cause to be placed in a postoffice of the United States at Philadelphia to be sent and delivered by the said postoffice establishment, *divers letters and packets, to wit, [310 twenty letters and circulars, directed respectively to the said divers persons, the names and addresses of whom are to this grand inquest unknown, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

In the second case the indictment charged substantially the same scheme to defraud, but specified that the purpose of the defendant was "to obtain and acquire for himself of and from another person, to wit, one W. S. Burk, at Chester, Pennsylvania, a large sum of money, to wit, the sum of $60, and to cheat and defraud the said W. S. Burk thereof." And then that "said scheme and artifice to defraud was to be effected by him, the said John H. Durland, opening a correspondence and communication with another person, to wit, the said W. S. Burk, residing within the United States, to wit, at Chester, Pennsylvania, by means of the postoffice establishment of the United States and by inciting the said W. S. Burk to open communication with him, the said John H. Durland, so devising and intending; and he, the said John H. Durland, did heretofore, to wit, upon the day and year aforesaid, so devising and intending in and for executing such scheme and artifice to defraud and attempting so to do, place and cause to be placed a letter in the postoffice establishment of the United States, to wit, the postoffice at Philadelphia, Pennsylvania, within the above district, which said letter was then and there addressed and directed as follows, to wit: 'Mr. W. S. Burk, Chester, Pa.', profert whereof is now made, contrary to the form of the act of Congress in such case made and provided against the peace and dignity of the United States of America."

The bond, a copy of which was in each indictment, is entitled a "Current-Tontine In-

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vestment Option Bond," purported to be issued by the Provident Bond & Investment Company, whose capital was named as $100,000, and was a promise on the part of the company to pay $1,000 upon nine conditions; the first being a monthly payment of $5, failure to make 311] any such monthly *payment working a forfeiture; second, that the company would retain 50 cents for expenses; of the net remainder, 25 per cent was to be carried to a reserve, and 75 per cent was to constitute a redemption fund. The third and fourth conditions were as follows:

"Third. (*a*) This bond will mature when the net monthly instalments (exclusive of expense fund), together with its apportionment of reserve credits, equal its face value. (*b*) It may be redeemed by the company at any time before its maturity, at any time after three regular monthly payments have been made herefor, the holder hereby agreeing to surrender the same whenever called, upon receipt of its then redemption value."

"Fourth. The redemption value of this bond when called will be the sum specified under the 'Table of Current Redemption Values' printed on the back hereof, according with the number of months it has been in force at time of call."

The table mentioned in this fourth specification is the redemption scale which appeared in the circular heretofore referred to. The remaining stipulations were in reference to calls, special redemptions, conversions into certificates, return in case of death of all payments made to the redemption and reserve fund, and assignments. Section 5480 as amended by the act of March 2, 1889, so far as material to this case, reads as follows:

"If any person having devised or intending to devise any scheme or artifice to defraud . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the postoffice establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet, or advertisement in any postoffice, branch-postoffice, or street or hotel letter box of the United States, to be sent or delivered by the said postoffice establishment, or shall take or receive any 312] such *therefrom, such person so misusing the postoffice establishment shall, upon conviction, be punishable," etc.

Messrs. **Hampton L. Carson, James M. Beck,** and *William F. Harrity* for plaintiff in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, and **John L. Thomas,** Assistant Attorney General for the Postoffice Department, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

Inasmuch as the testimony has not been preserved, we must assume that it was sufficient to substantiate the charges in the indictments; that this was a scheme and artifice to defraud, and that the defendant did not intend that the bonds should mature, or that although money was received any should be returned, but that it should be appropriated to his own use. In other words he was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such. So far as the moral element is concerned it must be taken that the defendant's guilt was established.

But the contention on his part is that the statute reaches only such cases as, at common law, would come within the definition of "false pretenses," in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future. It is urged that there was no misrepresentation as to the existence or solvency of the corporation, the Provident Bond & Investment Company, or as to its modes of doing business, no suggestion that it failed to issue its bonds to any and every one advancing the required dues, or that its promise of payment according to the conditions named in the bond was not a valid and binding promise. And, then, as counsel say in their brief, "it [the indictment] discloses on its face absolutely nothing but an *intention to commit a viola- [313 tion of a contract. If there be one principle of criminal law that is absolutely settled by an overwhelming avalanche of authority it is that fraud either in the civil courts or in the criminal courts must be the misrepresentation of an existing or a past fact, and cannot consist of the mere intention not to carry out a contract in the future."

The question thus presented is one of vital importance, and underlies both cases. We cannot agree with counsel. The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing. As said by *Mr. Justice* Brown in *Evans* v. *United States* (No. 1), 153 U. S. 584, 592 [38: 830, 833]: "If a person buys goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the states."

But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

In the light of this the statute must be read,

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and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testi-
314] mony had shown *that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the postoffice from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclosed an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise. This, which is the principal contention of counsel, must be overruled.

The second, which applies more fully to the first than the second case, is that the indictment is defective in that it avers that in pursuance of this fraudulent scheme twenty letters and circulars were deposited in the postoffice, without in any way specifying the character of those letters or circulars. It is contended that the indictment should either recite the letters, or at least by direct statements show their purpose and character, and that the names and addresses of the parties to whom the letters were sent should also be stated, so as to inform the defendant as to what parts of his correspondence the charge of crime is made, and also to enable him to defend himself against a subsequent indictment for the same transaction. These objections were raised by a motion to quash the indictment, but such a motion is ordinarily addressed to the discretion of the court, and a refusal to quash is not generally assignable for error. *Logan* v. *United States*, 144 U. S. 263-282 [36: 429-435].

Further, the omission to state the names of the parties intended to be defrauded and the names and addresses on the letters is satisfied by the allegation, if true, that such names and addresses are to the grand jury unknown. And
315] parol *evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal. *Dunbar* v. *United States*, 156 U. S. 185-191 [39: 390-392].

It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters, so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud. But still we think that as it stands it must be held to be sufficient. There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant "intending in and for executing such scheme and artifice to defraud, and attempting so to do placed and caused to be placed in the postoffice," etc. This, it will be noticed is substantially the language of the statute. If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars. *Rosen* v. *United States*, 161 U. S. 29 [*ante*, 606].

We do not wish to be understood as intimating that in order to constitute the offense it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it, deposits in the postoffice letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor.

A final objection is that the indictment in the first case is multifarious because, as claimed, it includes many offenses, and *Re Henry*, 123 U. S. 372-374 [31: 174, 175], is cited as authority therefor, in which, in reference to a case of this nature, *Chief Justice* Waite said: "Each letter so taken out or put in constitutes a separate and distinct violation of the act." This objection was not taken until after the verdict, and hence, if of any validity, was presented too late. *Connors* v. *United States*, 158 U. S. 408-411 [39: 1033, 1034].

These are the only objections which require consideration, and, finding no error in them, *the judgment in each of these cases is affirmed.*

WASHINGTON GASLIGHT COMPANY, *Plff. in Err.*, [316
v.
DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 316-333.)

Duty of gas company—cause of action by municipality—testimony—judgment, when conclusive.

1. It is the duty of a gas company to supervise and keep in repair a gas box which is part of the apparatus of the company, and is placed in a

NOTE.—*As to damages for personal injury from negligence*, see note to Pennsylvania Co. v. Roy, 26: 141.

Remedy over by a municipality against wrongdoer, after payment of damages by it to person injured; obstruction or defect in street; licensee; contractor; abutting owner; notice of suit; judgment as evidence; limitation of rule; burden of proof; railroad company; damages; sidewalk.

Where a person has negligently or unlawfully created an obstruction or defect in a street of a municipal corporation, and the latter has been compelled to pay a judgment recovered against it for damages sustained by an individual caused by such defect, it has an action over against such person. Seneca Falls v. Zalinski, 8 Hun, 571; Troy v. Troy & L. R. Co. 49 N. Y. 657; Robbins v. Chicago, 67 U. S. 2 Black, 418 (17: 298), 71 U. S. 4 Wall. 657 (18: 427); Lowell v. Short, 4 Cush. 275.

In case the obstruction was caused by a licensee, the right of recovery over depends upon his contract, express or implied, to perform the act permitted in such a manner as to protect the public

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sidewalk to afford means for turning on or off the gas from a house, when it has entire control of the box to the exclusion of the property owner, although the latter is required to pay for the gas box and connection.

2. A municipality when it has been condemned to pay damages occasioned by a defective gas box in a sidewalk, which it was the duty of a gas company to supervise and repair, has a cause of action against the gas company therefor.

3. Testimony given in an action is admissible after the death of the witness, in a subsequent action in which the judgment in the former is proved as a basis of recovery, in order to show the subject-matter of the controversy.

4. A judgment against a defendant who has a right of action to recover over against a third party is conclusive upon the latter, provided he has notice and full opportunity to defend.

[No. 40.]

Argued October 16, 17, 1895. Decided March 2, 1896.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment of that court affirming the judgment of the Special Term of that court in favor of the plaintiff, the District of Columbia, against the Washington Gaslight Company, defendant, for the amount of a judgment recovered by Marietta M. Parker against the District for damages for personal injury. *Affirmed.*

See same case below, 20 D. C. 39.

Statement by *Mr. Justice* **White:**

In July, 1879, Marietta M. Parker sued the District of Columbia to recover damages for an injury to her person, alleged to have been suffered from stepping into a certain "deep and dangerous hole" in the sidewalk of one of the streets of the city of Washington. The declaration contained all the essential averments necessary to fix liability on the corporation. Prior to the bringing of the suit, when Mrs. Parker first made demand against the District, the latter notified the Washington Gaslight Company, spoken of hereafter as the Gas Company, that it would be expected to indemnify the District for any amount which it might be compelled to pay to Mrs. Parker, and when the suit was commenced the Gas Company was also informed, and opportunity was afforded *that company to defend. [317 The proffer was not availed of although on the trial of the cause, which resulted in a verdict and judgment against the District for $5,000, officers of the Gas Company testified, and the counsel of that company was present during a portion of the trial, but purposely abstained from taking part in the defense. The action now here was brought by the District of Columbia against the Gas Company to recover over the amount of the judgment obtained by Mrs. Parker against the District, and which had been paid by it. The cause of action relied on to sustain this recovery was briefly as follows: That "the deep and dangerous hole" averred by Mrs. Parker to have existed, and which she alleged to have been the cause of her injury, and upon which her recovery was had, was proved on the trial of her case to

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from danger and the municipality from liability. Port Jervis v. First Nat. Bank, 96 N. Y. 550; Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475, 7 Am. Rep. 469; Congreve v. Morgan, 18 N. Y. 84, 72 Am. Dec. 495.

And the fact that the obstruction was made with the knowledge of the city places the person at fault on the same ground as the licensee. Seneca Falls v. Zalinski, *supra*.

In such case the licensee cannot defend upon the ground that the work was done for him by an independent contractor. Robbins v. Chicago, 71 U. S. 4 Wall. 657 (18: 427).

In case of work done for the municipality upon contract, the liability of the contractor must be expressed, and in case it is not and a judgment is procured against the city it cannot recover over against the contractor. Buffalo v. Holloway, 7 N. Y. 493, 57 Am. Dec. 550.

The abutting owner is not without statute or charter liable for the care of streets. In such a case there can be no recovery over. Fulton v. Tucker, 5 Thomp. & C. 621.

Notice of suit brought and opportunity to defend is usually given the person causing the obstruction, by the corporation intending to hold him to recovery over. Express notice is unnecessary. It is enough that the party knew the suit was pending and might have defended it. Barney v. Dewey, 13 Johns. 224, 7 Am. Dec. 372; Beers v. Pinney, 12 Wend. 309; Heiser v. Hatch, 86 N. Y. 614.

The omission to give notice does not go to the right of action but simply changes the burden of proof and imposes upon the party against whom the action was recovered the necessity of again litigating and establishing all the actionable facts. Aberdeen v. Blackmar, 6 Hill, 324; Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275; Binsse v. Wood, 37 N. Y. 526.

With notice, the record of the judgment against the municipality is competent evidence against the obstructor, and is conclusive as to his liability and as to the amount of recovery. Troy v. Troy & L. R. Co. 49 N. Y. 657.

The judgment after such notice is conclusive so far as relates to the cause of action, amount of damages, and other matters necessarily involved therein. Seneca Falls v. Zalinski, 8 Hun, 571.

Such judgment is conclusive both as to liability of corporation to person injured and as to any matter which might have been urged as a defense; so as to contributory negligence. Rochester v. Montgomery, 72 N. Y. 65; Boston v. Worthington, 10 Gray, 496.

A municipal corporation which has been compelled to pay damages for injuries sustained by reason of the wrongful acts of a third person rendering a street unsafe has a remedy over against such third person, unless as to him the corporation is itself a wrongdoer. Woods v. Groton, 111 Mass. 357; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; Catterlin v. Frankfort, 79 Ind. 547, 41 Am. Rep. 627; Elkhart v. Wickwire, 87 Ind. 77; McNaughton v. Elkhart, 85 Ind. 384; Brookville v. Arthurs, 130 Pa. 501; Keokuk v. Independent Dist. of Keokuk, 53 Iowa, 352, 36 Am. Rep. 226; Jansen v. Atchison, 16 Kan. 358.

If, because of the negligence of a lot owner in permitting water to leak from a defective pipe to the sidewalk, the city is compelled to pay a judgment, the town may sue the lot owner. New York v. Dimick, 20 Abb. N. C. 15.

A city or town may maintain an action of debt upon the promise of a railroad company to repay the damages recovered against the former by a person injured through a defective railroad crossing. Portland v. Atlantic & St. L. R. Co. 66 Me. 485.

Under a contract with a municipal corporation, by which the contracting party undertakes to keep a street in repair, the damages recoverable on a

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have been an open gas box placed and maintained in the sidewalk by the Gas Company for its own use and benefit, and which it was its duty to repair; that this duty had been grossly neglected by allowing the box to remain unrepaired, thus causing the injury for which the city had been held liable. The declaration, moreover, averred notice to the Gas Company, and the fact that adequate opportunity was given it to defend, and the failure of the Gas Company to act in defense of the suit. To this demand the defendant the (Gas Company) filed a plea of the general issue, and by stipulation it was agreed that it might thereunder avail itself of any defense which it might have.

On the trial of the cause before a jury, testimony was introduced tending to show that the gas box or stopcock box in question was placed by the Gas Company in the sidewalk in the city of Washington in 1873, this gas box being one of the customary appliances used by the company when connecting its mains with a house where gas was to be used; that this box consisted of an iron cylinder, four inches wide and two and a half feet deep, with an iron cover. The box served the purpose of affording access to a cock in the service pipe, which latter conducted the gas from the main of the company to the gas meter in the house, whence it was carried to the burners. By means of this box or cylinder, on re-
318] moving the cover *therefrom with a key made for the purpose, the cock in the service pipe could be reached, and the gas be thus turned on or off from the house. It was, moreover, shown that this box was placed in the sidewalk so as to be level with its surface, and that the cover thereon was held in place by lugs which slipped into slots made for the purpose. In addition it was proved that the box was put in by the company in accordance with the general methods used for introducing gas, and in compliance with the form of structure pointed out by an ordinance of the board of common council of the city of Washington, passed in March, 1868. Both parties introduced proof showing that the service pipe, the stopcock therein, and the gas box were put in at the request of the owner of the premises in front of which they were situated. That they were constructed by the Gas Company, which furnished the materials, and worked as any other plumber would have done, being paid therefor by the owner of the premises; that in order to do this work the company had first to obtain permission to open the street to make the requisite connections, and had paid to the District a permit fee of $1. There was, moreover, proof tending to show that when the gas box was first put in the work was skilfully done; that it was originally placed in a brick footway then existing, and near the curbstone, but that subsequently the board of public works of the District of Columbia widened the footway, and in consequence of this widening the gas box came to be about in the middle of the sidewalk.

Testimony was also introduced, tending to show that where the owners of private property

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breach are not restricted to the expense of repairing; the corporation may recover, in addition thereto, an amount for which it has been adjudged liable to a third person for injuries sustained by him by reason of the nonrepair. Brooklyn v. Brooklyn City R. Co. 8 Abb. Pr. N. S. 356.

The mere failure of an abutter to clean snow from the sidewalk as required by a city ordinance does not render him liable to one who is injured by falling thereon, nor can the city recover from him damages which it has been compelled to pay the injured person. Kirby v. Boylston Market Asso. 14 Gray, 249, 74 Am. Dec. 682; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502; Moore v. Gadsden, 93 N. Y. 12; Flynn v. Canton Co. 40 Md. 312, 17 Am. Rep. 603; Hartford v. Talcott, 48 Conn. 526, 40 Am. Rep. 189.

When such remedy over against a wrongdoer exists, the corporation may notify such wrongdoer of the pendency of the action against it and request him to come in and defend; he will then be concluded by the judgment as to the existence of the defect, the liability of the city, and the amount of damages. Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Morran v. Muldoon, 82 Ind. 347; Bever v. North, 107 Ind. 544.

When the negligent obstruction of a street by a railroad company causes an accident for which judgment has been recovered against the city, the city, unless it concurred in the wrong, has its remedy against the company. And, in the suit over, the record of the suit against the city is admissible in evidence, if the company had notice of its pendency and was requested to defend. Western & A. R. Co. v. Atlanta, 74 Ga. 774.

The omission to give such notice will not prejudice the right of the city to maintain an action against the wrongdoer, but it leaves the corporation with the burden of again litigating such matters and establishing the actionable facts. Port Jervis v. First Nat. Bank, 96 N. Y. 550; Binsse v. Wood, 37 N. Y. 530; Aberdeen v. Blackmar, 6 Hill, 324.

The notice need not be in writing. Robbins v. Chicago, 71 U. S. 4 Wall. 657 (18: 427); Barney v. Dewey, 13 Johns. 225, 7 Am. Dec. 372.

If, after notice and request to defend, the person who wrongfully created the obstruction which caused the injury fails to make any defense to the action against the city, and the city defends it for him, it may, if guilty of no misfeasance itself, recover from him, not only the amount of the judgment recovered from it, but also all reasonable and necessary expenses incurred in defending the action, including reasonable attorney fees. Westfield v. Mayo, 122 Mass. 100, 23 Am. Rep. 292; Veazie v. Penobscot R. Co. 49 Me. 119; Chesapeake & O. Canal Co. v. Allegany County Comrs. 57 Md. 201, 40 Am. Rep. 430; Baxendale v. London, C. D. R. Co. L. R. 10 Exch. 35. *Contra*, Littleton v. Richardson, 32 N. H. 59.

Where a city has been compelled to pay a judgment to one injured by reason of a pile of sand in the street, the corporation may maintain an action against the owner of the building, who caused the sand to be left there. Rochester v. Montgomery, 9 Hun, 394; Seneca Falls v. Zalinski, 8 Hun, 571.

In absence of statute or contract a village cannot recover over against the owner for neglect to repair a sidewalk. Fulton v. Tucker, 3 Hun, 529.

The abutting owner may be liable to the public corporation having control of the road or street and under a legal duty to keep it in suitable condition for travel for unlawfully meddling with the way, to the injury of such corporation. If the owner wrongfully makes the way unsafe, the corporation may repair it and recover of him the amount it was compelled to expend in making the repairs. Centerville v. Woods, 57 Ind. 192; Bishop, Non-Cont. Law, §§ 1003, 535.

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paid the Gas Company the cost of laying lateral service pipes and connections with the street mains and discontinued the use of gas in the premises, they would not be permitted to remove the same; that an adjoining private property owner was never permitted to have a key to the gas box, and that the defendant has, so far as such property owners are concerned, maintained and exercised exclusive supervision and control of the same. There was evidence also introduced tending to show that the defendant had men employed whose duty it was to ex-
319] amine, about the first of *each month, the condition of the meters in every house throughout the District into which gas had been introduced by the defendant, and that it was the duty of these employees to notice and report whether the gas boxes in the sidewalks were uncovered or out of order. The evidence moreover tended to establish that the superintendent of the Gas Company, when his attention had been called to the fact that gas boxes needed repair, had often caused such repair to be done by having the covers put on or doing any other required work. To the contrary, proof was also introduced tending to show that after the gas boxes were put in, the Gas Company took no further care or charge of them.

The District offered in evidence the record of the suit brought by Mrs. Parker and made proof that it paid the amount of the judgment therein rendered. The testimony which had been given by Mrs. Parker on the trial of that case was also afforded in evidence and admitted over objection, although no exception was reserved. This testimony tended to show that the sole cause of the injury for which she sued and had recovered was an open gas box in which, whilst walking on the street, her foot had become engaged. The deposition of Mrs. Parker taken in the case on the trial was also offered in evidence by the District, and contained the following description of the accident:

"The accident occurred in front of 121 C street N. E., about 5 o'clock in the afternoon of March 10, A. D. 1879. The immediate cause of the accident was an open gas box in about the center of the sidewalk. It was a perfect trap, as it was upon a level of the sidewalk, except at the side I stepped into, and there was a part of a brick sunk at least an inch and a half below the level of the walk so that any one in walking along could not see but the pavement was level until, like myself, when too late. Had not the half of the brick been sunken, the open hole would not have been so dangerous; for, upon stepping into the hole, I tried to step back, when I found my box toe shoe fast in the hole, and the sunken brick let my heel down with my entire weight 1½ inches more than would have occurred had the pavement been perfect around the gas box."

320] *The District, moreover, after proving the death of H. Clay Smith, a witness who had testified in the original suit, and the loss of the notes of his testimony, offered to prove by the stenographer who had taken the original notes what had been Smith's testimony. This was objected to, and on its being overruled, exception was reserved. The stenographer testified that Smith had on the original trial sworn that he lived within a few doors of the place where the Parker accident happened, and had noticed the gas box which caused the accident to be out of order "for two or three weeks prior to the accident to Mrs. Parker, and that he did not know how the top of the box came off, but he had noticed it."

At the close of the testimony offered in behalf of the District, the defendant company requested a peremptory instruction in its favor, which was refused and exception was taken. The plaintiff then asked for the following instructions: First, that the obligation of supervising and keeping the gas box in order rested on the Gas Company, and that if it had neglected so to do after actual notice of its being out of order, or after such condition had existed for a sufficient length of time to have enabled the company, with reasonable diligence, to have discovered it, the Gas Company was liable. Second, that if the company had notice of and opportunity to defend the original suit, it was bound by the judgment therein rendered. These instructions were given. The defendant company asked for several instructions, which were refused, and exceptions were reserved consequent on such refusal. They were: First, that the Gas Company was not obliged to keep the box in order; second, that, even if it was originally so bound, the widening of the footwalk by the city and the consequent shifting of the box to the middle of the sidewalk, had relieved it of such obligation; third, that if the jury found from the evidence that the injury of Mrs. Parker was caused in whole or in part from a defect in the sidewalk alongside of the gas box, the defendant should have a verdict; fourth, if the jury found from the evidence that the injury for which Mrs. Parker recovered was caused by the fault of both parties to the suit, the defendant was also entitled to a verdict. This last request *the court declined to give on the [321
ground that it was already covered by a general instruction given. The court in its general charge instructed the jury substantially as follows: That the primary duty rested on the Gas Company to repair and keep the gas box in order; hence, if the District had been compelled to pay as a result of the negligence of the Gas Company in discharging its legal obligation, the District was entitled to recover the amount; that notice having been given of the demand made by Mrs. Parker and of the suit brought by her, and an opportunity having been afforded the Gas Company to defend the same, the judgment in such suit was the thing adjudged against the defendant company as to the matters which it concluded. It also instructed that as the original action was for an accident caused by a "deep and dangerous hole," it was lawful and necessary to go beyond the face of the complaint and ascertain from the evidence whether the deep and dangerous hole referred to was the gas box of the defendant company; that the jury were to determine by an examination of the testimony offered in that case whether the verdict in the first suit was alone based on the gas box; if so, the District was entitled to recover. If, on the other hand, the jury found that the controversy in the first suit involved the question of liability on the part of the city for the gas

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box, and also for defective bricks around it, then it was the duty of the jury to ascertain whether the judgment which had been rendered against the city was because of the defective gas box or because of both the defect in the gas box and the bricks, and if the jury found that the judgment had been rendered in the former suit solely on the ground of the defective gas box, that judgment would be conclusive. If there was doubt on what ground the jury, in the previous suit, found its verdict, if the question of the gas box and bricks was before it, then the judgment would not be conclusive, and it would be an open question for the jury to weigh the evidence which might be produced on the subject irrespective of the former judgment. If in that contingency the jury were satisfied that the injury could not have happened but for the depression in the sidewalk occasioned by the 322]bricks, or that the *injury was aggravated by that fact so that "they could not apportion the injury between the gas box and the sidewalk, quite a grave question presents itself." On this grave question the court instructed: "If you can come to the conclusion that this depression in the sidewalk was one of the joint causes of the injury, I feel bound to say that I do not see how the District of Columbia could recover damages from the Gas Company. If, on the other hand, you are satisfied that the defect in the pavement played no conspicuous part in the injury, but that it was wholly due to the exposed condition of this gas box, then only one question remains, and that is whether the Gas Company was negligent in regard to the condition of that box, and whether its exposed condition was due to the negligence of the company." On the subject of negligence of the Gas Company, the court instructed that the former judgment did not conclusively fix upon the defendant the charge of negligence; that the negligence of the company might be ascertained from two conditions, either proof of actual negligence or of such failure to repair for a sufficient length of time as would justify the implication of negligence. There was a verdict and judgment for the plaintiff, the District of Columbia, and, on appeal, it was affirmed by the supreme court of the District, sitting in general term. The opinion of the general term is reported in 20 D. C. 39. Thereafter the case was brought by error here.

Messrs. **W. D. Davidge** and **W. B. Webb,** for plaintiff in error:

It was not in law the duty of the defendant to supervise and keep in repair the gas box.

It is conceded that whenever a party for his private benefit does an act, as in the common case of opening a coalhole, excavating an area, and the like, which renders the use of the street unsafe, he is liable for special injury. And it is further conceded that he is liable, irrespective of negligence on his part, for the simple reason that the structure is unlawful.

2 Dill. Mun. Corp. 4th ed. § 1032; *Congreve* v. *Smith*, 18 N. Y. 79; *Congreve* v. *Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Irvine* v. *Wood*, 51 N. Y. 225, 10 Am. Rep. 603.

Wholly different is the present case. The gas box in question and others of the same kind were placed in the sidewalk and paid for by the predecessor of the plaintiff acting from consideration of public duty and to accomplish public purposes and ends.

The design, material, and locality of the gas box were all prescribed by the predecessor of the plaintiff, and the box, when placed in the sidewalk, became as essentially public property as the sidewalk itself. It has existed in the sidewalk from the time it was placed there, by the force and command of law, and not by the act of any private party for private advantage. This gas box and others were placed in the sidewalk by the direction and in pursuance of the ordinance.

Keokuk v. *Independent Dist. of Keokuk*, 53 Iowa, 352.

The ordinance was not a nullity; it is sufficient that the charter of the defendant contained in plain terms the grant of the power in question. By an amendment of the charter of the plaintiff, approved the 23d of February, 1865 (13 Stat. at L. 434), the most explicit authority is given to enact the ordinance.

The duty to supervise and repair did not rest upon the defendant by reason of the benefit accruing to it in its relations to the consumers of gas.

The lot owner is not responsible over for a judgment recovered against the city.

Keokuk v. *Independent Dist. of Keokuk, supra; Jansen* v. *Atchison*, 16 Kan. 359; *Kirby* v. *Boylston Market Asso.* 14 Gray, 249; *Flynn* v. *Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Heeney* v. *Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Eustace* v. *Jahns*, 38 Cal. 3.

The testimony of Smith, a witness at the former trial, since deceased, was not competent to show notice to the defendant that the gas box was out of repair.

2 Dill. Mun. Corp. 4th ed. § 1026 and notes; *Robbins* v. *Chicago*, 67 U. S. 2 Black, 418 (17: 298), 71 U. S. 4 Wall. 657 (18: 427).

The plaintiff who joined in the infliction of the injury could not recover over against the defendant.

Messrs. **Sidney T. Thomas** and **Andrew B. Duvall,** for defendant in error:

While a municipal corporation, having the exclusive care and control of streets, is, in a proper case, liable to one who is injured by reason of the defective condition of one of its streets, it yet has a remedy over against a private party who has so used the streets as to produce the injury, unless the corporation concurred in the wrong. Such private party is concluded by the judgment against the corporation for his act or negligence, if he knew that the suit was pending and could have defended it, even though he had no express notice so to defend; but he is not estopped to show that he was under no obligation to keep the street in a safe condition, or that the injury did not result from his act or neglect, or that the corporation itself was also in fault.

Robbins v. *Chicago*, 67 U. S. 2 Black, 418 (17: 298), 71 U. S. 4 Wall. 657 (18: 427).

The verdict and judgment against the corporation in such case is conclusive upon the party in original default as to the facts: (1) that the highway was defective; (2) that the person was injured there while using due care; and, (3) of the amount of damage by the injury,

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but, not (1) of his liability to keep the place in repair, nor (2) of his having neglected (failed) to do so, nor (3) of his neglect or his failure having been the sole cause of the injury.

Boston v. *Worthington*, 10 Gray, 496.

And it is incompetent for the party in default to prove that in making a dangerous excavation he was guilty of no negligence, or that he properly guarded and covered the same on leaving off work on the night of the injury.

Portland v. *Richardson*, 54 Me. 46, 89 Am. Dec. 720.

The liability of the party in such cases is for the amount of the judgment against the corporation, with costs, interest, and counsel fees.

Chesapeake & O. Canal Co. v. *Allegheny County Comrs.* 57 Md. 201, 40 Am. Rep. 430; *Stoughton* v. *Porter*, 13 Allen, 191; *Port Jervis* v. *First Nat. Bank*, 31 Hun, 107; *Troy* v. *Troy & L. R. Co.* 49 N. Y. 657; *Rochester* v. *Montgomery*, 72 N. Y. 65; *Heiser* v. *Hatch*, 86 N. Y. 614.

It was, in law, the duty of the defendant to supervise and keep in repair the gas box in question.

Holly v. *Boston Gaslight Co.* 8 Gray, 124, 69 Am. Dec. 233.

The testimony of Smith, a witness at the former trial, since deceased, was entirely competent to show notice to the defendant that the gas box was out of repair.

1 Greenl. Ev. §§ 523, 525; *Lovejoy* v. *Murray*, 70 U. S. 3 Wall. 18 (18: 134); *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657 (18: 427).

It was not necessary that there should have been an actual cross-examination of the witness Smith as the opportunity to cross-examine was offered to the gaslight company.

Cazenove v. *Vaughan*, 1 Maule & S. 4; *McCombie* v. *Auton*, 6 Man. & G. 27.

Mr. Justice **White** delivered the opinion of the court:

The questions raised by the various assignments of error are: First, Did the legal obligation primarily rest on the Gas Company to repair and keep the gas box in good order? Second, Was that company liable over to the Dis-
323] trict in consequence *of its failure to do so? Third, Was the testimony of Smith, the witness in the original suit, admissible? Fourth, Was the judgment rendered against the District conclusive against the Gas Company?

We will consider these questions in the order stated.

First. Did the legal duty rest primarily on the Gas Company to repair and keep the gas box in order?

The Gaslight Company was incorporated by an act of Congress, approved July 8, 1848, and it was empowered "to manufacture, make, and sell gas . . . to be used for the purpose of lighting the city of Washington, or the streets thereof, and any buildings, manufactories, or houses therein contained and situate, and to lay pipes for the purpose of conducting gas in any of the streets, avenues, and alleys of said city; . . . *Provided, however*, That the said pipes should be laid subject to such conditions and in compliance with such regulations as the corporation of Washington may from time to time prescribe."

The trial court instructed the jury that the gas box was a part of the apparatus of the company, and hence it was its duty to exercise proper care over it and thus to prevent injury to persons using the sidewalk. The contention that this instruction was erroneous is based on the assertion that the gas box was not and could not become a part of the apparatus of that company, because under its charter only those things which were necessary in the manufacture of gas and which were needed to convey it after manufacture into and through the streets can be treated as part of its works. The proposition is without foundation. The plain object contemplated by the formation of the Gas Company was the supplying of the gas, to be by it manufactured, to consumers, and it is obvious that this could not be done without making a connection between the street mains and abutting dwellings. When such connections are made with the mains they receive from them and convey into dwellings highly inflammable material, which flows by an uninterrupted channel from the mains themselves into such dwellings. It must therefore have necessarily been contemplated that such connections with the *mains as were[324 from their very nature incidental to and inseparably connected with the consumption of gas should be a part of the apparatus of the Gas Company and be under its control, rather than under that of the city or the property owner. Indeed, the control by the Gas Company of the connection from its mains to the point of use is as absolutely necessary to make it possible for such company to carry out the very purpose of its charter as are the retorts and mains. Moreover the provision of the charter already quoted shows that it was thereby contemplated that the connections between the company's mains and the places where the gas was to be consumed should be made by the Gas Company and become a part of its apparatus. The charter does not confer the power to lay pipes upon those desiring a supply of gas, but gives such power to the company.

The danger of serious damage to the public at large and to the property of individuals and to the mains and other works and apparatus of the company, by intermeddling of third parties, would be precisely as great in the case of the lateral service pipes and the gas boxes placed in the sidewalks as in the case of interference with street mains. The necessity for affording protection to the company against such interference undoubtedly led to the enactment of the 8th section of the company's charter, wherein it is provided:

"That if any person or persons shall wilfully do, or cause to be done, any act or acts whatever, whereby the works of said corporation or any pipe, conduit, plug, cock, reservoir, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured, or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of the damage sustained by means of such offense or injury, to be recovered in the name of the said corporation, with costs of suit, in any action of debt, to be brought in any court having cognizance thereof."

The authority of the company over the gas

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boxes and its correlative duty to supervise and keep them in order, thus deduced from the terms 325] of the charter, the nature of its *business, and the use to which the gas boxes are applied, is also sustained by authority. In *Com.* v. *Lowell Gas Light Co.* 12 Allen, 77, the court, in considering the question of what were the machinery and appliances of such a company (p. 78), said:

"The mains or pipes laid down in the streets and elsewhere to distribute the gas among those who are to consume it were clearly a part of the apparatus necessary to be used by the corporation in order to accomplish the object for which it was established. They constituted a part of the machinery by means of which the corporate business was carried on, in the same manner as pipes attached to a pump or fire engine for the distribution of water, or wheels in a mill which communicate motion to looms and spindles, or the pipes attached to a steam engine to convey and distribute heat and steam for manufacturing purposes, makes a portion of the machinery of the mill in which they are used. Indeed, in a broad, comprehensive, and legitimate sense, the entire apparatus by which gas is manufactured and distributed for consumption throughout a city or town constitutes one great integral machine, consisting of retorts, station meters, gas holders, street mains, service pipes, and consumers' meters, all connected and operating together, by means of which the initial, intermediate, and final processes are carried on, from its generation in the retort to its delivery for the use of the consumers."

It would be unreasonable to infer that Congress, when it authorized the use of the streets or sidewalks for the purposes of the Gas Company's business, contemplated that the city of Washington or its successor, the District of Columbia, should keep in repair such apparatus, the continued location of which in the sidewalks of the city was permitted, not only as an incident to the right to make and sell gas, but also for the pecuniary benefit of the Gas Company. We conclude, therefore, that the duty was imposed upon the Gas Company to supervise and keep the gas box in repair. This duty not only does not conflict with the charter of the company, but on the contrary is sanctioned by its tenor, and is imposed as an inevitable accessory of the powers which the charter confers. Nor do we think that this duty was af-326] fected by the *circumstances that the cost of the labor and materials used in the construction of the connection and gas box was paid by an occupant or owner of property who desired to be furnished with gas. As the service pipe and stopcock was a part of the apparatus of the company and was used for the purpose of its business, it is entirely immaterial who paid the cost, or might in law, on the cessation of the use of the service pipe and gas box by the company, be regarded as the owner of the mere materials. Certainly it would not be claimed that if the box and its connections became so defective or out of repair that gas escaped therefrom and caused injury, the company could legally assert that it was under no obligation to take care of the apparatus, because of the circumstance that it had been compensated by others for its outlay in the construction of the receptacles from which the gas had escaped.

The argument seeking to distinguish between the service pipe and other appliances of the Gas Company and the gas box, so as to make the company liable for the one end and not for the other, is without merit. All these appliances were parts of the one structure, put in position and used together for the purposes of the company. There is nothing in the record even tending to show that such box was not one of the usual appliances of a gas company. It was manifestly treated as one of such instrumentalities, since it was put in the sidewalk as part of the works constructed for the purpose of introducing gas into the premises.

Nor are the foregoing conclusions weakened by the provisions of the city ordinance of March, 1866. That ordinance made it obligatory to construct service connections with the mains wherever the streets were ordered paved without regard to an existing or immediately expected necessity for such service. The purpose of the ordinance was to secure connections for both gas and water before streets were paved, thus obviating the tearing up of the pavement when once laid. Whether the company, under its charter and the laws relating thereto, would be compelled to make or allow to be made indefinite service connections with vacant property, need not be considered, because its determination bears no relation to the *question [327 whether the company is bound to keep its appliances, when constructed, in safe condition. In leaving this branch of the case, however, we add that it is clear from the proof that the gas box in question was not constructed in consequence of a duty imposed by this ordinance. It was put in place by the company voluntarily, at the request of the property owner for service. The work was done by the company upon a permit given by the District allowing the opening of an existing street and the sidewalk thereon.

Second. Had the District a cause of action against the Gas Company resulting from the fact that it had been condemned to pay damages occasioned by the defective gas box, which it was the duty of the Gas Company to supervise and repair?

An affirmative answer to this proposition is rendered necessary by both principle and authority. This court said in *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418, 422 [17: 298, 302]: "It is well settled that a municipal corporation having the exclusive care and control of the streets is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer." And the same doctrine is reiterated in almost the identical language in *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657, 670 [18: 427, 429].

The principle thus announced qualifies and restrains within just limits the rigor of the rule which forbids recourse between wrongdoers. In the leading case of *Lowell* v. *Boston*

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& L. R. Corp. 23 Pick. 24, 32, 34 Am. Dec. 33, the doctrine was thus stated:

"Our law, however, does not in every case disallow an action by one wrongdoer against another to recover damages incurred in consequence of their joint offense. The rule is, *In pari delicto potior est conditio defendentis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his codelinquent for damages incurred by their joint offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, 328]*and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

In *Brooklyn* v. *Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469, the same rule was applied, the court saying (p. 487): "Where the parties are not equally criminal, the principal delinquent may be held responsible to a codelinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators." All the cases referred to involved only the right of a municipal corporation to recover over the amount of the damages for which it had been held liable in consequence of a defective street, occasioned by the neglect or failure of another to perform his legal duty. The rule, however, is not predicated on the peculiar or exceptional rights of municipal corporations. It is general in its nature. It has been applied to public piers (*Oceanic Steam Nav. Co.* v. *Compania Transatlantica Espanola*, 144 N. Y. 663, 134 N. Y. 461); to the right of a property owner to recover for damages which he had been compelled to pay for a defective wire attached by a gaslight company to the chimney of the owner's house (*Gray* v. *Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324); to the right of a master to recover over the damages which he had been obliged to pay in consequence of a servant's negligence. *Grand Trunk R. Co.* v. *Latham*, 63 Me. 177; *Smith* v. *Foran*, 43 Conn. 244, 21 Am. Rep. 647. Indeed, the cases which illustrate the rule and its application to many conditions of fact are too numerous for citation, and are collected in the text books. Whart. Neg. 246; 2 Thomp. Neg. 789, 1061; Shearm. & Redf. Neg. (4th ed.) § 301; 2 Dill. Mun. Corp. § 1035, and cases there referred to in note.

Third. Was the testimony of Smith, the witness in the original action, admissible for the purpose of throwing light on the record of that action, in order to show the subject-matter there in controversy, and thereby to assist in the ascertainment of what was concluded by the judgment therein rendered?

329] *No question is made as to the adequacy of the foundation laid for the introduction of the secondary evidence; the sole controversy presented is the admissibility of the testimony. The bill of exceptions is general and specifies no particular objection. Clearly, even, although it be conceded that the testimony of the witness given on the first trial was *res inter alios* as to the defendant in this action, and was therefore not admissible as going to establish substantive facts, yet obviously it was competent for the purpose of throwing light upon the record of the first action, and thus elucidating the determination of the question of what was the subject-matter covered by the judgment rendered in that action. The contention of the plaintiff was that the judgment in the first action was based on the liability of the District for the defective gas box, and was conclusive as against the defendant in this suit. The elementary rule is that, for the purpose of ascertaining the subject-matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined. *Russell* v. *Place*, 94 U. S. 606, 609, 610 [24: 214, 215]; *Cromwell* v. *Sac County*, 94 U. S. 351, 355, 356 [24: 195, 198, 199]; *Lewis* v. *Ocean Nav. & P. Co.* 125 N. Y. 341, 348; *Littleton* v. *Richardson*, 34 N. H. 179, 188, 66 Am. Dec. 759; Freem. Judgm. § 273, and authorities there cited.

Fourth. Was the judgment against the District rendered after notice to the Gas Company, and opportunity afforded it to defend, conclusive of the liability of the Gas Company to the District?

As a deduction from the recognized right to recover over, it is settled that where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action. There is here no question of the sufficiency of the notice, or of the ample adequacy of the opportunity given the Gas Company to defend the suit had it elected to do so.

In both *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 [17: 298], and *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657 [18: 427], this court, after announcing the rule as to the liability over in the language already quoted, also held that where, in the *first suit, proper notice was[330 given to the party liable over, the first judgment would be conclusive against the latter in the action to recover over. In *Boston* v. *Worthington*, 10 Gray, 496, 498, 499, the language of the court in *Littleton* v. *Richardson*, 34 N. H. 187, 66 Am. Dec. 759, was quoted and adopted:

"When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

In *Oceanic Steam Nav. Co.* v. *Compania Transatlantica Espanola*, 144 N. Y. 663, 665, the rule is thus stated:

"It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim, and that the action is pending, with full opportunity to defend or to participate in the defense. If he then neglects

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or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record. *Port Jervis* v. *First Nat. Bank*, 96 N. Y. 550; *Rochester* v. *Montgomery*, 72 N. Y. 65; *Albany City Sav. Inst.* v. *Burdick*, 87 N. Y. 40, 45; *Andrews* v. *Gillespie*, 47 N. Y. 487; *Heiser* v. *Hatch*, 86 N. Y. 614."

The foregoing rulings are supported by many decided cases. *Portland* v. *Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Veazie* v. *Penobscot R. Co.* 49 Me. 119; *Reggio* v. *Braggiotti*, 7 Cush. 166; *Westfield* v. *Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Littleton* v. *Richardson*, 34 N. H. 179, 187, 66 Am. Dec. 759, and authorities there cited; *West Chester* v. *Apple*, 35 Pa. 284; *Catterlin* v. *Frankfort*, 79 Ind. 547, 41 Am. Rep. 627. See also 2 Dill. Mun. Corp. § 1035, and authorities there cited.

The contention of the plaintiff in error, however, is that although it be conceded that **331**] the judgment rendered against *the District in the first suit be conclusive, yet the judgment in this action to recover over should be reversed for the following reasons:

First, because, giving to the judgment first rendered all the effect to which it is entitled, it did not conclude the question of whether the Gas Company was negligent. And that, aside from the effect of the judgment, there was no evidence tending to show negligence, except the testimony of the witness Smith, which, if admissible to aid in the ascertainment of what was the thing adjudged by the judgment in the former action, yet was not competent to establish the existence of negligence as a substantive fact, apart from the probative force of the judgment itself. Second, that the judgment in the first suit was not conclusive as to whether the broken brick (for which the Gas Company was clearly not liable) had contributed to the accident, and therefore there was error in this particular in the instruction given by the trial court to the jury.

As to the first of these two contentions, the trial court instructed the jury that, although the judgment in the first action was binding on the Gas Company, it was not conclusive as to the negligence of that company, but that such negligence could be inferred by the jury from the testimony of Smith, thus treating that testimony as possessing intrinsic proving power. Both these rulings were erroneous. The testimony of Smith taken in the first suit was *res inter alios*, and therefore incompetent against the Gas Company as independent testimony. The fact that it was admissible for the purpose of determining the scope of the thing adjudged in the suit in which it was given did not justify its being used for a distinct and illegal purpose. Error, however, in this particular was in no sense prejudicial if the judgment in the first action conclusively established the negligence of the Gas Company. The liability of the District for the injury inflicted by the defective gas box depended on whether it had been guilty of negligence. But the neglect of the District to repair the gas box being one of omission as distinguished from the **332**]active doing of a negligent act, this *negligence, in the absence of a statutory rule to the contrary, could only have resulted from two conditions of fact—failure to repair after due notice of the defect, or proof of the existence of the defect for a sufficient lapse of time so as to justify the implication of knowledge and the resulting presumption of negligence. The elementary rule is thus stated in Dillon on Municipal Corporations, § 1024, where a copious list of adjudicated cases is found: "Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for defects occasioned by the wrongful acts of others; but as the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or of the facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability."

In the action against the District there was no evidence tending to show actual notice of the uncovered gas box. Indeed, the only proof tending to show negligence was the testimony of the witness Smith that the gas box had been observed by him to be uncovered for a considerable time prior to the accident. The verdict, therefore, against the District necessarily determined that the defect in the gas box had existed for such a length of time as to impute negligence to those whose duty it was to keep it in repair. The finding of this fact in the first action was an essential prerequisite to a judgment against the District. The length of time required to imply knowledge and negligence on the part of the District is also sufficient in law to imply such knowledge and negligence on the part of the Gas Company. It follows, therefore, that the judgment against the District conclusively established a fact from which, as the duty to repair rested on the Gas Company, its negligence results.

The proposition that the judgment, although conclusive, does not determine the negligence of the Gas Company, is a mere sophistry, since, on the one hand, it admits the estoppel resulting from the judgment, and, on the other, denies a fact *upon which the judgment [**333** depends, and without which it could not exist. It is true that in *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 [17: 298], in speaking of the conclusiveness of the judgment rendered against the city, the court said (p. 423 [302]): "Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened." But in that case the liability of the city rested on actual notice of the defect in the street, and not on implied negligence based on the continued existence of the defect which caused the injury; therefore the essential fact on which the judgment against the city rested did not, as a legal consequence, imply negligence on the part of Robbins. Here, of course, a different state of fact gives rise to a different legal result. *Rochester* v. *Montgomery*, 72 N. Y. 65; *Carpenter* v. *Pier*, 30 Vt. 81, 87; *Port Jervis* v. *First Nat. Bank*, 96 N. Y. 550.

The error which it is asserted the trial court committed on the subject of the broken brick

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at the side of the gas box, and its alleged contribution to the accident, may be conceded without creating cause for reversal. There was no evidence tending, either in the first action or in this, to show actual notice to the District of the defective brick, nor was there evidence tending to show the existence of the defect, for such length of time as to impute knowledge and negligence to the District. One or the other of these conditions being essential to establish negligence and thereby render the District liable for any accident to which the broken brick may have contributed, it follows that in neither of the actions was there any evidence which would have supported a judgment against the District because of the defective brick.

Judgment affirmed.

334] ALBERT T. SCHROEDER ET AL., *Appts.*, *v.* JOHN M. YOUNG.

(See S. C. Reporter's ed. 334-345.)

When judicial sales may be canceled for fraud —purchase by attorneys—suit in equity to annul sale.

1. Execution sales of real property, made for grossly inadequate prices, may be canceled where the property was purchased by one of the plaintiff's attorneys, and the sales were made in pursuance of a plan to obtain the property by successive sales of different parts thereof for the least possible sum, leaving a balance due after each sale so as to sell all the debtor's property, and the levies were made under specific directions of the attorney, who was the sole bidder at the sales and the only person present except the officer conducting the sales,—especially where an offer to redeem the property by payment of more than was due has been refused.
2. One of a firm of attorneys who has acquired an interest in the property under a purchase on execution sales, fraudulently made by his partner, cannot set up the title thereby acquired and at the same time repudiate his partner's acts in the acquisition thereof.
3. The expiration of the statutory period for redemption from a sale of land under execution does not bar a suit in equity to annul the sale and a deed made thereon, because of the fraudulent conduct of plaintiff's attorneys, who purchased at the sale, where they lulled the debtor into false security by assurances of permission to redeem irrespective of the statute, although these were not in writing and were made without consideration.

[No. 458.]

Submitted January 9, 1896. Decided March 2, 1896.

ON APPEAL from a decree of the Supreme Court of the Territory of Utah affirming the decree of the District Court of the Third Judicial District of that Territory, permitting the plaintiff, Young, to redeem certain real property in Salt Lake City from execution sales, and ordering the defendants, Albert T. Schroeder *et al.*, to execute and deliver to plaintiff a deed of the property. *Affirmed.*

See same case below, 10 Utah, 155.

NOTE.—*As to when execution may issue against individual property of administrator or executor for debts of deceased*, see note to Dickson v. Wilkinson, 11: 491.

As to laws changing exemptions from execution, constitutionality of, see note to Gunn v. Barry, 21: 212.

As to cancelation of a deed or a contract in equity for fraud, concealment, or misrepresentation, see note to Neblett v. Macfarland, 23: 471.

As to what are fraudulent conveyances; when void; when voluntary conveyances are valid; when void,—see note to Gaylord v. Kelshaw, 17: 612.

As to inadequacy of price, to impeach or set aside sale, see note to Erwin v. Parham, 13: 952.

As to how far failure of title is defense to action for purchase price,—see note to Greenleaf v. Cook, 4: 172.

Judicial sales, when will be set aside; fraud; irregularity; accident; mistake; inadequacy of price; effect of reversal of judgment; jurisdiction.

Judicial sales when affected with fraud, irregularity, or error, or wilful disregard of the statutory regulations by the officer, whereby the rights of either of the parties interested are seriously affected, will be set aside, and a resale ordered of the property. Jarboe v. Colvin, 4 Bush, 70; King v. Platt, 37 N. Y. 155; Rhonemus v. Corwin, 9 Ohio St. 366; Hopton v. Swan, 50 Miss. 545; Hilleary v. Thompson, 11 W. Va. 113; Fix v. Loranger, 50 Mich. 199; Hudson v. Morriss, 55 Tex. 595; Fleming v. Maddox, 30 Iowa, 239; Ewald v. Coleman, 19 Ind. 66; Kauffman v. Walker, 9 Md. 240.

Among the causes for which sales have most often been set aside are fraud, accident, and mistake. Seaman v. Higgins, 2 N. J. Eq. 214, 34 Am. Dec. 200, with *note*; Aldrich v. Wilcox, 10 R. I. 405, 414; Wetzler v. Schaumann, 24 N. J. Eq. 64; Campbell v. Gardner, 11 N. J. Eq. 423, 69 Am. Dec. 596; Littell v. Zuntz, 2 Ala. 256, 36 Am. Dec. 415; Hoppock v. Conklin, 4 Sandf. Ch. 582; Cummings' Appeal, 23 Pa. 509; Allen v. Clark, 36 Wis. 101.

Where the complainant in the original cause promised to notify the petitioner, who was interested in the property, of the time and place of sale, and forgot so to do, in consequence whereof the petitioner did not attend, and the property was sacrificed, such sale was set aside. Pell v. Vreeland, 35 N. J. Eq. 22.

A judgment creditor who, by reason of the unusual hour at which an execution sale is made and the inclemency of the weather, is prevented, without laches on his part, from being present to protect his interest as a bidder against an insolvent judgment debtor, whereby, and because of few bidders being present, the property sold for less than its value and less than the judgment, is entitled in equity to have the sale set aside. Johnson v. Crawl, 55 Tex. 571; Weir v. Travelers' Ins. Co. 32 Kan. 325.

Where, on inquiry at the office of the sheriff by the attorney of a defendant in an execution, he is informed by a deputy in charge of the office that the sale of the property levied on, consisting of three hundred and thirty-three shares of stock in a corporation, will take place at twelve o'clock on the day of sale, and subsequently the sale is made *en masse* at ten o'clock, in the absence of the defendant or his attorney, and without their knowledge, and at a great sacrifice of the value of the property, such sale will be set aside, on timely application on motion of defendant. American Wine Co. v. Scholer, 85 Mo. 496.

When a purchaser of land at sheriff's sale induces others not to bid and thus procures the land for less than it is worth the sale will be set aside, though the action is not instituted until after the year of redemption has expired. Lynch v. Reese, 97 Ind. 300.

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Statement by *Mr. Justice* **Brown**:

This was a complaint in the nature of a bill in equity originally filed in the third judicial 335]district court of the *territory of Utah, by John M. Young against Frank B. Stephens and wife and Albert T. Schroeder and wife, as defendants, to set aside and cancel certain execution sales of real property in Salt Lake City as fraudulent and void, and for permission to redeem from such sales, notwithstanding the expiration of the statutory time for redemption, and for a decree compelling the defendants to convey to the plaintiff the property mentioned, upon just and equitable terms.

The material facts in the case were that, on March 6, 1891, Clark, Eldredge, & Co., a corporation, obtained judgment by default in said court against the appellee, John M. Young, Henry Goddard, and George Goddard in the sum of $1,673.36, with $30.60 costs. Frank B. Stephens and Albert T. Schroeder, partners and the principal defendants, were the attorneys for Clark, Eldredge, & Co. in such action. The plaintiff, John M. Young, was the owner of the undivided one half of two parcels of land in Salt Lake City, and plaintiff's sister, Lydia Y. Merrill, was the owner of the other undivided one half of the said parcels. Their title was derived from the will of their father, and, as to the greater part of such property, was subject to a right in Sarah Milton Young and Ann Olive Young to receive each one fourth of the money arising from said property during their respective lives.

On April 29, 1881, an execution was issued in said action of Clark, Eldredge, & Co. against John M. Young, directing the marshal

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Where two separate lots, of the value of $8,000, are sold on execution for $65, *en masse*, without first offering them separately, a court of equity will interpose, if invoked in a reasonable time, and set the sale aside. Berry v. Lovi, 107 Ill. 612.

Where the land sold for one fortieth of its real value, the sale was set aside, it being shown that the sale was made in violation of an agreement between the debtor and creditor for indulgence, and both uniting in proceedings to set it aside. Hughes v. Duncan, 60 Tex. 72.

At an execution sale the defendant's property was bid off by the plaintiff at an inconsiderable sum, in pursuance of an alleged fraudulent arrangement to suppress competition among bidders. Held, in an action to impeach the title acquired by plaintiff, that the sale should be set aside and the parties placed *in statu quo*, without prejudice to the plaintiff's remedies from lapse of time since the sale. Currie v. Clark, 90 N. C. 355.

Where an attachment sale is made without a bond having been given and confirmed, the decree confirming such sale will be reversed and the sale set aside. Hall v. Lowther, 22 W. Va. 570.

An execution sale of real property will not be set aside merely because sold for much less than its real value, there remaining a right of redemption after the sale. Nor will it be set aside because the tract sold, being composed of parts of two lots and occupied by two dwelling houses, was sold as one parcel, it being determined that in fact the property consisted of but one tract or parcel of land. Coolbaugh v. Roemer, 32 Minn. 445.

Where a judgment is rendered and an execution issued against Rosine Coons, it is not sufficient reason for setting aside a sale of real estate made on such execution that the right name of the defendant is shown to be Rosina Kuhn. Kuhn v. Kilmer, 16 Neb. 699.

Defects in the advertisement of the sale by the sheriff, and in the notice given to the defendant in execution, are mere irregularities, and do not furnish good grounds for setting aside the sale without proof of consequent injury to the party complaining. Holly v. Bass, 68 Ala. 206.

Mere irregularity in making a judicial sale, when taken in connection with gross inadequacy of consideration, will not alone, as matter of law, be held a sufficient ground for vacating such sale, in the absence of facts showing that the irregularity conduced to the inadequacy of the sum bid. Allen v. Pierson, 60 Tex. 604.

In Pennsylvania, after a sheriff's sale has been confirmed, the purchase money paid, the deed acknowledged, recorded, and delivered to the purchaser and possession of the premises taken by him, the court has no power, upon a rule to show cause, to set aside the sale and compel the purchaser to deliver up the deed to be canceled. Evans v. Maury, 112 Pa. 309; Cooper v. Wilson, 96 Pa. 409.

In Illinois, after the deed for real estate sold under execution has been made, the court has no power, on motion, to set aside the deed or set aside the sale, unless there was no judgment or execution, or the court had no jurisdiction to render the judgment. Jenkins v. Merriweather, 109 Ill. 647.

The order of the court setting aside a judicial sale without notice to the parties interested is erroneous. Baker v. Hall, 29 Kan. 617.

A sale of land under an alias writ will not be set aside as void merely because the writ was improvidently issued by the clerk without the plaintiff's order. Johnson v. Murray, 112 Ind. 154.

The doctrine of estoppel will often prevent a party from having a sale set aside where he has acquiesced therein, delayed too long, or received the benefits thereof. Walet v. Haskins, 68 Tex. 418.

Mere inadequacy of price is not of itself sufficient cause, in an ordinary case, for setting aside the sale. Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Parker v. Glenn, 72 Ga. 637; Beckwith v. Kings Mountain Min. Co. 87 N. C. 155; Hunt v. Fisher, 29 Fed. Rep. 801, and *note*.

A sheriff's sale on execution of real estate of the alleged value of $6,400, subject to a mortgage of $4,000, for the sum of $5, will not be set aside merely on the ground of inadequacy of price. Kerr v. Haverstick, 94 Ind. 178. So held where $165 was bid for property worth $600. Sowles v. Harvey, 20 Ind. 217, 83 Am. Dec. 315; Holly v. Bass, 68 Ala. 206.

Gross inadequacy of price has been treated as a badge of fraud, and, when coupled with other suspicious circumstances, may be sufficient cause for setting aside the sale. Fisher v. Shelver, 53 Wis. 498; Ames v. Gilmore, 59 Mo. 537; Fuller v. Brewster, 53 Md. 358, 361; Apperson v. Burgett, 33 Ark. 338; Stevens v. Dillman, 86 Ill. 233; Loring v. Dunning, 16 Fla. 119; Kloepping v. Stellmacher, 21 N. J. Eq. 328; Fletcher v. McGill, 110 Ind. 395; Cubbage v. Franklin, 62 Mo. 364; Morris v. Robey, 73 Ill. 462; Pearson v. Hudson, 52 Tex. 352; Lee v. Davis, 16 Ala. 516; Beckwith v. Kings Mountain Min. Co. 87 N. C. 155.

Inadequacy of price is not sufficient *per se* to set aside a sale, unless it is so gross as, when combined with other circumstances, to amount to fraud; but if it be great, it is of itself a strong circumstance, to evidence fraud. Parker v. Glenn, 72 Ga. 637.

Where an order of sale is issued without the authority or knowledge of the judgment creditor or any of his attorneys, and the creditor has no knowledge of the day of sale, and the attorneys of the creditor testify they had no notice thereof, and the attorneys are not present at the sale, and the real estate is bid in by one of the judgment debtors under the direction of his wife, for and in her

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of the United States, if sufficient personal property could not be found to satisfy the judgment, to levy upon the real estate belonging to Young and his codefendants in such action; and on May 7, 1891, the marshal gave notice that he attached and levied on all the right, title, claim, and interest of the said John M. Young and his codefendants in and to that parcel of land described as beginning 101 feet north, and 39½ feet east of the S. W. corner of lot 2, block 70, plat "A," Salt Lake City survey, and running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning; and also on that part of the same lot described as beginning 32½ feet west from the S. E. corner of the said lot, running thence west 38 feet, 336] thence north 98½ *feet, thence east 38 feet, thence south 98½ feet to the place of beginning; and also on a part of lot 12, block 8, 5-acre plat "A," Big Field survey.

Afterwards, on July 25, 1891, the marshal certified that he had sold the property described in the notice to John Clark, and, deducting his commissions and expenses of sale, paid the balance realized upon said sale, *viz.*, $962.36, to the attorneys of Clark, Eldredge, & Co., and further returned that there was still due and unpaid on said judgment the sum of $886.90. The John Clark mentioned in the return was a director and the principal stockholder of Clark, Eldredge, & Co. Afterwards, on July 28, an alias execution issued from the said court in such action for the full sum of $1,673.36, and $30.50 costs, by virtue of which the marshal levied upon a certain

name, at a grossly inadequate price, the district court is justified in setting the sale aside. Weir v. Travelers' Ins. Co. 32 Kan. 325.

If the inadequacy of price at a sale on an execution be so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of unfairness or has taken any undue advantage, or if the owner of the property or the party interested in it has been for any other reason mislead or surprised, then the sale will be regarded as fraudulent and void, and the party injured will be permitted to redeem the property sold. Graffam v. Burgess, 117 U. S. 180 (29: 839).

Where real estate is sold at sheriff's sale, a few minutes prior to the time at which the sale was advertised to take place, and at a grossly inadequate price, the sale may be set aside on motion of the defendant. Pickett v. Pickett, 31 Kan. 727.

Any party in interest, usually the plaintiff, the defendant, or the purchaser, may have the sale vacated for good cause when he has been prejudiced thereby. But a stranger in interest who is not injuriously affected by the sale cannot have it vacated. Freem. Executions, § 305; Galbreath v. Drought, 29 Kan. 711; Cravens v. Wilson, 48 Tex. 324; United States v. Vestal, 12 Fed. Rep. 59; *Re* Gilmer, 21 La. Ann. 589; Laird v. Laird, 4 Pac. L. J. 474; Glassell v. Wilson, 4 Wash. C. C. 59.

One who seeks to set aside a sale should act promptly, lest innocent parties should acquire rights, or he should be deemed to have acquiesced therein. Vanduyne v. Vanduyne, 16 N. J. Eq. 93; Cunningham v. Felker, 26 Iowa, 117; Lyon v. Brunson, 48 Mich. 194; Central P. R. Co. v. Creed, 70 Cal. 497; Cowan v. Sapp, 81 Ala. 526; Raymond v. Pauli, 21 Wis. 531; Jenkins v. Merriweather, 109 Ill. 647; Ingram v. Belk, 2 Strobh. L. 207, 47 Am. Dec. 591; Stewart v. Marshall, 4 G. Greene, 75.

And notice of the motion or proceeding to vacate a sale should be given to all parties in interest. Wright v. Leclaire, 3 Iowa, 241; Osborn v. Cloud, 21 Iowa, 236; Lyster v. Brewer, 13 Iowa, 461; Stark v. Mitchell, 2 A. K. Marsh. 16; Williams v. Cummins, 4 J. J. Marsh. 637; Toler v. Ayres, 1 Tex. 398; McKinney v. Jones, 7 Tex. 598, 58 Am. Dec. 83; Sears v. Low, 7 Ill. 281; Baker v. Hall, 29 Kan. 617; Cline v. Green, 1 Blackf. 53; State Bank v. Marsh. 10 Ark. 129.

Void process confers no right on an officer to sell property; and all acts done under it are absolute nullities. Mitchell v. St. Maxent, 71 U. S. 4 Wall. 237 (18: 326); Gantly v. Ewing, 44 U. S. 3 How. 707 (11: 794).

A decree which is interlocutory, in which no authority is given to sell until a commissioner had reported and the court had passed on the report, does not authorize a sale. Gray v. Brignardello, 68 U. S. 1 Wall. 627 (17: 693).

A purchaser at a judicial sale does not acquire a good title unless the formalities prescribed by law for the alienation of property were observed. Gaines v. Lizarde, 73 U. S. 6 Wall. 719 (18: 967); Erwin v. Lowry, 48 U. S. 7 How. 172 (12: 655).

Mere inadequacy of price does not of itself make void a purchase at a judicial sale, or furnish a sufficient reason for dismissing a bill in chancery based on such purchase. Erwin v. Parham, 53 U. S. 12 How. 197 (13: 952).

A tenant of property who bought it at a judicial sale for a trifle, in the absence of his landlord, by unfair practices which prevented persons from bidding, may be compelled in equity to reconvey to his landlord. Cooks v. Izard, 74 U. S. 7 Wall. 559 (19: 275).

A bona fide purchaser of land under a sale made without authority is not protected. Williamson v. Irish Presbyterian Congregation, 49 U. S. 8 How. 565 (12: 1200); Gantly v. Ewing, 44 U. S. 3 How. 707 (11: 794); Williamson v. Ball, 49 U. S. 8 How. 566 (12: 1200); Gaines v. New Orleans, 73 U. S. 6 Wall. 642 (18: 950).

In judicial sales there is no warranty, express or implied. The Monte Allegre, 22 U. S. 9 Wheat. 616 (6: 174); Waples v. United States, 110 U. S. 630 (28: 273).

Reversal of the judgment does not affect a purchaser at a sale under it, not a party to the suit. McGoon v. Scales, 76 U. S. 9 Wall. 23 (19: 545); Gray v. Brignardello, 68 U. S. 1 Wall. 627 (17: 693).

A judicial sale and title acquired thereunder, under proceedings of a court of competent jurisdiction, cannot be questioned collaterally, except for fraud in which the purchaser is participant. Griffith v. Bogert, 59 U. S. 18 How. 158 (15: 307); Grignon v. Astor, 43 U. S. 2 How. 319 (11: 283).

If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question. Thompson v. Tolmie, 27 U. S. 2 Pet. 157 (7: 381); Voorhees v. Jackson, 35 U. S. 10 Pet. 449 (9: 490).

A sale under execution without notification to defendant, of his right of exemption as the head of a family, may be vacated in Missouri even after the execution of a deed to the purchaser. Finke v. Craig, 57 Mo. App. 393.

A sale of real property under foreclosure of a mortgage will not be set aside on the ground of inadequacy of price, in the absence of any available assurance that a higher and better price will be realized by the proposed sale of property. Fidelity Ins. T. & S. D. Co. v. Byrnes, 166 Pa. 496.

A judicial sale is properly set aside upon application promptly made by a mortgagee, showing gross inadequacy of price and a mistaken belief that his lien would not be affected, accompanied by an offer to bid a substantial increase. Phillips v. Wilson, 164 Pa. 350.

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other parcel of the same lot described as beginning 64½ feet west of the N. E. corner of said lot 2, running thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90¾ feet, thence east 31½ feet, thence north 41½ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning; and on August 25 the marshal returned that he had sold these premises to the defendants Stephens and Schroeder for the sum of $828.70, and further certified that the judgment obtained by said corporation was still unsatisfied to the extent of $100.

On September 30 said marshal made a further return to the last-mentioned writ, in which he certified that he sold all of lot 12, block 8, 5-acre plat "A," Big Field survey, situate in Salt Lake county, and also a certain parcel of land described as beginning 39 feet east and 81 feet north of the S. W. corner of said lot 2, running thence north 209 feet, thence east 16½ feet, thence south 209 feet, thence west 16½ feet to the place of beginning, to Stephens and Schroeder for the sum of $136, and that, deducting the costs and expenses of said last levy, amounting to $30, paid the balance, $106, to the attorneys of Clark, Eldredge, & Co., and returned said writ fully satisfied.

The court found that all that part of lot 2 as 337] described in *this statement, a plat of which appeared in the record, constituted a single parcel of land, and should have been regarded and treated as such, and not as being divided into separate lots or parcels, and that the first parcel sold being 15½ by 28 feet had no ingress or egress, and that the same as sold would necessarily be sacrificed on such sale on account of its location, but that at the time of the sale of this parcel neither Stephens nor Schroeder had actual knowledge of any other realty owned by plaintiff.

The other material facts are stated in the opinion of the court.

Before the case was called for argument, the suit was settled so far as the defendants Stephens and his wife were concerned, leaving Schroeder and his wife sole defendants. The case coming on to be heard upon pleadings and proofs, the district court made a decree permitting the plaintiff Young to redeem the property upon paying to the defendants the sum of $723.25, less certain costs, but subject to one half of a mortgage executed by the defendants, who were ordered to execute and deliver to plaintiff a deed of the property. From this decree an appeal was taken to the supreme court of the territory, which affirmed the decree of the district court, whereupon appellants prayed and were allowed an appeal to this court.

Messrs. **A. T. Schroeder** and **Jas. B. Edmonds** for appellants.

Mr. **Parley L. Williams** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Plaintiff relies mainly for a decree in this case upon the fact that his interest in the property in question, which the trial court found to be worth $26,000, was sacrificed at these several judicial sales to pay a judgment of little more than $1,700.

While mere inadequacy of price has rarely been held *sufficient in itself to justify set [338 ting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price,—the sale may be set aside, and the owner may be permitted to redeem.

Thus, in *Byers* v. *Surget*, 60 U. S. 19 How. 303 [15: 670], lands to the amount of 14,000 acres, and estimated at from $40,000 to $70,000 in value, were sold by the sheriff in satisfaction of a judgment for costs of $39, to the attorney for the successful party, and conveyed to him for $9.31½. The sale was pronounced to have been fraudulent and void, and a reconveyance of the property was decreed. It appeared that the owner of the property had no knowledge of the suit until he was informed of the sale of the land; that the attorney for the successful party, the defendant, assumed himself the power to tax the costs, the right of selecting the final process, of prescribing the description and quantity of the property which he chose to have seized in satisfaction, of directing the sheriff as to the various steps to be taken by him, and of becoming the purchaser himself for the petty sum of $9.31½. Of this proceeding, *Mr. Justice* Daniel in delivering the opinion of the court remarks: "Such is the history of a transaction which the appellant asks of this court to sanction; and it seems pertinent here to inquire under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused, or even palliated."

In *Graffam* v. *Burgess*, 117 U. S. 180 [29: 839], two judgment *creditors became the pur- [339 chasers for about $150 of unencumbered property worth at least $10,000, although the judgment debtor had $3,000 worth of furniture and personal property in the house subject to levy. During the temporary absence of the complainant, the defendants entered upon the premises, broke into the house and took possession of it on behalf of the purchasers, removed the furniture and other personal property, including the wearing apparel of the complainant, took possession of her personal correspondence and papers and the sum of $170 in money, and still retained possession of the property at the time of the filing of the bill. The court found that the complainant was ignorant of the issue of the execution or of the sale of the property, that the purchasers knew that she was unconscious of it, and endeavored to keep her so, and took an inequita-

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bie advantage of her ignorance to get possession of it. In reply to the argument that the proceedings were regular, *Mr. Justice* Bradley observed: "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law." The court commented most severely upon the conduct of the purchasers, and found no difficulty in setting aside the sale, although four members of the court dissented upon the ground that the complainant had failed in her duty to redeem from the sale within the time limited by law.

In *Howell* v. *Baker*, 4 Johns. Ch. 118, a farm worth $2,000 was sold under a judgment and execution, on which not more than $80 were due, to the attorney of the plaintiff, who attended the sheriff's sale, for $10. The sale was held upon a stormy day, when no person but the attorney and the deputy sheriff were present, and it was held that these facts, connected with the gross inadequacy of price, were sufficient to authorize the purchaser to be held as trustee for the respective interests of the parties to the execution, and the bidder was allowed to redeem on equitable terms. A large number of other cases are also cited by *Mr.* [340] *Justice* Bradley in his *opinion in *Graffam* v. *Burgess*, and the general proposition laid down, as above stated, that if, in addition to inadequacy of price, there be other circumstances throwing a shadow upon the fairness of the transaction, the judgment debtor will be allowed to redeem.

There are other facts in this case than the grossly inadequate price realized for this property that afford ample justification for the action of the court below in permitting the plaintiff to redeem upon equitable terms, and ordering a reconveyance of the property.

1. The property was sold to Stephens and Schroeder, who had acted as attorneys for the judgment creditor throughout the entire transaction, and had been fully paid by the corporation for their services. In this connection the trial court further found that Stephens furnished the officer a description of the property to be levied upon and sold, and that he accordingly did levy upon and sell as he was directed by Stephens according to such description. Add to this the further finding that at neither of the sales was there any other bidder and no other person present than Stephens and the officer conducting the sales, and we can readily appreciate how inevitable it was that the property should be sacrificed. Although there is no general rule that an attorney may not purchase at an execution sale, provided it be not done to the prejudice of his own clients (*Pacific R. Co.* v. *Ketchum*, 101 U. S. 289, 300 [25: 932, 937]), such purchase in itself is calculated to throw a doubt upon the fairness of the sale, and as is quaintly said of such sales by the court of appeals of Kentucky in *Howell* v. *McCreery*, 7 Dana, 388: "Public policy and the analogies of law require that they should be considered *per se* as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts." See also *Hall* v. *Hallet*, 1 Cox, Ch. 134; *Jones* v. *Martin*, 26 Tex. 57; *Byers* v. *Surget*, 60 U. S. 19 How. 303 [15: 670]; *Blight* v. *Tobin*, 7 T. B. Mon. 612, 18 Am. Dec. 219.

2. The alias execution of July 28 was not only issued for the full amount of the original judgment, $1,678.86 and $30.50 costs, without deducting $962.86, realized upon the first *exe- [341] cution, but under it the marshal sold, under the directions of Stephens and Schroeder, property for an amount in excess of the amount remaining unpaid on the judgment, and collected the excess and paid it over to Stephens and Schroeder, who retained it. In this connection the trial court made the following finding: "At the time of the last sale, to wit, September 30, 1891, there was a balance due Clark, Eldredge, & Co. of only $25.57, and their judgment had been satisfied except said sum, and to satisfy said balance property was sold as aforesaid, amounting in all to $136, $106 of which was paid by the United States marshal to said Stephens and Schroeder." Upon no theory were the judgment creditors entitled to any more than the amount of their claim, and if, as may sometimes happen, the property be sold for more than the amount of the execution, the residue should be returned to the judgment debtor.

There is reason for saying that the issue of an alias execution for the original amount of the judgment, after the return of a prior execution, satisfied to the amount of nearly one half of such judgment, the sale of property thereunder to an amount more than sufficient to satisfy the amount actually due, and the payment of the excess to the plaintiff's attorneys, invalidate the entire proceedings—the rule in some states being that a levy for an amount exceeding the amount of the judgment, or the amount actually due upon the judgment, with interest and costs, is void. 2 Freem. Executions, § 381; *Glidden* v. *Chase*, 35 Me. 90, 56 Am. Dec. 690; *Pickett* v. *Breckenridge*, 22 Pick. 297, 33 Am. Dec. 745; *Peck* v. *Tiffany*, 2 N. Y. 457; *Hastings* v. *Johnson*, 1 Nev. 614; *Patterson* v. *Carneal*, 3 A. K. Marsh. 618, 13 Am. Dec. 208. But, however this may be, there can be no doubt that this alias execution and the proceedings thereunder were irregular so far as Stephens and Schroeder were concerned, though perhaps not to the extent of invalidating the title of a bona fide purchaser. *Stead* v. *Course*, 8 U. S. 4 Cranch, 403 [2: 660]; *French* v. *Edwards*, 80 U. S. 13 Wall. 506 [20: 702]; *Groff* v. *Jones*, 6 Wend. 522, 22 Am. Dec. 545; *Tiernan* v. *Wilson*, 6 Johns. Ch. 411.

3. The court below was also of opinion that the property of the debtor was sacrificed by the manner in which the sales *were made, [342] and particularly by the successive sales of his interest in different parts of lot 2, block 70, held in common with his sister, Lydia Y. Merrill, and that a proper regard for his interests required that his entire right to the whole land thus held in common should have been sold at one time. This, however, raises a question as to which the authorities are not entirely in harmony, *viz.*, whether the levy upon the interest of a cotenant, in a specific part, designated by metes and bounds, of a certain larger quantity of land, is valid. In view of the other

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manifest irregularities, we do not feel called upon to express an opinion upon this point.

There is one finding, however, in respect to these sales, which, taken in connection with the facts that the defendants were the attorneys for the judgment creditors, furnished the officer selling the property with the description of the property to be levied upon and sold, and became the purchasers of the property either directly from the marshal, or indirectly through their client Clark, which is in itself sufficient to justify the action of the court below in vacating the sales and permitting the plaintiff to redeem, *viz.*, that "before any of said property was sold, said Stephens, who was the sole bidder at each of said sales, formed the intention that, regardless of the value of the various pieces of property to be sold, and that were sold, he would leave a balance after each sale, so that all of the plaintiff's property would be sold, and he so bid at the various sales as to accomplish, and did accomplish, said object and purpose." As Stephens was appellant's partner in the practice of law, and in the prosecution of the claim of Clark, Eldredge, & Co., and bought the property in for himself and partner, who now sets up title in himself by virtue of such purchase, it is clear that he is bound by Stephens' acts and representations. Certainly he cannot set up a title acquired by Stephens' assistance, and at the same time repudiate his acts in connection with the acquisition of such title.

There are other circumstances also found by the court below, which, taken in connection with the grossly inadequate price paid, render it still more inequitable that purchasers standing in the position of the defendants in this case 343]*should insist upon the letter of the bargain, and throw something more than a mere doubt upon the fairness of the transaction. Before the time had expired for redemption Stephens and Schroeder requested the collector of taxes of that county to allow them to bring suit against the plaintiff to recover the taxes owing by him for the year 1890, on the part of lot 2 described in the complaint, and agreed that, if the collector so consented, they would bring the suit, and make the collection free of cost to the collector,—an arrangement which was carried out according to its terms. On April 10, 1892, plaintiff offered to pay defendants the full amount of the judgment obtained by them, together with interest at the rate of 1 per cent per month, and also to liberally compensate them for all their services and trouble, give them $1,000 besides as a bonus, and pay all their advances with interest if they would reconvey to him, which the defendants refused to do. Of a similar offer and refusal this court in 60 U. S. 19 How. 310, 311 [15: 673], speaking through *Mr. Justice* Daniel said: "Another pregnant proof of the design of the appellant to grasp and retain what no principle of liberality or equity could warrant is the fact, clearly established, of his refusal after the sale to accept from the appellee, for the redemption of his lands so glaringly sacrificed, a sum of money considerably exceeding in amount the judgment for costs, with all the expenses incidental to the carrying that judgment into effect. The appellant, by his irregular and unconscientious contrivances, achieved what he conceived to be an immense speculation, and he determined to avail himself of it, regardless of its injustice and ruinous consequences to the appellee."

About the same time the plaintiff, being ignorant of the fact that lot 12 had been sold and that the defendants had a deed therefor, informed the defendant Schroeder that he intended to redeem the lot from a sale that had been made for the taxes of 1891, and afterwards did so redeem said lot, and informed Schroeder that it had been done, the plaintiff being still ignorant that the defendants held a marshal's deed for it. Again on April 24, plaintiff being still ignorant that defendants held a marshal's deed for lot 12, informed *Schroeder that he intended to redeem [344 said lot from a tax sale that had been made thereof for the taxes of 1890, and did subsequently redeem the same, and informed Schroeder of the fact, and that Schroeder never at any time informed him that he had obtained a deed for the lot. The court further found that defendants purposely and intentionally failed to inform the plaintiff that they had a title to the said lot at the time the plaintiff was redeeming the same from the tax sales. The court further found that the said attorneys, in violation of their duty to obtain the highest possible price for the property while acting in behalf of their clients, became the bidders upon said property, and so acted as to obtain the same for the least possible sum, so as to satisfy the judgment, and at the same time to sell all the property belonging to said Young. If these facts be not sufficient to justify a rescission of these sales, it is difficult to imagine what would be so considered.

4. Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security. *Guinn* v. *Locke*, 1 Head, 110; *Combs* v. *Little*, 4 N. J. Eq. 310, 40 Am. Dec 207; *Griffin* v. *Coffey*, 9 B. Mon. 452; *Martin* v. *Martin*, 16 B. Mon. 8; *Butt* v. *Butt*, 91 Ind. 305; *Turner* v. *King*, 2 Ired. Eq. 132, 38 Am. Dec. 679; *Lucas* v. *Nichols*, 66 Ill. 41; *McMakin* v. *Schenck*, 98 Ind. 264. In *Southard* v. *Pope*, 9 B. Mon. 261, 264, it is said that "a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the defendant in execution, and authorize an application by him to a court of equity for relief."

*Probably, if a motion had been made [345 in the original case to set aside the sale upon the ground of mere irregularities, such motion would have to be made before the statutory period for redemption had passed; but in this class of cases, where fraudulent conduct is imputed to the parties conducting the sale, there

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is a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident, or mistake, which may be exercised, notwithstanding the statutory period for redemption has expired. It is evident that, where a sale has culminated in the execution and delivery of a deed to the purchaser, which is not void upon its face, or a mortgage has been put upon the property, as in this case, no remedy is complete which does not go to the cancelation of such deed, and the complete reinvestment of the title in the plaintiff. It also appears from the findings that appellant has received rents from the property, that various sums had been expended for taxes and other purposes, that an accounting was necessary in adjusting the rights of the parties, which could not be effectually carried on in a court of law. There can be no doubt of the jurisdiction of a court of equity in such case notwithstanding the expiration of the statutory time of redemption. *Graffam* v. *Burgess*, 117 U. S. 180 [29: 839]; *Blight* v. *Tobin*, 7 T. B. Mon. 612, 18 Am. Dec. 219; *Day* v. *Graham*, 6 Ill. 435; *Morris* v. *Robey*, 78 Ill. 462; *Fergus* v. *Woodworth*, 44 Ill. 374; *Bullen* v. *Dawson*, 139 Ill. 633; *Jenkins* v. *Merriweather*, 109 Ill. 647; *State Bank* v. *Noland*, 13 Ark. 299.

The appellant's brief deals largely with criticisms upon the findings and upon the admission of testimony, which we do not feel it necessary to discuss, as they do not involve the merits of the case, which rest upon the undisputed facts. It would be a reproach to a court of equity, if it could not lay hold of such a transaction as this is shown to be, and set aside a sale of property acquired under the forms of law and in defiance of natural justice.

The decree of the court below is therefore affirmed.

346]ROBERT M. DOUGLAS, *Plff. in Err.*,
v.
ISAAC WALLACE ET AL.

(See S. C. Reporter's ed. 346-350.)

Motion to dismiss—assignments of claims against the United States.

1. On a motion to dismiss for want of jurisdiction, or to affirm upon the ground that the writ of error was sued out for delay merely, where the claim of a Federal question is not so clearly frivolous as to authorize a dismissal, such color for the motion to dismiss authorizes this court to proceed to the consideration of the question involved.

2. Drafts by deputies upon a United States marshal, accepted by him payable when he receives funds to their use, do not constitute assignments of claims against the United States, as the claims of the deputies for services are against the marshal personally, and not against the United States.

[No. 611.]

Submitted January 27, 1896. Decided March 2, 1896.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment of that court affirming the judgment of the Superior Court of Iredell County in that State, in favor of the plaintiffs, Isaac Wallace *et al.*, for the recovery from Robert M. Douglas of the amount of certain drafts drawn upon him. On motion to dismiss or affirm. *Affirmed.*

See same case below, 116 N. C. 659.

Statement by *Mr. Justice* **Brown:**

This was a motion to dismiss a writ of error for want of jurisdiction, or to affirm the judgment of the supreme court of North Carolina upon the ground that the writ of error was sued out for delay merely, and the question upon which jurisdiction depended was so frivolous as not to need further argument.

The action was brought in the superior court of Iredell county, North Carolina, by the defendants in error, the firm of Wallace Bros., to recover of Douglas, the plaintiff in error, the amount of certain drafts drawn upon him by certain persons, and accepted by writing across said drafts: "Accepted; payable when I receive funds to the use of" the drawer of the drafts. (Signed) "R. M. Douglas, U. S. Marshal." The matters involved in the action were referred to a referee, who found that the defendant Douglas was marshal of the United States for the western district of North Carolina for the years 1878 to 1881, and that during this time he had in his employment as deputy marshals J. T. Patterson, Jr., in whose favor he accepted a draft of $200; W. J. Patterson, in whose favor he accepted a draft for $325, and S. P. Graham, who had a claim against the marshal for $98.82 for official services rendered to the marshal, all of which were assigned to the plaintiffs. The referee further reported that there had been placed to the credit of Douglas in the Treasury Department of the United States the sum of $460.76 upon claims due him for the services of J. T. Patterson, Jr., performed prior to the *accept- [347 ance of his draft for $200, not subject to any previous order, and that the same was placed to his credit since the acceptance of the draft; that there had also been placed to his credit the sum of $2,274.55, due him for the services of W. J. Patterson, rendered prior to the acceptance of his draft for $325, and that the same was subject only to two drafts for the aggregate sum of $600; that of the claim of $98.82 due to S. P. Graham for services rendered as deputy, $95.62 had been placed to the credit of the defendant in the Treasury Department since the acceptance of the claim by the defendant, the remainder of said claim having been allowed by the government; that the vouchers so traded to the plaintiffs were for services rendered prior to the said acceptance, and before the same was transferred to the plaintiffs, and that the further sum of $2,858.76 was placed to the defendant's credit and control in the Treasury Department for services rendered by Graham, out of which

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

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sum defendant received $900, leaving $1,958. 67 to the credit of the defendant since the acceptance. The referee accordingly reported that the plaintiffs were entitled to payment for the full amount of their claim.

Before the judgment of the court was rendered, the defendant moved that the action be dismissed, upon the ground that the evidence disclosed that the drafts and accounts declared upon were drawn upon claims, or an interest in claims, against the United States before their allowance, and were therefore null and void under U. S. Rev. Stat. § 3477, inhibiting the assignment of claims against the United States. This motion was overruled, the court proceeded to consider the case upon the report of the referee and exceptions thereto, and entered a judgment in favor of the plaintiffs, from which the defendant appealed to the supreme court of North Carolina, which affirmed the judgment of the court below. Whereupon defendant sued out this writ of error.

Mr. **Robert M. Douglas,** plaintiff in error, in person.

Mr. **W. P. Montague** for defendants in error.

Mr. Justice **Brown** delivered the opinion of the court:

348] *The only Federal question in this case was raised upon the motion of the defendant to dismiss, upon the ground that the evidence disclosed that the drafts and accounts declared upon were drawn upon claims, or an interest in claims, against the United States before their allowance, contrary to the provisions of U. S. Rev. Stat. § 3477, which declares that "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof," etc.

While we are of the opinion that the claim of a Federal question thus presented is not so clearly frivolous as to authorize us to dismiss the case, within the rulings in *Millingar* v. *Hartupee*, 73 U. S 6 Wall. 258 [18:829]; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 87 [35:943, 946]; and *Hamblin* v. *Western Land Co.* 147 U. S. 531 [37:267],—we think there was such color for the motion to dismiss as authorizes us to proceed to the consideration of the question involved.

Upon the merits, we think the position assumed by the defendant is wholly untenable. The deputy marshals, for whose services the drafts in question were accepted, not only had no claim upon the United States, and no part or share in any such claim, but they had no proper interest in any such claim. Their accounts, for which the drafts were accepted, were claims against the marshal personally, and not against the United States, though they were paid out of the funds to be realized by the marshal from the government. Although deputies are recognized by law as necessary to the proper administration of the marshal's office, they receive from the government neither salaries nor fees, and the government has no dealings directly with them. The accounts are rendered by the marshal, who charges, not only for his own services, but *for those of each of his deputies, who **[349** are appointed by the marshal personally and accountable to him alone, though subject to be removed by the court at its pleasure. U. S. Rev. Stat. § 780. The marshal makes his own bargains with his deputies, and is unrestricted in the amount he shall pay them, which may be either a salary or a proportion of the fees earned by them, except that, in computing the maximum compensation to which he is entitled, the allowance of no deputy shall exceed three fourths of the fees and emoluments received or payable for the services rendered by him. § 841. He is thus bound to charge himself with a quarter of the fees earned by each deputy. Their claims for services against the marshal stand upon the same footing as those of an ordinary employee against his employer, and are not even contingent upon the marshal collecting his own accounts against the United States, although in the present case the marshal accepted the drafts in suit upon such contingency.

It is true that in a narrow sense of the word these deputies may be said to have had an interest in the claim of the marshal against the United States, inasmuch as their drafts were not payable until the marshal received funds for the use of the drawers, or rather applicable to the services rendered by the drawers; but this was rather a method of fixing a date for the maturity of the drafts than a contingency upon the happening of which the claims of the deputies should be payable. If, for instance, the marshal were to give his grocer or other ordinary creditor a note, payable when a certain claim of his against the government were paid, such creditor might be said to be interested in the payment of the claim; but he could not, in the sense of the statute, be said to have an interest in the claim itself, since his debt existed entirely independently of the claim. Had the drafts in this case been surrendered and canceled, the claims would still have existed against the marshal personally, and, in the absence of any agreement to the contrary might have been subject to enforcement. Their claims were for services rendered to the marshal, though the amount of such claims was measured by the fees which the marshal was entitled to charge the government for *their services. Had **[350** the marshal neglected to include them in his accounts their validity as claims against him would not have been affected, and if they chose to wait payment of their claims until the marshal received money applicable to their services, this was a matter of favor to him. The plaintiffs are no more the assignees of the deputies' claims against the government than the deputies were of a share or interest in the marshal's claim against the government. Upon the theory of the defendant the deputies would be without remedy. They would have

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no claim directly against the government, because he stands between them; they would have none against him personally, since, by his acceptance of their drafts, they became assignees of a share or interest in his claim against the government.

The judgment of the supreme court of North Carolina is affirmed.

GEORGE W. COCHRAN, *Appt.*,
v.
ISAAC L. BLOUT, Trustee, ET AL.

(See S. C. Reporter's ed. 350-355.)

Specific performance—contract by broker—effect of answer.

1. Specific performance by a part owner of land, of a contract made by a real-estate broker, cannot be enforced unless he held himself out as the sole owner or as having authority from his co-owners to sell the whole.
2. The fact that a paper given by a real-estate broker to a purchaser of land, containing a memorandum of the agreement, is signed by the broker as agent for a person named "and others," is sufficient to show that the broker was aware that the person named was not the sole owner, and also is notice to the purchaser of that fact.
3. The burden of overcoming the responsive effect of a sworn answer, necessary in equity, is upon the complainant.

[No. 116.]

Argued December 12, 13, 1895. Decided March 2, 1896.

APPEAL from a decree of the Supreme Court of the District of Columbia reversing the decree of the Special Term of that Court for the specific performance of a contract by Julius Lansburgh as to a third interest in land in an action brought by George W. Cochran against Isaac L. Blout, Trustee, *et al.* *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

On July 21, 1890, George W. Cochran filed in the supreme court of the District of Columbia a bill of complaint against Isaac L. Blout, trustee, James P. Ryon, and Julius Lansburgh, whereby he sought a decree, in the nature of a decree for specific performance, to compel Lansburgh to convey to him an undivided one-third equitable interest owned by Lansburgh in a certain square or tract of land in the city of Washington, and Blout and Ryon to join in said conveyance as holders of the legal title.

The facts out of which the controversy grew were substantially these:

351] *By virtue of certain deeds and agreements, not necessary here to state, on June 1, 1886, the legal title to square 980 in the city of Washington became vested in Isaac L. Blout, who executed a contemporaneous declaration of trust, wherein he acknowledged that he held said square in trust for the following persons: For himself, one sixth; Julius Lansburgh, one third; Henry T. Tracy, one sixth; Morris Clark, one sixth; and the firm of Ryon & Tracy, composed of James P. Ryon and Burr R. Tracy, one sixth,—each of said parties having paid his proportional part of the purchase money,—and for the following purposes: The land was to be subdivided in such manner as might be agreed on by the parties in interest, such agreement to be expressed by the written signature of James P. Ryon, and to be sold either in whole or in part upon such terms as should be agreed upon by the parties in interest, such agreement to be expressed by the written signature of James P. Ryon, and upon the trust to convey the ground so sold to the purchaser or purchasers, and to pay over unto the parties in interest, according to their respective interests at the time of sale, or, if the parties in interest should so desire, to apply said proceeds of sale to the payment of certain described encumbrances on said tract.

In January, 1889, Lansburgh put the said square, with other property wholly his own, into the hands of Joseph T. Dyer, a real-estate broker in the city of Washington, for sale at and for the sum of 28 cents per square foot. On September 26, 1889, Dyer gave to George W. Cochran, the plaintiff, a paper in the following terms:

Washington, D. C., Sept. 26, 1889.

Received of George W. Cochran, Esq., a deposit of three hundred ($300) dollars, to be applied in part payment of purchase of all of square 980, sold him for 28 cents per square foot on following terms: One third cash, bal. in 1, 2, and 3 years, with interest at 6 per cent, payable semi-annually; property sold as a good title, or no sale; all taxes to be paid to Nov. 30th, 1889. The purchaser is required to make full settlement in accordance with terms of sale within thirty *days from this date, or |**352** deposit will be forfeited. Conveyancing at purchaser's cost. J. T. Dyer,
Agent for Julius Lansburgh and others.

On that day Dyer gave a written notice of the sale to Lansburgh, and on the next day to Ryon & Tracy, who approved the same. The notice and approval were in form as follows:

Washington, D. C., Sept. 26, 1889.

Messrs. Ryon & Tracy.

Dear Sirs: I have sold square 980 to George W. Cochran, Esq., for 28 cents per square foot, one third cash, balance in 1, 2, and 3 years, 6 per cent, and have received a deposit of $300 to bind the sale; property sold as a good title.
J. T. Dyer.

Sale approved: Ryon & Tracy, Sept. 27, 1889.

Approved: Julius Lansburgh.

NOTE.—*As to when specific performance decreed, and when refused,* see notes to Hepburn v. Dunlop, 4: 65; Colson v. Thompson, 4: 253; and Brashier v. Gratz, 5: 322.

That plaintiff must show performance, or readiness to perform, and offer to perform; decreed against subsequent purchaser,—see notes to Colson v. Thompson, 4: 253, and Pratt v. Carroll, 3: 627.

As to when a broker to sell real estate is entitled to commission, see note to McGavock v. Woodlief, 15: 884.

That title may be made any time before decree; necessary parties to action, objection to; unnecessary parties; when objection made striking out parties,—see notes to Hepburn v. Dunlop, 4: 65, and Morgan v. Morgan, 4: 242.

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There was no third person present when Lansburgh signed this paper, and one of the disputed questions in this case is whether Lansburgh's approval was unconditional, or upon the verbal condition that it was not to bind him until concurred in by other parties in interest.

Blout and Clark, each holding a one-sixth interest in the property, declined to approve the sale to Cochran. The firm of Ryon & Tracy, owning a one-sixth interest, and Henry C. Tracy, owning a one-sixth interest, were willing to carry out the sale as made. Lansburgh, having learned that some of the parties in interest refused to acquiesce in the sale, declined to convey his share.

Subsequently, on November 14, 1889, Cochran filed a bill against Blout and all the parties in interest, seeking to have specific performance of the contract of sale made by Dyer and approved by Ryon & Tracy and Lansburgh. Blout and Clark filed answers, alleging that they had not authorized Lansburgh or Dyer to make the sale to Cochran, and that they had never approved or ratified the same.

353] *Ryon & Tracy and Henry C. Tracy conveyed their respective interests in the square to Cochran. Evidence was taken, and Cochran, finding that he could not maintain his bill against Blout or Clark, dismissed his bill as against them; and subsequently, on July 21, 1890, filed the present amended bill.

Lansburgh answered, alleging that he had approved the sale with the understanding with Dyer that the latter should obtain the consent of Blout before his own approval should take effect. Blout answered, denying the right of Dyer to make the sale, and asserting his ignorance of other matters alleged in the bill.

James P. Ryon answered that he and Tracy had assigned and transferred to Cochran their interests in the trust property held by Blout, and expressing his willingness to sign a deed, to be executed by Blout, trustee, conveying Lansburgh's undivided one-third interest in said square.

Issue was duly joined on these answers, and testimony was taken. The case was heard in the special term of the supreme court of the District of Columbia, and a decree was rendered for specific performance by Lansburgh as to his one-third interest in the square. In the general term, on appeal by Lansburgh, the decree of the special term was reversed and the bill dismissed. From this decree of the general term Cochran appealed to this court.

Messrs. **Samuel Maddox** and **A. S. Worthington**, for appellant:

One who has made a valid agreement in writing to sell real estate and give a good title, if his title prove defective as to a part of the land only, may be compelled in equity to perform the contract so far as practicable by conveying such title as he has with an abatement of a part of the purchase money to compensate the vendee for the defect in the title.

1 Story, Eq. Jur. 779; 3 Pom. Eq. Jur. § 1407, *note 3;* Fry, Specific Performance, § 1222; *Hepburn* v. *Dunlop*, 14 U. S. 1 Wheat. 200 (4: 71); *Mortlock* v. *Buller*, 10 Ves. Jr. 292-315; *Burrow* v. *Scammell*, L. R. 19 Ch. Div. 175; *Waters* v. *Travis*, 9 Johns. 450; *Bogan* v. *Daughdrill*, 51 Ala. 312; *Towle* v. *Ionia, E. & B. F. Mut. F. Ins. Co.* 91 Mich. 219.

Messrs. **A. B. Duvall** and **Leon Tobriner**, for appellees:

To entitle a party to specific performance there must not only be a valid and binding agreement, but as a rule the contract at the time it was entered into must have been capable of being enforced by either of the parties against the other.

Rutland Marble Co. v. *Ripley*, 77 U. S. 10 Wall. 339 (19: 955); *Richardson* v. *Hardwick*, 106 U. S. 252 (27: 145); *Geiger* v. *Green*, 4 Gill, 476; *Luse* v. *Deitz*, 46 Iowa, 205; *Bronson* v. *Cahill*, 4 McLean, 19; *Snyder* v. *Neefus*, 53 Barb. 63; *Price* v. *Griffith*, 1 DeG. M. & G. 80; *Bodine* v. *Glading*, 21 Pa. 50, 59 Am. Dec. 749; *Peacock* v. *Deweese*, 73 Ga. 570; *Cooper* v. *Pena*, 21 Cal. 401; *Maynard* v. *Brown*, 41 Mich. 298; *Boucher* v. *Vanbuskirk*, 2 A. K. Marsh. 345.

Mr. Justice **Shiras** delivered the opinion of the court:

In order to be able to enforce specific performance by Lansburgh, as prayed for in his amended bill of complaint, Cochran must show that, at the time he made the agreement with Dyer, Lansburgh either held himself out as the owner of the *entire square, or as [354 having authority from his co-owners to sell the whole of it.

It is a conceded fact that Lansburgh was the owner of but one third interest in the land concerned, and it is clear that, on September 26, 1889, Dyer was aware that there were other owners. This appears from the fact that prior to that date Dyer reported to Lansburgh that one Holtzman had made a proposal to buy a part of the square, and had been told by Lansburgh that he was not the sole owner of the property, and would have to see others. The fact that the paper given by Dyer to Cochran was signed by the former as agent for Lansburgh and others was sufficient to show that Dyer was aware that Lansburgh was not the sole owner, and was notice to Cochran of that fact.

There remains, then, the other alternative. Did Lansburgh claim to have authority from his co-owners to act for them in selling the whole? If he did so, and if Dyer, acting upon such a representation, contracted, as agent for the owners, with Cochran for a sale of the entire tract, then it may be conceded that Cochran, upon compliance by him with the terms of the contract, might, on learning that some of the owners had not authorized Lansburgh to sell their interests and refused to be bound, hold Lansburgh to make good his representations by conveying his individual interest in the land sold.

In his amended bill of complaint Cochran charges that Lansburgh claimed to act under authority from the other owners in placing the lands in the hands of Dyer for sale. Lansburgh, in his answer, denies that he claimed to act for the others, and asserts that he fully informed Dyer that he would have to secure the approval of the other owners; that Dyer acted upon that information and endeavored vainly to procure their assent to the sale, and that his, Lansburgh's, approval of the sale, was conditional on such assent.

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In the issue thus formed as to this question of fact the burden is upon Cochran. He must overcome the responsive effect of the sworn answer, and satisfy a court of equity that the facts were as alleged by him. And this we think he has failed to do.

355] *The testimony was conflicting, and our examination of it leads to the adoption of the conclusion of the supreme court of the District, *and its decree dismissing the bill is accordingly affirmed.*

FRANK W. SMITH ET AL., *Appts.*,
v.
GORDON McKAY, Trustee for the McKAY SEWING MACHINE ASSOCIATION.

(See S. C. Reporter's ed. 355-359.)

Certificate of jurisdiction of circuit court—question—appeal.

1. The question of the jurisdiction of the circuit court is sufficiently certified to this court under the judiciary act of March 3, 1891, § 5, where the record discloses that the appeal was taken upon the express ground that the court erred in taking jurisdiction and not dismissing for want of jurisdiction, and appellant prayed that the question of jurisdiction be certified, and that such appeal was allowed; and the certificate further states that a copy of so much of the record is sent up as is necessary to determine the question of jurisdiction, and a part of the record so certified is the opinion, in accordance with which the motion to dismiss for want of jurisdiction was denied in the court below.
2. The question of the jurisdiction in equity of the circuit court, based on the alleged existence of a complete remedy at law, when that court has jurisdiction of the parties by reason of diverse citizenship and of the subject-matter, is not a question of jurisdiction in that court which can be certified to this court under the judiciary act of March 3, 1891, § 5, the objection being, not to the want of power, but to the want of equity.
3. When the requisite citizenship of the parties appears, and the subject-matter is such that the circuit court is competent to deal with it, the jurisdiction of that court attaches. If any error is committed in the exercise of such jurisdiction, it can only be remedied by an appeal to the circuit court of appeals.

[No. 83.]

Argued December 20, 1895. Decided March 2, 1896.

APPEAL from a decree of the Circuit Court of the United States for the District of Massachusetts in favor of plaintiff, Gordon McKay, Trustee, against Frank W. Smith *et al.*, defendants, for damages for a failure to comply with the terms of a lease, reserving rent or license fees, for the use of certain sewing machines and other patented devices, etc. *Dismissed.*

Statement by *Mr. Justice* **Shiras:**

In the circuit court of the United States for the district of Massachusetts, Gordon McKay, as trustee for the McKay Sewing Machine Association, *and a citizen of the state of Rhode Island*, filed a bill of complaint against Frank W. Smith and others, citizens of the state of Massachusetts, doing business as copartners in the firm name of Smith, Stoughton, & Payne. The bill was brought upon a lease between said parties, bearing date January 23, 1878, whereby the complainant had granted to the defendants, in consideration of *rent or license [356 fees, the right to use certain sewing machines and other patented devices belonging to the complainant. The bill alleged a failure by the defendants to comply with the terms of the lease, and prayed for a discovery, accounting, payment of rent, and for an injunction restraining the defendants from using the patented machines until they had fully paid the amount found to be due.

The defendants filed an answer responding to various allegations of the bill, and averring that the complainant, so far as he had any just cause of action, had a plain, adequate, and complete remedy at law. Subsequently the defendants filed a special motion to dismiss the bill for the alleged reason that the complainant had a plain, adequate, and complete remedy at law. After argument this motion was denied. The cause was heard upon the pleadings and proofs, and at the May term, 1889, an accounting was awarded, a master was appointed, and, on the coming in of his report, on December 22, 1891, a final decree was rendered that the complainant should recover damages in excess of the sum of $5,000 and cost of suit. From this decree an appeal was taken and allowed to this court, and error was assigned to the action of the circuit court in taking jurisdiction of the bill and in not dismissing the same for want of jurisdiction.

Messrs. **Causten Browne,** *Payson Eliot Tucker,* and *Charles Allen Taber* for appellants.

Mr. **James J. Myers** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

The appellants seek to have this court review the action of the circuit court in entertaining jurisdiction of a bill in equity in a case in which, as they allege, it appears that the complainant had a plain, adequate, and complete remedy at law.

It is contended on the part of the appellee that we should dismiss this appeal, because the question of jurisdiction is not properly certified to this court.

*The record discloses that the defend- [357 ants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the supreme court, and that *said ap-*

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence,* see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; conpons; residence of assignor,—see note to M'Donald v. Smalley, 7: 237.

As to jurisdiction of United States courts over common-law offenses, see note to United States v. Coolidge, 4: 124.

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peal was allowed. The certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and a part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied. It therefore appears that the appeal was granted solely upon the question of jurisdiction, and this brings the case within the rulings in *Shields* v. *Coleman*, 157 U. S. 168 [39: 660], and *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322 [39: 438].

It is further contended by the appellee that this appeal should be dismissed because there is no right of appeal to this court in such a case as the present one.

The appellants claim that this appeal is within the first class under the judiciary act of March 3, 1891, § 5, providing that "in any case in which the question of the jurisdiction of the court is in issue, in such case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

The position of the appellee is that only questions of Federal jurisdiction can be brought directly here; that if the circuit court has jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it has no jurisdiction on its equity side raises no question of jurisdiction within the meaning of the act under which this appeal is taken; and that whether a case has been made out by the plaintiff in equity or at law is not a question that puts in issue the jurisdiction of the court in the sense in which that phrase is used in the judiciary act.

The question thus raised has never been directly decided by this court. It did present itself in the case of *World's Columbian Exposition* v. *United States*, 18 U. S. App. 42. That was a case in which the circuit court of the 358 United States for the *northern district of Illinois had granted, at the suit of the United States, an injunction against the World's Columbian Exposition, a corporation of the state of Illinois, restraining the defendant from opening the exposition grounds or buildings to the public on Sunday. From this decree an appeal was taken to the circuit court of appeals for the seventh circuit, and that court, speaking through *Chief Justice* Fuller, presiding, stated and disposed of the question as follows:

"The appellees have submitted a motion to dismiss the appeal upon the grounds that the jurisdiction of the circuit court was in issue; that the case involved the construction or application of the Constitution of the United States: that the constitutionality of laws of the United States was drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States, and not to this court; and hence that this appeal, which is from an interlocutory order, cannot be maintained under the 7th section of the judiciary act of March 3, 1891.

"We do not understand that the power of the circuit court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the circuit court was therefore not in issue within the intent and meaning of the act."

We regard this as a sound exposition of the law, and, applied to the case now in hand, it demands a dismissal of the appeal on the ground that the objection was not to the want of power in the circuit court to entertain the suit, but to the want of equity in the complainant's bill. The appellants' contention in this respect would require us to entertain an appeal from the circuit court in every case in equity in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law.

When the requisite citizenship of the parties appears, and the subject matter is such that the circuit court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for *equitable relief, or should 359 dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the circuit court of appeals.

The learned counsel for the appellants claims in his brief that the case of *Mississippi Mills* v. *Cohn*, 150 U. S. 202 [37: 1052], sustains his present contention.

That was an appeal from the circuit court of the United States for the western district of Louisiana, under the provisions of the act of February 25, 1889. 25 Stat. at L. 693, chap. 36. The court below dismissed the complainant's bill in equity on the ground that no relief could be had in equity because, under the practice prescribed by a state law, there was a remedy by an action at law. But this court held that the jurisdiction of Federal courts, sitting as courts of equity, cannot be enlarged or diminished by state legislation, and that hence the circuit court had committed error by allowing a state law to overturn the well-settled practice in the Federal court. In the condition of the Federal statutes at that time there was no circuit court of appeals, and the plaintiff's remedy, given him by the act of February 25, 1889, was by appeal to this court. Should such a state of facts again arise, the remedy would now be by appeal to the circuit court of appeals.

The appeal from the circuit court is accordingly dismissed.

LUTHER R. GRAVES, D. B. WESSON, SOCIETY FOR SAVINGS, and WILLIAM BURGOYNE, *Appts.*,

v.

COUNTY OF SALINE.

(See S. C. Reporter's ed. 359-375.)

County bonds—when valid.

1. The issue by a county of negotiable bonds reciting that they are issued and delivered upon a

NOTE.—*As to negotiability of railroad bonds*, see note to White v. Vermont & M. R. Co. 16: 221.

As to recitals in negotiable bonds or securities as

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subscription to railroad stock in pursuance of a vote of the people authorized by statute, without any reference to a condition on which the subscription was made, where the county was at liberty to make an unconditional subscription, estops the county so withholding from the public the existence of such condition, to plead the breach of this condition as against a bona fide holder of the bonds.

2. The issuing of funding bonds of a county in pursuance of statute, on a vote by the people of the county, to take up other bonds issued by it on a subscription to railroad stock which were invalid because a condition of such subscription was not complied with, is a declaration by the people that there was a substantial compliance with the original condition: and such funding bonds will be valid in the hands of a bona fide holder, where the original subscription might have been made unconditional.

[No. 510.]

Submitted December 2, 1895. Decided March 2, 1896.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit certifying certain questions to this court in a suit in equity brought by the county of Saline against Luther R. Graves *et al.* to restrain the levy and collection of a tax to pay interest on bonds of said county. *Questions answered.*

Statement by *Mr. Justice* **Shiras:**

This case came into the circuit court of appeals for the seventh circuit, at October term, 1894, on an appeal from a decree of the circuit court of the United States for the southern district of Illinois.

The original action was a suit in equity brought in the circuit court of Saline county, Illinois, by the county of Saline as complainant against the treasurer and auditor of public accounts of the state of Illinois and the collector of taxes and clerk of the county court of Saline county, to restrain the levy and collection of the tax required to be levied by the said auditor of public accounts of the state of Illinois, to pay the interest on one hundred registered refunding bonds of the said county.

Luther R. Graves, one of the holders of such refunding bonds, intervened in the circuit court of Saline county, and had the cause removed to the circuit court of the United States for the southern district of Illinois, where the Society for Savings, D. B. Wesson, and William Burgoyne, other holders of such bonds, also filed intervening petitions. That court granted the injunction asked for by the county, and the case was then taken by appeal to the 361]circuit court of appeals of the *seventh circuit, and thereupon the latter court certified to this court the following statement of facts and questions for its opinion and instructions:

The appellants were, prior to the year 1883, bona fide holders for value and before maturity of certain bonds issued by the county of Saline to the Belleville & Eldorado Railroad Company and to the St. Louis & Southeastern Railway Company respectively. These bonds ($75,000 in amount to the former and $25,000 in amount to the latter company, and bearing interest at the rate of 8 per cent per annum, payable semi-annually) were issued under authority of acts of the general assembly of the state of Illinois, passed in the years 1861 (Ill. Priv. Laws 1861, p. 485) and 1869 (Ill. Priv. Laws 1869, vol. 3, p. 238) and pursuant to an election duly ordered and held according to law on the 9th day of October, 1869, and in payment of subscriptions to stock in said companies respectively, dated January 15, 1870, duly authorized by said election, upon certain conditions, one of which was that said railroad should be commenced within one year and completed within three years from the date of subscription, and another of the conditions was that the St. Louis & Southeastern Railway should pass and a depot be established within one half mile of the old court-house in Raleigh, and within one half mile of the church in Galatia.

These bonds to the St. Louis & Southeastern Railway Company were dated January 1, 1872, payable twenty years after date, with option of paying five years after date, and were issued and delivered to that company February 1, 1872, and were purchased in open market by the appellants and for value and without notice, prior to the year 1876. The railroad was never constructed within one half mile of the old court-house in Raleigh, or within one half mile of the church in Galatia, but was constructed in a different direction, and the said condition was in no sense complied with, but was waived by the board of commissioners of said county after July 2, 1870.

The time for the completion of the Belleville & Eldorado Railroad was by the board of commissioners of the county of Saline after July 2, 1870, extended from time to time and *un-[362 til October 20, 1877, and the bonds were issued and delivered on the 19th day of April, 1877, being dated March 9, 1877, and payable twenty years after the 1st day of January, 1873, with option of paying five years after date.

The amendment to the Constitution of the state of Illinois, which went into effect July 2, 1870, provided: "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donations to or loan its credit in aid of such corporation: provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

The bonds issued to the St. Louis & Southeastern Railway Company were valid obligations of the county in the hands of the appellants under the decisions of the supreme court

evidence of the fact recited and as an estoppel,—see note to Mercer County v. Hackett, 17: 548.

As to mandamus to compel city, town, or county to levy tax to pay bonds or interest on bonds,—see note to Davenport v. United States, 19: 704.

As to municipal bonds; power to issue; amount; in aid of railroads; ratifying; conditions of issue; rights of bona fide holders; recitals; effect of over issue; validity,—see note to Sutliff v. Lake County Comrs. 37: 145.

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in the cases of *American L. Ins. Co.* v. *Bruce*, 105 U. S. 328 [26:1121], and *Oregon* v. *Jennings*, 119 U. S. 74 [30:323].

The bonds issued to the Belleville & Eldorado Railroad Company were void even in the hands of bona fide purchasers for value, within the decision of *German Sav. Bank* v. *Franklin County*, 128 U. S. 526 [32:519].

The bonds to the St. Louis & Southeastern Railway Company were issued before and those to the Belleville & Eldorado Railroad Company were issued after the decision of the supreme court of Illinois, in the case of *Eagle* v. *Kohn*, 84 Ill. 292, decided in 1876.

The validity of none of these bonds was at any time questioned by the county of Saline until December 30, 1889, and the county had annually paid the interest on all of these bonds from the time of their issue until they were exchanged for funding bonds of the county as hereinafter stated.

The county of Saline has always retained and now has the stock in said railway companies obtained by it for the bonds so issued to said railway companies respectively; but such stock is now and always has been wholly worthless and of no value.

363] *The general assembly of the state of Illinois, by act approved February 13, 1865, and by acts amendatory thereto approved April 27, 1877, and June 4, 1879, enacted as follows (Ill. Rev. Stat. (Cothran's Anno. ed. 1881) p. 1119, 2 Starr & C. Stat. chap. 113, p. 1877):

"Sec. 1. That in all cases where any county, city, town, township, school district, or other municipal corporation has issued bonds or other evidences of indebtedness for money, or has contracted debts, which are the binding, subsisting, legal obligations of such county, city, town, township, school district, or other municipal corporation, and the same or any portion thereof remain outstanding and unpaid, it shall be lawful for the proper corporate authorities of any such county, city, town, township, school district, or other municipal corporation, upon the surrender of any such bonds or other evidences of indebtedness, or any number or portion thereof, to issue, in lieu or place thereof, to the owners or holders of the same, new bonds prepared as hereinafter directed, and for such amounts, upon such time, not exceeding twenty years, payable at such place, and bearing such rate of interest, not exceeding 7 per cent per annum, as may be agreed upon with the owners or holders of such outstanding bonds or other evidences of indebtedness: *Provided*, That bonds issued under this act, to mature within five years from their date, may bear interest not to exceed 8 per cent per annum. And it shall also be lawful for the proper corporate authorities of any such county, city, town, township, school district, or other municipal corporation to cause to be thus issued such new bonds, and sell the same to raise money to purchase or retire any or all of such outstanding bonds or other evidences of indebtedness; the proceeds of the sales of such new bonds to be expended, under the direction of the corporate authorities aforesaid, in the purchase or retiring of the outstanding bonds or other evidences of indebtedness of such county, city, town, township, school district, or other municipal corporation, and for no other purpose whatever. All bonds or other evidences of indebtedness, issued under the provisions of this act, shall show upon their face that they are issued under this act, *and the purpose for which they [364 are issued, and shall be of uniform design and style throughout the state, to be prescribed by the state auditor, whose imperative duty it shall be to devise and prepare such uniform style and draft adapted to the classes of bonds herein provided for, namely, the first class to consist of bonds of which only the interest is payable annually; the second class to consist of those of which the interest and 5 per centum of the principal are to be paid annually, and the third class to consist of a graduated series, the first grade made payable, principal and interest, at the end of one year from the date of issue; the second at the end of two years, and thus to the end of the series, the class to be issued being at the option of the legal voters expressed as herein provided. In any case, the new bonds or other evidences of indebtedness authorized to be issued by this act shall not be for a greater sum in the aggregate than the principal and accrued or earned interest unpaid of such outstanding bonds or other evidences of indebtedness. And when such new bonds or other evidences of indebtedness shall have been issued, in order to be placed on the market and sold to obtain proceeds with which to retire outstanding bonds or other evidences of indebtedness, it shall be the duty of the state auditor, on the request of the corporate authorities issuing them, and at the expense of the corporation in whose behalf the issue is thus made, to negotiate the same, at not less than par value, and on the best terms which can be obtained: *Provided always*, That any such county, city, town, township, school district, or other municipal corporation issuing bonds under the provisions of this act may, through its corporate authorities duly authorized, negotiate, sell, or dispose of said bonds, or any part thereof, at not less than their par value, without the intervention of the auditor of state: *And provided further*, That no new bonds or other evidences of indebtedness shall be issued under this act, unless the same shall be first authorized, as hereinafter provided by a vote of a majority of the legal voters of such county, city, town, township, school district, or other municipal corporation voting at some general election or special election held for that purpose."

*Under and by virtue of this provision [365 of law the board of commissioners of the county of Saline duly ordered an election to determine the question of issuing the bonds of the county for the purpose of paying and redeeming the bonds above stated issued to the St. Louis & Southeastern Railway Company and to the Belleville & Eldorado Railroad Company and to another railway company, respectively, and at such election duly held according to law on the 6th day of November, 1883, a majority of the legal voters of the county of Saline voting at such election voted in favor of such proposition. On the 15th day of November, 1883, the board of commissioners of the county, by order duly made and entered, ordered in compliance with such vote that one hundred and ninety-five bonds of said county, of $1,000

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each, be issued to take up and pay off the said bonds so issued to the St. Louis & Southeastern Railway Company, the Belleville & Eldorado Railroad Company, and said other company; and the duly constituted officers of said county thereafter, on the 1st day of July, 1885, issued the bonds of said county in strict conformity with said act, to the amount in the aggregate of $100,000, to take up and pay off the said bonds so issued to the St. Louis & Southeastern Railway Company and to the Belleville & Eldorado Railroad Company, each of said bonds being of the tenor and effect following:

United States of America. $1,000.
State of Illinois, county of Saline, funding bond, issued under the act of 1865 as amended April 27, 1877, and June 4, 1879.

Twenty years after date, for value received, the county of Saline promises to pay to the bearer hereof the sum of $1,000 in lawful money of the United States, at the office of the treasurer of the state of Illinois, in the city of New York, with interest at the rate of 6 per cent per annum, payable annually, as shown by and upon the surrender of the annexed coupons, as they severally become due, reserving, however, the right to redeem this bond at any time after five years from date.

This bond is one of a series of 195 of like tenor, [366] issued *for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county, which remain outstanding and unpaid, under the provisions of an act of the general assembly of the state of Illinois, entitled "An act to enable counties, cities, towns, townships school districts, and other municipal corporations to fund, retire, and purchase their outstanding bonds and other evidences of indebtedness, and provide for the registration of new bonds or other evidences of indebtedness, in the office of the auditor of public accounts," approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879, and in pursuance of a vote of the majority of the legal voters of said county, voting at an election legally called, under said act, the 6th of November, 1883.

We hereby certify that all requirements of said acts have been fully complied with in the issue thereof.

In testimony whereof, we, the undersigned officers of said county, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures this 1st day of July, A. D. 1885.

W. G. Frith,
Chairman of the County Board.
[seal.] W. E. Burnett, County Clerk.

Each of said bonds was duly registered according to law with the auditor of the state of Illinois, who indorsed upon each of said bonds the following:

State of Illinois. $1,000.
Saline County Bond.

Date of bond, July 1, 1885. Payable twenty years after date. Redeemable five years after date. Interest payable July 1, annually. Principal and interest payable at the office of the state treasurer of the state of Illinois, in the city of New York, and state of New York.

Auditor's Office, Illinois,
Springfield, Nov. 23d, 1885.

I, Charles P. Swigert, auditor of public accounts of the *state of Illinois, do hereby [367] certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to enable counties, cities, towns, townships, school districts, and other municipal corporations to fund, retire, and purchase their outstanding bonds and other evidences of indebtedness, and to provide for the registration of new bonds or other evidences of indebtedness, in the office of the auditor of public accounts," approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879.

I further certify that the aggregate equalized valuation of property assessed for taxation in said county for the year 1885 were certified to this office as follows:

Real estate, $1,362,921. Personal property, $477,340.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office, the day and year aforesaid.

[seal.] Charles P. Swigert,
Auditor Public Accounts.

The county of Saline appointed an agent to solicit the exchange of bonds, and obtained from the appellants and canceled the old bonds respectively held by them, and issued to them the funding bonds in lieu thereof. The county of Saline thereafter, until the year 1890, paid the annual interest on such new issue bonds.

Upon these facts the questions certified were as follows:

"First. Is the county of Saline estopped by the recital in the funding bonds to assert that the bonds issued to the St. Louis & Southeastern Railway Company, and to the Belleville & Eldorado Railroad Company, respectively, and for which the funding bonds were exchanged, were not binding, subsisting, legal obligations of said county?

"Second. Are the funding bonds so issued by the county of Saline legal, valid, and binding obligations upon said county in the hands of a bona fide holder for value before maturity?

"Third. If the court should be of opinion that the funding bonds are invalid, would it be competent for the court in this *cause, [368] which is a suit in equity instituted by the county of Saline to restrain officers of the law from levying and collecting a tax as required by law to pay the interest upon the funding bonds, to grant the relief asked only upon condition that the county of Saline pay to the holders the amount of the valid bonds issued to the St. Louis & Southeastern Railway Company which were exchanged for the funding bonds?"

Messrs. **George A. Sanders, Thomas C. Mather,** *William R. Bowers, James A. Connolly,* and *John C. Mathis,* for appellants:

After the county, by its proper corporate authorities, pursuant to a vote of the people, had proclaimed its decision, and publicly recognized and said that the original bonds were binding, subsisting, legal obligations against it, is is estopped fully and completely from raising any further question as to the validity of the same.

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The purchaser of refunding bonds can depend upon the findings of the municipality offering the same as to the validity of the original indebtedness.

Beach, Pub. Corp. § 929; 15 Am. & Eng. Enc. Law, 1263; *Meyer* v. *Brown*, 65 Cal. 590; *Hills* v. *Peekskill Sav. Bank*, 101 N. Y. 490; *Little Rock* v. *Merchants' Nat. Bank*, 98 U. S. 308 (25: 108); *Ashley* v. *Presque Isle County Supers.* 60 Fed. Rep. 55-71; *Jasper County* v. *Ballou*, 103 U. S. 745 (26: 422); *American L. Ins. Co.* v. *Bruce*, 105 U. S. 328 (26: 1121).

The funding bonds so issued by the county of Saline are valid and binding obligations in the hands of a bona fide holder for value before maturity.

Knox County Comrs. v. *Aspinwall*, 62 U. S. 21 How. 539 (16: 208); *Cairo* v. *Zane*, 149 U. S. 122 (37: 673); *Pana* v. *Bowler*, 107 U. S. 529 (27: 424); *Lewis* v. *Barbour County Comrs.* 105 U. S. 739 (26: 993); *Hackett* v. *Ottawa*, 99 U. S. 86 (25: 363); *Ottawa* v. *First Nat. Bank*, 105 U. S. 343 (26: 1127); *Ashley* v. *Presque Isle County Supers.* 60 Fed. Rep. 55; *Coloma* v. *Eaves*, 92 U. S. 484 (23: 579); *Chaffee County Comrs.* v. *Potter*, 142 U. S. 355 (35: 1040); *Zabriskie* v. *Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 381 (16: 488); *Cadillac* v. *Woonsocket Inst. for Savings*, 58 Fed. Rep. 935.

The intending purchaser had a right to rely upon their recitals and was by no rules or decisions of this court required to look further.

Little Rock v. *Merchants' Nat. Bank*, 98 U. S. 308 (25: 108); *Chandler* v. *Attica*, 18 Fed. Rep. 299; *Hills* v. *Peekskill Sav. Bank*, 101 N. Y. 490; *Meyer* v. *Brown*, 65 Cal. 590; *Risley* v. *Howell*, 64 Fed. Rep. 453; *National L. Ins. Co.* v. *Huron Bd. of Edu.* 62 Fed. Rep. 778.

Messrs. **Samuel P. Wheeler** and *W. H. Boyer*, for appellee:

In order to ratify, the party must, at the time of ratification, be capable of making the original contract.

Marsh v. *Fulton County Supers.* 77 U. S. 10 Wall. 676 (19: 1040); *Norton* v. *Shelby County*, 118 U. S. 425 (30: 178); *Dariess County* v. *Dickinson*, 117 U. S. 657 (29: 1026).

Recitals in bonds of this character, issued without power, cannot estop the county from setting up their invalidity.

Hedges v. *Dixon County*, 150 U. S. 182 (37: 1044), and cases cited.

Mr. Justice **Shiras** delivered the opinion of the court:

Under the authority of certain acts of the general assembly of the state of Illinois, and in pursuance of an election duly ordered and held according to law, and in payment of a subscription to stock in the St. Louis & Southeastern Railway Company, the county of Saline issued bonds to the amount of $25,000, bearing interest at the rate of 8 per cent to the said railway company, bearing date January 1, 1872, payable twenty years after date. These bonds were delivered to the railway company February 1, 1872, and were purchased in open market by the appellants, for value and without notice of any defense, prior to the year 1876.

The contract of subscription contained a condition that the said St. Louis & Southeastern Railway should pass and a depot be established within one half mile of the old court-house in Raleigh and within one half mile of the church in Galatia. The railroad was not constructed within the prescribed limits, but was constructed in said county in a different direction, and compliance with the said condition was waived by the board of commissioners of said county.

*By the 7th section of the act of April 16, [369 1869, it is provided that "any county, township, city, or town shall have the right, when making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds and subscriptions or donations shall be made, and such bonds, subscriptions, or donations shall not be valid and binding until such conditions precedent shall have been complied with."

The Constitution of Illinois, which took effect July 2, 1870, provides as follows: "No county, city, town, township, or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however,* That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

Such an election was held by the people of Saline county on October 9, 1868; and the subscription was made January 15, 1870.

The validity of these bonds so issued to the St. Louis & Southeastern Railway Company was continually recognized by the county of Saline by the payment of interest thereon and by the refunding of the same into new bonds of the county in July, 1885; and the said county has always retained and now has the stock in said railway company.

This state of facts brings the case, as respects the bonds originally issued to the St. Louis & Southeastern Railway Company, clearly within the decision of this court in the precisely similar case of *American L. Ins. Co.* v. *Bruce*, 105 U. S. 328 [26: 1121]; and where, per *Mr. Justice* Harlan, it was said:

"The statute did not make it obligatory on the town to impose conditions upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute the town could issue and deliver bonds for the subscription in advance *of the construction of any part of [370 the road. But when conditions were prescribed, good faith and the obligations which everywhere arise out of negotiable securities required—if the town intended to rely upon them—that the public, who were expected to buy the bonds or to advance money upon them, should be informed by their recitals that the town had exercised its statutory right to impose conditions upon its liability. The officers, both of the town and the railroad company, knew, however, that bonds could not be negotiated in the market had their recitals disclosed the fact that payment depended

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upon conditions thereafter to be fulfilled by the railroad corporation. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town, and the officers or agents of the company, co-operated in putting out bonds negotiable in form, and with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals full of everything necessary to induce the public to buy the bonds. The statement, on the face of the bonds, that they were issued by virtue of the statutes of April 15, 1869, and April 16, 1869,—the first of which contains an absolute requirement that the bonds be issued and delivered upon the subscription being voted, while the second gives the *right*, but does not make it imperative, to impose conditions,—and the further statement that the people had voted for subscription and to issue township bonds therefor, fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of bona fide purchasers. Under these circumstances, the town, by every principle of justice, is estopped, as against a bona fide holder, to plead conditions, the fact of the existence of which was withheld from the public, for one of two reasons, either to facilitate their negotiation in the markets of the country, or in reliance upon the railway company meeting the prescribed conditions. It should not now be heard to make a defense inconsistent with the representations contained in the 371] *recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed."

Similar conclusions were reached in the case of *Oregon* v. *Jennings*, 119 U. S. 74 [30:323], where, citing *American L. Ins. Co.* v. *Bruce*, it was held that bonds issued by the town of Oregon, a municipal corporation of the state of Illinois, in compliance with a vote of the people held prior to the adoption of the Illinois Constitution of 1870, in pursuance of a law providing therefor, were valid, although a condition as to the completion of the road was not complied with, because the recitals in the bonds were made by officers entrusted under the statute with the duty of determining whether the condition had been complied with, and the town was thereby estopped from asserting the contrary. The doctrine of the case of *Jasper County* v. *Ballou*, 103 U. S. 745 [26:422], is applicable. There it was held in a case arising, like this one, in the state of Illinois, that when the people of a county, at an election held under a refunding act, voted to issue new bonds to exchange for old ones, such a vote recognized the original bonds as binding and subsisting obligations, and that the county was therefore estopped from setting up that they were invalid because voted for at an election called by the board of supervisors instead of by the county court, and that where, at an election held according to law, the people of a county authorized their proper representatives to treat certain outstanding county obligations as properly authorized by law for the purpose of settling with the holders, and the settlement has been made, the validity of the obligations can be no longer questioned. There, as here, there was lawful power in the county to issue the original bonds, but there was an irregularity in the election having been called for by the wrong officers.

Applying these cases to the present one, we conclude that, under the facts contained in the statement, the bonds issued to the St. Louis & Southeastern Railway Company in July, 1872, were binding and subsisting obligations of Saline county, and having been recognized as such by the county authorities in 1885, by lifting them with new bonds under the *refund- [372 ing act, the second question put to us by the circuit court of appeals must, as respects said new bonds, be answered in the affirmative.

The history of the bond originally issued to the Belleville & Eldorado Railroad Company is somewhat different. These bonds were issued and delivered on April 19, 1877, after the decision of the supreme court of Illinois in the case of *Eagle* v. *Kohn*, 84 Ill. 292. The nature and effect of that decision were thus described in the case of *German Sav. Bank* v. *Franklin County*, 128 U.S. 526 [32:524].

"That was a suit against the town of Eagle, brought by innocent holders for value, to recover on coupons cut from bonds issued by the town to a railroad company, December 1, 1870, in payment of a subscription to stock in pursuance of a vote of the people of the town had November 2, 1869. In that vote certain conditions as to time had been prescribed, upon which the bonds should be issued. Those conditions had not been complied with. The question arose in the case whether the declaration of the statute, that the bonds should not be valid and binding until such conditions precedent have been complied with, was to be confined, in its operation, to the railroad company to which the bonds should have been issued, or whether it extended to innocent holders for value. The court held that although the statute did not declare that the bonds should be void, its declarations that they should not be valid and binding until the conditions precedent should have been complied with was an imperative and peremptory declaration that the bonds should not be valid and binding until the conditions named should have been complied with, even in the hands of innocent holders without notice; and it declared the bonds to be invalid in the hands of the plaintiffs. This interpretation of § 7 of the act of April 16, 1869, accompanied all bonds subsequently issued, into the hands of whoever took them, whether a bona fide holder or not. This court must recognize this decision of the supreme court of Illinois as an authoritative construction of the statute made before the bonds were issued, and to be followed by this court."

*If the present case stood only on the [373 footing of the original conditional contract of subscription we would be compelled to follow the holding of the supreme court of Illinois, and to hold that the original bonds were uncollectible even by innocent holders. But we have here an additional feature, not present in the case of *German Sav. Bank* v. *Franklin County*,

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or in the case of *Eagle* v. *Kohn*, and that is found in the fact that in the year 1885, in pursuance of the Illinois funding bond act, approved February 18, 1865, as amended by acts approved April 27, 1877, and June 4, 1879 (Ill. Laws 1879, p. 229), and in pursuance of a vote of a majority of the legal voters of Saline county as prescribed in said statutes, new bonds were issued and registered in manner as directed in the law, and were delivered to the holders of the original bonds, which latter were surrendered and canceled. The county of Saline thereafter, until the year 1890, paid the annual interest on such new issue of bonds.

While it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities. It must be admitted as well-settled law that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defense by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet where the right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions.

But where the municipality is empowered to 374] subscribe with *or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons. Such was the present case. The subscription was made on condition that the railroad should be commenced within one year and completed within three years from the date of the subscription, and it may be, under the doctrine of *Eagle* v. *Kohn*, 84 Ill. 292, that the action of the board of commissioners in extending the period for commencing and finishing the railroad would not relieve the company from the condition, nor avail to estop the county as against bona fide holders of the bonds. But when, in pursuance of the funding laws, the question whether the outstanding original bonds issued to the Belleville & Eldorado Railroad Company should be refunded in new bonds was submitted to the same constituent body that authorized the original issue, and when, in accordance with the vote so taken, and in formal compliance with the other directions of the funding laws, negotiable securities were issued and delivered in payment of the outstanding bonds, we know of no principle of law which forbids the county of Saline from such honorable discharge of its liabilities in the hands of innocent holders. Such action on the part of the legal voters of Saline county may well be regarded as a declaration that there had been, by the actual construction of the railroad and the delivery of the stock, a substantial compliance with the original conditions. After such deliberate action, it is now too late for Saline county to seek the aid of a court of equity to enable it to avoid its contracts made in pursuance of a legislative grant of power, and the consideration of which has been received. In equity, time is usually not of the essence of the contract, and is never regarded as such when the contract has been fully executed, without objection. It may be fairly said that, while a municipal corporation may not ratify a contract into which it had no power to enter, and may not waive a condition put by the legislature upon the exercise of a given power, yet it *may well waive a [375 condition made by itself and not a condition upon the exercise of the power. Such a waiver is not an attempt to ratify a void contract, but is rather an admission that the condition has been complied with in an equitable sense.

If these views are sound in respect to the bonds issued to the Belleville & Eldorado Railroad Company they apply with stronger reason to the bonds issued to the St. Louis & Southeastern Railway Company, because the subscription to the stock of the latter company and the issue of bonds in payment took place before the decision of the case of *Eagle* v. *Kohn*, and in circumstances, as we have seen, that rendered those bonds valid independently of the subsequent vote by Saline county to refund.

We therefore answer the second question put to us by the circuit court of appeals in the affirmative, and this renders a formal answer to the other questions unnecessary.

HARVEY SPALDING ET AL., *Appts.*,
v.
GEORGE MASON.

(See S. C. Reporter's ed. 375-397.)

Decree, when reviewed—contract, when enforced—collection of claim—interest, when allowed.

1. A decree determining the principles upon which an accounting is to be taken may be reviewed in

NOTE.—*As to what constitutes an account stated*, see note to Wiggins v. Burkham, 19: 884.

As to account stated, bar to a bill in equity, see note to Chappedelaine v. Dechenaux, 2: 629.

As to when impeachable for fraud, mistake, error, omission, accident, or usurious charges, see note to Perkins v. Hart, 6: 463.

As to attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage; purchase of interest in the suit or subject of litigation by attorney,—see note to McMicken v. Perin, 15: 504.

As to lien of an attorney for compensation, see note to Texas v. White, 19: 992.

As to interest, when recoverable as damages or on money, see note to Sneed v. Wister, 5: 717.

As to rate of interest after maturity, see note to Ohio v. Frank, 26: 531.

As to the rule of calculation of interest, see note to Story v. Livingston, 10: 200.

As to suspension of interest during war, see note to Ward v. Smith, 19: 207.

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this court on appeal from a final decree of the general term of the supreme court of the District of Columbia, although an appeal might have been taken, but was not, from the first decree, under U. S. Rev. Stat. D. C. § 772.

2. A contract for the sale of a one-fourth interest in fees to be obtained for the prosecution of claims for readjustment of salaries of postmasters under the act of Congress of June 12, 1866, § 8, in consideration of advances to aid in prosecuting the claims and urging the passage of bills then pending in Congress to aid in their settlements, entitles the purchaser to such interest in the fees recovered on the claims contemplated by the agreement, although the claims were not sustained according to the particular theory on which they were prosecuted, where they were paid by virtue of the provisions of the act named and a new act directing the adjustment under the former.

3. The failure to obtain the passage of an act of Congress for the settlement of a certain class of claims will not defeat the right under a contract to a share of the fees for collecting such claims, where at a later session a bill was passed practically identical with the former except that it provided for payment directly to the claimant in person.

4. A demand for an accounting is necessary before interest will begin to run on the amount due upon an accounting, where the failure to render an account and make settlements has been acquiesced in by the creditor.

5. Interest will be allowed on money due where the debtor was able to determine the amount, although the creditor may have claimed a greater sum than was actually due.

[No. 55.]

Argued April 25, 26, 1895. Decided March 2, 1896.

APPEAL from a judgment of the Supreme Court of the District of Columbia modifying the judgment of the special term, and being for the amount found due against the defendant Spalding, on his bond for appeal in a suit brought by Mason against said defendant Spalding and the sureties on his bond. *Judgment modified, and as modified, affirmed.*

See same case below, 18 D. C. 115.

Statement by *Mr. Justice* **White**:

Mason filed his bill in equity in the supreme court of the District of Columbia for a discovery and an accounting by Harvey Spalding as to certain fees collected by the defendant, 376]* in which Mason claimed a one-fourth interest. The persons joined with Spalding in this court are the sureties upon an appeal bond given by Spalding, the general term, upon the affirmance of a judgment in favor of Mason, having entered judgment against all the parties who executed the appeal bond.

The interest in question was acquired by Mason under an agreement between himself and Spalding, executed June 8, 1880, which recited that Spalding had on hand about 1,700 claims (and expected to receive enough more to make up 4,000 claims) for moneys which was believed would be due from the government to postmasters and late postmasters upon a readjustment of salaries under the provisions of an act approved June 12, 1866, and was in need of funds to prosecute said claims and to urge the passage of bills then pending in Congress looking to their settlement. By the agreement Spalding sold to Mason for the consideration of $2,500, payable in instalments, a one-fourth interest in the fees to be collected from said claims, "free from charges for expenses in prosecuting said claims to collection," and Spalding agreed to obtain as many claims as he could secure in addition to those referred to in the contract as on hand or expected to be acquired.

The congressional bills alluded to in the agreement failed of passage, but at the next Congress an act was passed and was approved March 3, 1883, which was similar to one of said bills which had failed of passage at the preceding Congress, "except two unimportant verbal alterations, with a proviso added as to the manner of application for readjustment of salaries thereunder and the manner of payment thereof."

The bill averred that defendant had collected a large sum of money as fees upon the claims in question and was largely indebted to complainant on account thereof, but that he had failed and refused to render a statement of the amount of fees collected, and, in substance, the bill also averred that the defendant Spalding was liable to account to complainant not only for fees received by him from the 4,000 claims referred to in the agreement as on hand and expected to be *obtained, but for all [377 fees received by him from claimants whose rights depended upon the act of 1866 and the act of 1883.

In his answer Spalding averred that at the time of the negotiation for the sale to Mason of an interest in his business he had in his possession, and so informed Mason, lists of the names of some 7,500 postmasters, who he was satisfied were embraced by the provisions of the bills then pending in the respective houses of Congress. He alleged, in substance, that upon the defeat of the House bill on January 17, 1881, the rights of Mason under the contract of June 3, 1880, ceased, and a new and oral contract was entered into between them, by which in consideration of his (Spalding's) agreement to make renewed efforts to procure favorable legislation and secure the collection of the claims in question, and the retention by complainant of an interest in the claims covered by the prior contract, complainant agreed to share in future expenses and make advances of money for such purposes; and it was averred that in consequence of such renewed efforts on defendant's part the act of March 3, 1883, became law. He alleged that Mason failed to keep his agreement in respect to advances, and for that reason, in September, 1882, he (Spalding) terminated the contract between them by notice to him, but that in consideration of the $2,500 paid under the first contract he promised to pay Mason in case of eventual success $10,000, and it was averred that since said date he had conducted his business upon that footing.

The answer also alleged "that besides the 1,700 claims in defendant's hands on the 3d of June, 1880, he had received by the 17th of January, 1881, some 500; and also between the latter date and March 3, 1883, he had procured enough more of these to make in all 4,208, all of these being included in the list of 7,500 first

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above mentioned." It was charged that in administering the act of March 3, 1883, the Postmaster General adopted a construction of that act and of the act of 1866 which was entirely different from the construction of the act of 1866 assumed by complainant and defendant when entering into the contract of June 3, 1880, and [378] from that *entertained by defendant when making up said list of 7,500 persons whom it was supposed would be entitled to claim relief. He averred that the effect of the construction given to the act of 1883 by the Postmaster General was not only to defeat claims mentioned in said list, but to create a class of new claims not contemplated at the time he made his original contract with Mason.

It was also averred that, in consequence of the new claimants whose rights arose solely from this new construction, defendant, subsequent to July, 1883, adapted his business thereto, and secured 20,000 cases of postmasters other than those who were upon the list of 7,500 cases, or who had been thought of as having claims under the act aforesaid at any time before the month of May, 1883.

The answer concluded with a statement as to the fees collected from the 4,208 claims (out of the list of 7,500), etc., and averred that he (Spalding) had been put to an expense of about 10 per cent in collecting said fees by reason of a proviso in the act of 1883 requiring payments to be made directly to the claimants, and denied "that excepting what may be due to the complainant upon the above statement after deducting therefrom what he has already received thereabouts, any debt is or will at any time be due to the said complainant by this defendant because of the contract of June 3, 1880, and subsequent dealing between the parties thereto."

An additional answer was subsequently filed giving a more detailed account of the receipts, etc., in connection with all the claims. Various sums were also set out claimed to have been expended after January 17, 1881,—the date of the alleged new and oral contract,—for clerk hire, printing, office rent, postage, discounts, interest, etc., in prosecuting the business. It was specifically stated that "this statement does not include the 10 per cent expended as in the original answer stated to collect fees that had been received."

Issue was joined by the replication of complainant, and evidence was taken in the cause. Upon the hearing, the court, on March 23, 1888, entered a decree which substantially rejected the complainant's demand for a right to share [379] in any *other fees than those resulting from such claims as were included in the list of 7,500 cases referred to in the answer, and contemplated and considered by the parties at the time the contract was made.

It adjudged in favor of the complainant that he was entitled to one fourth of each and every fee which had been collected or might thereafter be collected upon claims included in the list aforesaid, and that he was not chargeable with any part of the expenses of the business of securing and prosecuting such claims. The cause was referred to an auditor to state an account upon this basis. From this decree an appeal was taken by the complainant to the general term, and, on January 28, 1889, that tribunal affirmed the decree of the special term, and remanded the cause for further proceedings in accordance therewith. The opinion of the general term is reported in 18 D. C. 115.

The hearing before the auditor was then proceeded with. He reported that Mason was entitled to share in the fees received by Spalding, as well from claims which had been forwarded to him by attorneys as in claims that had been received directly from claimants.

He also held that certain claims designated by half numbers, that were entered in a book which purported to contain the list of the 7,500 cases heretofore referred to, constituted part of the said list of 7,500 cases, and that complainant was entitled to share in the fees derived from said claims. He allowed deductions made by Spalding for bank discounts on collections of drafts for fees, as also sums paid attorneys for collecting fees, upon the theory that such charges were not expenses for securing and prosecuting the claims, which latter claim had been rejected by the court; but he declined to allow a claim made by defendant for a deduction of 20 per cent from complainant's share for alleged expenses in collecting fees, on the ground that the same had not been sufficiently proved. Other matters included in the report are not in controversy in this court.

Exceptions were filed to the auditor's report on behalf of both parties.

*Upon the amount found due by the [380] auditor, as Mason's share of fees collected in accordance with the decree of reference, the auditor allowed interest as follows: He took the sum total of fees collected in each month and awarded interest to run from the beginning of the succeeding month, and on the payments made by Spalding to Mason on account of fees, he allowed interest from the date of payment.

The court, at the special term, overruled all of the exceptions, and approved and confirmed the report of the auditor, and entered judgment in favor of complainant for the sum of $16,304.82 (being the principal sum of $13,669.11, and interest to date of decree). The court also reserved the right to complainant to apply thereafter in this suit for an accounting as to fees which might subsequently be collected from claims embraced in the list of 7,500, these being the only claims in which Mason was adjudged to have an interest.

On appeal the general term modified the judgment as to interest by providing that the interest on the principal sum should commence from August 9, 1887, the date of the demand by Mason for an accounting; set aside the reservation of a right in favor of complainant to apply in this action for a further accounting; and entered a decree for the amount found due against the defendant Spalding and the sureties on his bond for appeal. The cause was then brought here by appeal.

Mr. **W. Willoughby** for appellants.
Mr. **W. L. Cole** for appellee.

Mr. Justice **White** delivered the opinion of the court:

A preliminary objection has been advanced

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on behalf of the appellee against a review of the first judgment rendered by the general term, which determined the principles upon which the account was to be taken by the auditor. It is claimed that the appellants are concluded by the failure of the then defendant, Harvey Spalding, to appeal from the decree of 381] the *special term, when an appeal had been taken by the complainant.

U. S. Rev. Stat. § 772, relating to the District of Columbia, provides as follows:

"Any party aggrieved by any order, judgment, or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the supreme court, and upon such appeal the general term shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just."

This section does not in terms confine the right of appeal from the special to the general term to merely final orders or final decrees in a cause. An interlocutory order or decree which involves the merits may be reviewed by the general term upon the appeal of a dissatisfied party without awaiting a final determination of the cause. It is not made obligatory upon a dissatisfied party to appeal, because the other party has done so; and we are of opinion that, upon an appeal to this court from a final decree of the general term (U. S. Rev. Stat. § 705), the entire record is brought up for review. *Hitz* v. *Jenks*, 123 U. S. 297 [31: 156]; *District of Columbia* v. *McBlair*, 124 U. S. 820 [31: 449]; *Grant* v. *Phœnix Mut. L. Ins. Co.* 121 U. S. 105 [30: 905].

The errors specified in the brief of counsel are fifteen in number. The first six and number 13 attack the correctness of the decision holding that the complainant was entitled to recover his proportion of the fees collected upon claims embraced in the list of 7,500 referred to in the answer. Assignment 7 covers the second exception taken to the report of the auditor; assignments 8 and 9 question the correctness of the finding "that the complainant is not chargeable with any part of the expenses of the business of securing and prosecuting" the claims contained in said list of 7,500 cases; the 10th and 11th assignments of error cover the fourth exception to the auditor's report; and the 12th assignment alleges error in the allowance of interest.

Before taking up, for detailed examination, 382] these *assignments of error, it will be necessary to consider the claims which the defendant Spalding represented at the time of the execution of the contract of June 3, 1880, and his construction of the rights of the claimants.

We quote the following statement from the brief of his counsel:

"Under the provisions of the act of June 22, 1854 (10 Stat. at L. 298), postmasters were paid for their services by commissions on the postage collected at their respective offices, which commissions were adjusted by the Auditor of the Postoffice Department upon the returns for each quarter after the said returns had been made by the postmaster and received by the Department.

"By the act of July 1, 1864 (13 Stat. at L. 335), a complete change was made in the mode of regulating the compensation of postmasters. A salary system was adopted instead of the commission system. The salaries were fixed for two years in advance upon the basis of the business of the past two years, that is, the commissions upon the business of the past two years were computed at the rate fixed by the act of 1854, and the sum thus arrived at was made the fixed salary of the office for the ensuing two years, a readjustment of the salaries of every postoffice to be made upon this basis every two years."

Under the provisions of the act of 1864 it necessarily followed that where the business of an office rapidly increased the compensation earned by the postmaster fell below what he would have received if his pay had been calculated by commissions as under the act of 1854. It also followed that if the business of the office fell off, the incumbent might receive a larger compensation than he would have been entitled to under the previous act. The act of June 12, 1866 (14 Stat. at L. 60), directed the Postmaster General to readjust salaries of postmasters when the quarterly returns showed that the salary allowed the postmaster was 10 per cent less than it would have been had the provision of the act of 1864 continued in force. The claims which Spalding was prosecuting resulted from this act of 1866, and the reason for their *prosecution before Congress, was [383 the fact that the Postmaster General had not made a readjustment, and that this court had decided in January, 1873, that the court of claims had no jurisdiction to enter a judgment for any amount in favor of such claimants until after the Postmaster General had readjusted the salaries.

By an act approved March 3, 1883 (22 Stat. at L. 487), it was provided:

"That the Postmaster General be, and he is hereby, authorized and directed to readjust the salaries of all postmasters and late postmasters of the third, fourth, and fifth classes, under the classification provided for in the act of July first, eighteen hundred and sixty-four, whose salaries have not heretofore been readjusted under the terms of section eight of the act of June twelfth, eighteen hundred and sixty-six, who made sworn returns of receipts and business for readjustment of salary to the Postmaster General, the First Assistant Postmaster General, or the Third Assistant Postmaster General, or who made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was ten per centum less than it would have been upon the basis of commissions under the act of June twelfth, eighteen hundred and sixty-six, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made: *Provided*, That every readjustment of salary under this act shall be upon a written application signed by the postmaster or late postmaster or legal representative entitled to said readjustment; and that each payment shall be by warrant or check on the Treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded, by mail, to him at the postoffice within whose delivery he

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resides, and which address shall be set forth in the application above provided for."

Except as to one of two immaterial verbal alterations, this act of 1888 was similar to House bill 3981, mentioned in the contract between complainant and defendant, and which failed to pass January 17, 1881, except that 384] the House *bill did not embody the proviso found at the end of the act of 1888.

In making up the list of 7,500 cases referred to, Spalding had construed the act of 1866—as he subsequently did the act of 1883—as entitling the claimants embraced in said list to a sum equal to the difference between the amount of any salary which, during a particular term, they had received, and the sum which they would have received had they been paid commissions on the business done in the office at the rate prescribed by the act of 1854. The Postmaster General, in May, 1883,—and his opinion was concurred in by the Attorney General in February, 1884,—construed the act of 1883 in connection with the act of 1866 in a different manner. It is unnecessary for the purpose of this opinion to state or discuss the particulars in which the construction of the Postmaster General differed from that adopted by Spalding, or to indicate in any way which construction was correct. It is unquestioned, however, that the operation of the construction by the Postmaster General was that many of the persons whose claims were embraced in the list of 7,500 cases referred to in the contract of June 3, 1880, were excluded from receiving any additional pay, and that rights arose in favor of others who were not supposed by Spalding to have claims at the time he prepared the list. Mason asserted a right to participate, not only in the fees collected from the claims embraced in the list of 7,500, but also in all other claims obtained by Spalding after the passage of the act of 1883. The general term, however, decided adversely to the contention of the complainant, and held that his share in fees was limited to cases embraced in the list of 7,500, upon which claims the court held that the contract between complainant and defendant was based. In that construction complainant has acquiesced.

Assignments numbers 1-6 read as follows:

"1st. The court erred in allowing to the complainant an interest in all or any of the claims embraced in a list of 7,500 claims mentioned in the answer of defendant.

"2d. The court erred in holding that the claims contemplated by the parties when they 385] executed the contract of *June 3, 1880, were of such a nature that they could be regarded, for the purpose of giving the complainant an interest therein, as the same claims that were actually prosecuted and collected under the act of 1883 and August 4, 1886.

"3d. The court erred in allowing the complainant $9,972.88 as his share of fees collected by the defendant on claims paid at various dates between October 1, 1886, and May 1, 1889, as all of said fees were collected upon claims allowed and paid neither under authority of § 8 of the act of June 12, 1866, or under authority of the act of March 3, 1883, but under the sole authority contained in the act of August 4, 1886 (24 Stat. at L. 308). (See pp. 116 and 117 of record.)

"4th. The court erred in not holding that the contract of June 3, 1880, became of no effect by the failure of passage of the bill in Congress mentioned therein, and in not holding that thereupon a new contract was made which became of no effect in charging the defendant with any liability thereunder by reason of the failure of the complainant to perform the same on his part, and by the putting an end thereto by the act of the defendant.

"5th. The court erred in holding that the complainant was entitled to one fourth of all fees which have been collected out of the said list of 7,500 claims which were procured subsequently to January 17, 1881.

"6th. The court erred in holding that the complainant was entitled to one fourth of all fees which had been collected out of the list of 7,500 claims which were procured subsequently to March 3, 1883."

As before stated, no appeal was taken by the defendant to the general term from the interlocutory decree at the special term fixing the principles upon which the account should be taken. At the hearing in general term he seems to have acquiesced in the view that the complainant was entitled to an account as to 4,208 cases admitted in the answer to have been received by Spalding for prosecution, and to have been embraced in his list of 7,500 cases, from which he received fees, and concerning which he offered to account. On the hearing before the auditor no exception was taken to the *admission of evidence as to the fees cal- [386 culated upon claims embraced in the list of 7,500 cases except as to cases which were sent to him for prosecution by attorneys. And although the auditor reported that the "amount of fees received by him in the cases included in the order of reference" was the sum of $16,-339.11, no exception was taken by Spalding to such finding.

It is insisted now, however, that a proper construction of the contract excludes the complainant from any share whatever in the fees collected upon the claims embraced in the list of 7,500 cases. This is asserted, although the claimants had valid claims against the government under the act of 1866, either upon the theory which Spalding believed to be correct according to his construction of the act or upon the theory actually put into practice by the Postmaster General under his construction of that act in connection with the act of 1883. The contract, it is contended, contemplated that a recovery by the claimants should be had upon the precise theory which Spalding and the complainant entertained when the contract of June 3, 1880, was made. We do not adopt such a narrow view of the terms of the contract between the parties in the absence of clear and unequivocal language warranting it. This construction imports that Mason took the hazard, not of Spalding's ability to collect from the government for the claimants he represented, but the hazard of the government adopting and putting in practice Spalding's theory as to the exact status of the claimants under the act of 1866. If the claim of counsel is well founded, then had the House bill referred to in the contract, and which, as has been shown, was practically identical with the subsequent act of 1883, become a law, a con-

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struction of that act similar to that adopted by the Postmaster General with reference to the act of 1883 would have defeated all Mason's rights under the contract. But, in consideration of the payment by Mason of $2,500, Spalding agreed to "prosecute to collection" the "claims" then in hand and others expected to be secured of "postmasters and late postmas-
387] ters for *adjustment of their salaries, in conformity to § 8 of the act of June 12, 1866." There was no qualification that the collection should be according to a particular theory as to the amount which ought to be recovered, but the plain import was that whatever was due by the general government to the claimants under the provisions of that act was to be collected. Whether we look at the act of 1866 and 1883 or the later act of 1886, which merely approved the form of readjustment which had been theretofore pursued by the Postmaster General under the act of 1883, and directed that mode of adjustment to be continued in the settlement of further claims under the act of 1866, it is clear that whatever was allowed and paid to claimants was acquired by virtue of the provisions of the act of 1866. We therefore find assignments 1 and 2 to be without merit.

The objection covered by assignment 3 is also made for the first time in this court. No exception of this character was taken to the findings of the auditor. It appears to have been an afterthought. The point that payments subsequent to October 1, 1886, were made solely under the authority of the act of August 4, 1886, is clearly not well taken, for that act did not originate rights against the government, but simply regulated the mode of adjusting rights which had vested under the act of 1866, pursuant to the remedy afforded by the act of 1883. We have looked in vain through the carefully prepared answer of the defendant himself, an attorney, for any suggestion that the act of August 4, 1886, in any way injuriously affected the rights of complainant, though an intimation to that effect is contained in one or more letters from Spalding to Mason written after August 9, 1887. All through the answer it is admitted that the remedy by which Spalding made his collections was provided by the act of 1883. Further, the table showing the dates from which the auditor found the interest should be calculated does not justify the assumption of counsel that any part of the $9,972.88 was allowed complainant as his share of fees collected by defendant on claims paid at various times between October 1, 1886, and May 1, 1889. The table does not indicate when the "claims" were either "allowed" or "paid," and as the fees were
388] *collected from claimants after they had received the full amount of their claims, it may well be that the entire sum had been allowed and paid by the government prior to October 1, 1886.

Some of the observations heretofore made are applicable to the 4th assignment of error. The terms of the contract will not justify the construction that the rights of complainant were dependent upon the successful passage of the bills then pending in Congress. As to the alleged oral contract set up in the answer as having been entered into on the day of the failure of the passage of the House bill, to wit, January 17, 1881, aside from the fact that no consideration appears therefor, the making of the same was flatly denied by complainant, and the auditor found that no such contract was entered into. We not only cannot say that the finding of the auditor, sustained by both the special and general terms of the supreme court of the District, is obviously wrong, but we think, on the contrary, that it was clearly warranted by the evidence. A circumstance which would be of great weight in inducing us to reach this conclusion, were it necessary for us to carefully weigh the evidence, is the fact that at the time of the failure of the bill in question $500 was still due from Mason to defendant under the contract of June 3, 1880, and that sum was subsequently paid to Spalding, and the payment indorsed upon the contract, and there was no indorsement of a modification in any respect of the terms of that contract.

What we have said with reference to the 4th assignment disposes of the 5th.

The 6th assignment of error needs but little consideration. It was provided in the contract of June 3, 1880, as follows:

"The said Harvey Spalding agrees and binds himself to obtain all the claims of the class named he can, and to make contracts for fees equal to 25 per cent of the collections, and to subject the whole to be shared together with those in hand by said George Mason for the consideration herein specified."

The House bill 3981, referred to in the contract between the parties as having been favorably reported by the proper committee, was, as we have shown, practically identical with the *subsequent act of 1883, the only material[389
difference being that the proviso contained in the act of 1883 was not in the House bill. If we suppose that the House bill in question had been amended by adding a similar proviso, and, as thus amended, became a law, it could not reasonably be contended that Mason would not have had a right to share in any fees collected upon claims embraced in the list of 7,500 cases, which Spalding had procured for collection subsequent to the passage of the bill. If such would not have been the effect had the House bill passed with that proviso, no reason is apparent why a contrary effect should be claimed for the act of 1883. The assignment is not tenable.

The 7th assignment reads as follows:

"7th. The court erred in allowing complainant an interest in fees in claims registered in the same book as the 7,500 claims, but inserted at a different time, and designated by half numbers."

This is a reiteration of the second exception to the auditor's report.

The list of 7,500 cases which the evidence shows Spalding had collected in books and upon slips at the time of the making of the contract was supposed and was intended to embrace all persons entitled to $25 and over, by virtue of § 8 of the act of 1866, as construed by Spalding. His counsel does not argue that the half-numbered claims held by the auditor to constitute part of the list of 7,500 cases were not embraced in the character of claims designed to be covered by said list.

We adopt the reasoning by which the auditor reached a decision allowing complainant a

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share in the fees derived from these half-numbered claims. He said:

"In the examination of the defendant's books containing a list of the claims which are the subject of this account there appeared to have been entered claims described in the testimony as half numbers, and the fees received in these cases are not included in the statements of the defendant above referred to. These claims are enumerated in another paper marked 'Defendant's Schedule B.'

"The defendant contends (see his brief) that 390] these claims *do not belong on the Mason list, they were subsequently entered there in error, and that they are not covered by the decree.

"The order of reference directs an accounting as to the claims contained 'in a list of about 7,500 cases mentioned in the defendant's answer.' No list was filed with the answer, nor has any list been produced in the progress of the cause other than the schedules made by the defendant for the purposes of this reference and the books in which these half numbers appear. It is clear, therefore, that the court in making the decree had no such list before it and could not intend to restrict the accounting to any particular claim by names or numbers. Indeed, the whole case shows the intention of the court to have been to divide the cases as to which the bill sought an accounting into two classes, the dividing line being the change of construction by the government officers of the law relating to these claims.

"So far as appears here, these half-numbered cases are of the same class as the others on the Mason list, and are therefore included in the contract of sale, and not excluded by the decree.

"The evidence as to the time of their entry on the list and the attempted withdrawal of them from it is not at all clear.

"These fees aggregate the sum of $1,678.48."

The 8th and 9th assignments of error read as follows:

"8th. The court erred in holding that the complainant was not chargeable with any part of the expense of procuring claims obtained by the defendant subsequent to January 17, 1871.

"9th. The court erred in holding that the complainant was not chargeable with any part of the expenses of prosecuting claims obtained by the defendant."

It was expressly stipulated in the contract of June 3, 1880, that the one-fourth interest of Mason should be "free from all charges of expenses in prosecuting said claims to collection."

These assignments therefore depend for their support upon the claim that on the 17th of 391] January, 1881, a new contract *was entered into between complainant and defendant, under the terms of which Mason agreed to share in all future expenses connected with the business. Our concurrence with the holding of the master that no such agreement was entered into leads us to overrule these assignments.

The 10th and 11th assignments of error read as follows:

"10th. The court erred in holding that the complainant was not chargeable with any part of the expenses of securing and collecting fees which were incurred in consequence of the proviso of the act of March 3, 1883, and of a circular issued by the Postmaster General to make difficult the collection of the fees.

"11th. The court erred in not allowing the defendant 20 per cent or some per cent or gross amount for expenses in collecting fees."

In his original answer, defendant, after averring the amount of fees collected upon the 4,208 claims concerning which he submitted to an account, said "that, owing to the change made by the act of 1883 in the previous method of collecting fees, as well as to certain circulars thereunder issued by the Postmaster General, he has been put to an expense of about 10 per cent to collect such fees after the allowances had been made and in respect of which they were due." This refers to the requirement by Congress that the claims under the act, when allowed, should be paid to the claimants directly, and not to attorneys.

In his additional answer Spalding admitted that he had received for collection 24,259 claims, and averred that the expenditures incurred and paid for clerk hire, printing, office rent, postage, discounts, interest, etc., in prosecuting said claims from January 17, 1881, to December 31, 1887, aggregated $64,547.75, but that such expenditures did not include the 10 per cent expended as in the original answer stated to collect fees that had been earned. It thus appears that before the taking of testimony the expenses of the prosecution of the claims was sworn to by the defendant as being distinct and separate from the expense of collecting fees.

The auditor allowed all actual, direct, and necessary expenses *in the collection of fees, [392 such as bank charges, express charges, and attorneys' fees, the total amount of such expenses having been deducted from the gross fee charged by Spalding under the contract with claimants, the net sum received by Spalding being returned as the gross amount of fees which he had collected.

Changing, however, the position taken in his sworn answer, the defendant demanded at the auditor's hands an allowance for expenses in collecting fees, for office rent, clerk hire, postage, stationery, printing, etc., from 1883 to 1887, to an amount exceeding more than one half the total expenditures of that character stated in Spalding's answer to have been by him incurred in the prosecution of the entire business of over 24,000 claims. Mason had an interest in but 4,208 of these, and 427 of that number were received from two attorneys, and presumably did not require special effort in each of the cases to collect Spalding's proportion of the fees. The claims asserted were not itemized, but were made in bulk sums, and the amounts were mere estimates. No receipts or vouchers were produced by defendant, nor was any book produced containing itemized statements whereby the propriety or correctness of the expenditures might have been determined or tested. Though no fees were collected during the year 1883, and the first five months of 1884, one half of the total expenses of that period are charged as expenses for collection of fees.

The defendant testified that the gross amount of fees collected on all claims was $165,241.80.

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He claimed that in order to effect collections he had expended for—

Clerk hire	$15,608 24
Office rent	2,540 00
Postage	6,375 00
Stationery, printing, etc.	5,959 18
Miscellaneous expenses	2,565 78
Total	$33,048 20

The alleged expenses thus amounted to ex-
393] actly 20 per cent *of the gross amount of fees collected, whereas the answer claimed but 10 per cent.

The unreliable character of the testimony as to these items of expenditure is illustrated by counsel for appellee in his brief. On cross-examination of Mr. Spalding as to an expense account filed May 22, 1889, he testified that he had disbursed the following amounts:

Statement made at session May 22, 1889.

Half of postage from March 3, 1883, to January 1, 1884	$ 750 00
Half of postage in 1884	1,000 00
" " " 1885	1,000 00
" " " 1886	1,500 00
Whole of " " 1887	750 00
" " " 1888	1,000 00
" " 5 months, 1889	375 00
Add miscellaneous expenses	2,565 78
	$8,940 78

When pressed to give the items of the miscellaneous expenditures stated as $2,565.78, defendant promised a full statement at the next session, but instead of making such explanation, he filed a statement showing miscellaneous expenditures reduced to $143.50, but the postage items increased proportionately, as shown in the following statement:

Statement made at session June 5, 1889.

Half of postage from March 3, 1883, to January 1, 1884	$ 865 00
Half of postage in 1884	730 00
" " " 1885	1,600 00
" " " 1886	2,920 00
Whole " " 1887	1,300 00
" " " 1888	1,240 00
" " 5 months, 1889	518 50
Total	$9,173 50

394] *The contract did not contemplate a necessity for expenditures in connection with the collection of fees, as, on June 3, 1880, it was believed that drafts for the amounts of the difference claimed would be delivered to Spalding as attorney for the claimants, and that he would make his deduction of fees therefrom.

For this reason, the auditor reached the conclusion that Mason's interest should be charged with its just share of expenses necessary and reasonably incurred in securing and realizing the fees of which he was to receive a share with the qualification that perhaps before any considerable amount of such expenses had been incurred the complainant should have been notified. Complainant does not find fault with deductions actually allowed. Concerning, however, the claim for an allowance of 20 per cent upon Mason's share of fees, as an expense for collection, the auditor said:

"Some of these expenses were incurred in unsuccessful endeavors to secure fees, and before his interest in fees collected can be charged with expenses connected with fees not collected it should appear that he assented to such expenditures, or at least had knowledge of them. Neither of these conditions is shown to exist here.

"The defendant kept no current account of these expenditures even in gross, and is now compelled to estimate some of them upon a basis of unreliable data. He made no attempt to keep any separate account of those incurred in securing the Mason fees as distinguished from his other business, as he should have done if he intended to claim allowance for them in his settlement with the complainant.

"Nor is the evidence before me sufficient to establish the necessity for or reasonable character of these expenses."

We find no obvious error in this conclusion. Where an allowance is asked which is clearly excessive and exorbitant, it is for the party claiming to be entitled to establish just what is the amount he is properly entitled to, and it is not made the duty of the court or its officers to arbitrarily guess at the amount.

The 12th assignment alleges error in the allowance by *the general term, in its final [395 decree, of interest upon the entire principal sum found due from August 9, 1887.

The contract of June 3, 1880, provided that "all the fees collected by the said Spalding shall be accounted for and settlements shall be made from time to time as collections are made, and the divisions thereof shall be made, three fourths going to said Spalding and one fourth to said Mason."

The auditor made monthly rests in the collection of fees, and allowed interest on all collections during a particular month from the first day of the succeeding month. The special term entered a decree in accordance with that method. The general term, however, sustained the exception to the auditor's allowance of interest, and modified the decree of the special term in that particular by allowing interest on the entire principal sum found due by the auditor from the time when complainant made his demand upon Spalding for an account as to the fees collected.

Spalding's failure, prior to August 9, 1887, to render an account and make settlements for collections of fees, is shown by the evidence of Mason to have been acquiesced in by him. The general term therefore correctly held that interest should run only from the date when the demand for an accounting was made, and the right of complainant thereto was denied.

Appellant strenuously insists that no interest whatever should be allowed. The claim is without merit. Defendant had no reasonable ground for refusing to account, at least as to the fees earned upon the claims embraced in the list of 7,500 cases. To that extent he was clearly indebted to Mason, less the amount of any payments which he had made. He had in his possession and control the means of determining the amount of such indebtedness, and as to an indebtedness which he ought not to

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have disputed he should have ascertained the amount due and tendered it without prejudice to a dispute concerning other items. Interest is allowed both at law and equity upon money due. As said by this court in *Curtis* v. *Innerarity*, 47 U. S. 6 How. 146, 154 [12: 380, 384], considering and overruling an exception to an allowance of interest from the time certain payments had become due:

396] *"It is a dictate of natural justice and the law of every civilized country that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. . . . Every one who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties."

It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when the payment should have been made. *Crescent Min. Co.* v. *Wasatch Min. Co.* 151 U. S. 317, 323 [38: 177, 179].

The circumstance that the complainant may have considered himself entitled to an account and to receive a greater sum than was actually found to be due does not affect complainant's right to the interest upon what was really due. *Sturm* v. *Boker*, 150 U. S. 312, 341 [37: 1093, 1104]. In the case just cited, while the right to an account was sustained, it was held that a portion of the matters claimed by complainant could not be allowed on a final accounting, but it was directed that the account should be stated up to the filing of the bill, and that any balance shown in favor of either side should bear interest from that date.

The general term, however, erred in its direction on the subject of interest. It overlooked the fact that some of the fees for which a recovery was allowed, amounting to $4,735.06, were collected after August, 1887. The dates of the collections made after that date are shown by the record, and an allowance of an average of interest will correct the error.

This completes our consideration of the specific assignments of error. The general assignment that the court erred in not dismissing the bill of complaint with costs is shown to be without merit by what we have already stated.

The error in respect to interest necessitates a modification of the decree under review. As it is a matter, however, of mere interest, not affecting the real merits of the controversy, and which we think would have been corrected

397] by the lower court *had its attention been called to it, the costs of this appeal must be borne by appellants.

It is therefore ordered that the judgment of the supreme court of the District of Columbia be and is hereby modified by providing that of the principal sum due, $8,934.05 shall bear interest from August 9, 1887, and $4,735.06 shall bear interest from August 2, 1888, and as thus modified the judgment is affirmed at the costs of appellants.

Mr. Justice **Gray** dissents.

THEODORE HANSEN, *Plff. in Err.*,
v.
JAMES E. BOYD ET AL.

(See S. C. Reporter's ed. 397-412.)

Submission of case to jury—evidence—waiver of exception—instruction—assumption — theory of case—ratification—remittitur.

1. Where there was a motion to direct a verdict, and both parties therefore agreed to submit the issues of fact to the jury, it must be assumed that there was sufficient evidence to warrant the court in permitting the jury to decide upon the evidence, where the record does not purport to contain all of it.
2. The rules and regulations of a board of trade are competent evidence in a case involving liability on a contract which was made subject to such rules.
3. Introducing testimony after a motion to direct a verdict is a waiver of an exception to the refusal of such direction.
4. An instruction to the effect that the precise meaning of a certain term used in evidence has not been clearly shown, and making a mere comment upon the evidence, is not erroneous, as it could not have operated to prevent the jury giving such weight as they saw fit to the testimony on the subject.
5. When all the evidence is not shown to be contained in the record, it must be assumed that there was evidence in the case tending to support a theory of the case stated by the court.
6. The unauthorized voluntary act of a broker in making a purchase is not ratified by his principal by mere retention without complaint of an account and statement showing that the purchase had been made.
7. It is proper to permit the party in whose favor a verdict or judgment has been returned or entered, in order to avoid the granting of a new trial on account of error affecting only a part thereof, to enter a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same.

[No. 113.]

Argued December 11, 12, 1895. Decided March 2, 1896.

IN ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment of that court in favor of plaintiffs, James E. Boyd *et al.*, against defendant, Theodore Hansen, for the recovery of payments made for account of defendant in the purchase and sale of grain in Chicago, and for services rendered therein. *Affirmed on filing a remittitur of part of the judgment; if remittitur be not filed, then the judgment reversed.*

See same case below, 41 Fed. Rep. 174.

NOTE.—*That ratification proves agency*, see note to Bank of United States v. Dandridge, 6: 552.

That ratification binds principal if made with knowledge of all the facts; assent presumed if dissent not made within reasonable time after notice,—see note to Parsons v. Armor, 7: 726.

That ratification of unauthorized act of agent discharges agent's liability, but not unless made with knowledge of all the facts, see note to Owings v. Hull, 9: 246.

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Statement by *Mr. Justice* **White:**

The action below was instituted by defendants in error to recover from plaintiff in error the amount of payments alleged to have been made for account of defendant, between the 24th day of August, 1888, and the 8th day of June, 1889, and resulting from the purchase and sale of certain grain made for account of the defendant, in the city of Chicago, and also the value of services rendered in connection therewith.

Defendant pleaded that the plaintiffs did not purchase or sell any grain for his account, but that the transactions in question were mere wagering contracts intended by both as gambling upon the price of wheat, and that the moneys expended by the plaintiffs on account of the matters sued for were advanced at the city of Chicago in paying for wheat options and "futures;" that the services alleged to have been rendered were performed in connection with such illegal transactions, which, it was averred, were in violation of the statutes of the state of Illinois.

Plaintiffs filed a reply to the answer of defendant, denying that it was the understanding and agreement of the parties that there were to be no actual sales or delivery of wheat, and that settlements were to be made by one party paying to the other the difference in values between the contract price and the market price of the wheat bought, according 399] to *fluctuations in the market, and also denied generally all the allegations in the answer to the effect that the transactions were gambling contracts and in violation of law.

The cause was tried by a jury, and the following facts are shown by so much of the evidence as is contained in the bill of exceptions.

On and prior to August 24, 1888, plaintiffs were partners in business at Chicago under the firm name of James E. Boyd & Bro., and were members of, and commission merchants doing business on, the Board of Trade in that city. They had a branch office at Minneapolis, Minnesota, at which Charles E. Handy was their agent from January 1, 1887, to February 1, 1889, Handy being succeeded on the latter date by George M. Brush. Prior and subsequently to 1888, Theodore Hansen resided at Bensen, Minnesota, a town on the Great Northern Railway, about 120 miles west of Minneapolis, being engaged there in the business of general merchandise and grain, owning and operating a grain elevator and warehouse. Prior to the transactions between Boyd & Bro., hereinafter mentioned, Hansen had sold wheat through brokers on the Board of Trade at Chicago and the Chamber of Commerce at Minneapolis, and had had some "option deals," as he expressed it, and was generally familiar with the manner in which business was done on those boards.

Early in August, 1888, as a result of a conversation had with Boyd & Bro.'s Minneapolis agent, a few days previously, Hansen called at Handy's office and gave him an order for the purchase of 5,000 bushels of December wheat. Defendant claimed that in the prior conversation Handy had alluded to losses which Hansen had sustained in "some trades" about a year prior thereto, and said "he thought it was a good chance to make something back this fall by making some scalps." Hansen further testified that he supposed the transactions were to be conducted for him on the Board of Trade at Chicago by Boyd & Bro., but claimed that at none of the interviews between himself and Handy was any allusion made to the Board of Trade or the rules of the Board of Trade. He also testified that it was not his intention to buy or sell any *grain on any of the orders [400 given to Handy, but that he contemplated mere speculations on margins. Handy, however, testified that when the first order was given he told Hansen that the commission would be ⅛ of a cent per bushel; that he would have to abide by the rules of the Chicago Board of Trade, and stated that he informed Mr. Hansen what those rules were as concerned the handling of grain on that board, and also informed him that a delivery was contemplated in every trade, either by buyer or seller, which was understood by Hansen; that in case wheat was delivered he must take care of it, and pay the purchase price and interest on the money, etc.

The first order to purchase was given August 10, 1888, and from that time until about April, 1889, occasional orders to buy and sell wheat were given. In none of the transactions was wheat offered or furnished by Hansen or to him personally, but the purchases and sales were all made on the Chicago Board of Trade according to the rules of that board. Hansen became delinquent in the furnishing of margins on his contract. On April 16, 1889, 40,000 bushels of May wheat were bought on his account at prices ranging from 109⅛ to 111¼. On April 26 and 29 following, by telegrams, and about those dates, by personal solicitation of Handy, Boyd, & Bro. requested authority to "transfer," as they expressed it, the May wheat to June wheat. Hansen did not answer the telegrams, and gave no satisfactory response to the verbal inquiry. On April 29, however, Boyd & Bro. sold the 40,000 bushels of May wheat, on which Hansen was then in default for margins, at 81¼, and the loss of $11,500 was charged against Hansen in his account on the books of Boyd & Bro. The firm then bought 40,000 bushels of June wheat at 82¼, and sent a memorandum notice of the sale of the May wheat and the purchase of the June wheat to Hansen, together with an account of the loss sustained on the May wheat. On May 4, 1889, Boyd's agent, Brush, wrote Hansen that Boyd & Bro. demanded an immediate settlement of his account. Personal interviews with Brush and correspondence with Boyd & Bro. followed. On June 8, 1889, the then open contracts on the books of Boyd & *Bro. with Hansen were [401 closed, and the 40,000 bushels of June delivery wheat, above referred to, were sold on the Board of Trade, and the loss, $1,300 and $50 commission on the transaction, was charged against Hansen. A day or two following an account exhibiting the total indebtedness of Hansen to Boyd & Bro. ($18,248.36) was delivered to Hansen and payment thereof demanded, which was refused, and the next day this action was brought. There was no controversy at the trial as to the correctness of any of the items of the account, other than as to the legality or illegality of the transactions, with the exception of the loss resulting from the 40,000 bushels of June wheat, asserted by Boyd & Bro. to have been purchased by authority of

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Hansen, but which Hansen claimed he had never authorized, and hence should not be held liable for the loss thereon, nor for the commission charged.

As to all the items of the account, plaintiffs contended that the transactions were legitimate purchases and sales of wheat under the rules of the Chicago Board of Trade; that deliveries were intended by the parties to the contracts on the Board of Trade; that Boyd & Bro. and Hansen understood that actual purchases and deliveries of wheat were intended. On the other hand, Hansen claimed that no actual purchases or sales of wheat were agreed to be made or were intended, and that the orders given by him were mere wagers upon the price of wheat—deals in futures upon the rise and fall in prices of wheat, according to the quotations on the Chicago Board of Trade.

The court instructed the jury very fully as to the law of the case upon the differing contentions of the parties, and the defendant took seven exceptions to the charge of the court. But one instruction was asked on behalf of defendant, and that was given to the jury. It was as follows:

"If you should believe that it was the intention of both parties to this contract that no actual wheat was sold or delivered or intended to be delivered at a future time, and if you should find from the evidence that it was not the intention of either party that a contract should be made by plaintiffs to buy and hold wheat for delivery to the defendant, but that [402] *it was the real intention and the understanding of the parties that a contract should be made which should be closed at a future date, not by the delivery of the wheat and the payment of the purchase price, but by the payment of money to one party or the other, the parties to receive the same and the amount to be paid to be determined upon a basis of the difference between the agreed purchase price at the time the purchases were made and the actual market value of the wheat on the day when the contracts were closed, then the jury are instructed that such contracts are illegal in law and void, and you will find for the defendant."

A verdict was returned for the full amount claimed by plaintiffs. Judgment was entered thereon, and the court overruled a motion for a new trial. The case was then brought to this court by writ of error.

Mr. **Chas. E. Flandrau** for plaintiff in error.

Mr. **Ralph Whelan** for defendants in error.

Mr. Justice **White** delivered the opinion of the court:

The assignments of error set out in the record are fifteen in number. The first five are not pressed in the argument for plaintiff in error, and we only briefly notice them.

In number 1 it was assigned as error that the evidence conclusively showed that the transactions upon which the plaintiffs below claimed a right to recover were wagering and gambling contracts, and that the court erred in not so holding and the jury in not so finding.

This assignment is of course without merit, since it asks us to determine the weight of proof, and thus usurp the province of the jury. There was no motion made at the close of the evidence to direct a verdict, and both parties therefore agreed to the submission of the issues of fact to the consideration of the jury. In the absence of such a request we must assume that there was sufficient evidence to warrant the court in permitting the jury to draw the inferences proper to be deduced *from the [403] evidence in the case. Moreover, the bill of exceptions filed in the record does not purport to contain all the evidence.

The 2d, 3d, 4th, and 5th assignments of error cover exceptions to the admission in evidence of the rules of the Board of Trade at Chicago, the rules of the clearing house of that board, and the admission in evidence of certain testimony given by James E. Boyd, one of the plaintiffs, explanatory of the clearing-house rules, and of the manner in which the payments of losses and profits accruing under the various transactions involved in this action were made by the clearing house of the Chicago Board of Trade. Evidence had been introduced on behalf of plaintiffs that the agreement with Hansen was that the transactions were to be conducted under the rules of the Board of Trade at Chicago, and that such rules were explained to him. The rules and regulations in question were therefore competent evidence. *Bibb* v. *Allen*, 149 U. S. 481, 489, 490 [37: 819, 823]. The oral testimony of Boyd tended to explain the purport of those rules and the transactions thereunder, and was consequently relevant.

The 6th assignment relates to the overruling of a motion, made at the close of the evidence for plaintiffs, that the court instruct a verdict for the defendant; and assignments 7 to 15 inclusive attack portions of the charge to the jury. As to the alleged error in refusing to instruct a verdict at the close of the evidence for plaintiffs, it is sufficient to say that it has been repeatedly held by this court that when, after such a motion, the defendant introduces testimony, as was done in the case at bar, an exception to the action of the court in refusing to direct a verdict is waived. *Runkle* v. *Burnham*, 153 U. S. 216 [38: 694].

Assignment 7 asserts that the court erred in giving the following instruction:

"The time during which these transactions occurred commenced in August, 1888, and were concluded and the whole transaction finally closed up in June, 1889. The plaintiffs claim that the defendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery; *that he in- [404] quired of the manager the commission to be charged, and was informed of the rate, and also told by the manager in charge that it was a good time to make some scalps, but what that term means has not been developed by the testimony."

The exception taken to this portion of the charge was that the defendant, in his testimony, had "stated and developed the meaning of the word 'scalp,' and that the charge excepted to was a denial of actual, material testimony introduced on the part of the defendant and material to his defense." In his brief, counsel for plaintiff in error asserts that the charge misled the jury, and, in effect, with-

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drew the evidence on the subject from the jury and wholly annulled its force. Concerning this alleged error, the trial judge, in his opinion denying the motion for a new trial, said:

"It is urged that the jury were misled by a statement in the charge that the word 'scalps,' used by the agent of the defendant before the defendant authorized him to enter into any contracts for the purchase or sale of wheat, misled the jury.

"Hansen, the defendant, testified, in substance, that in the latter part of July, 1888, the manager of the plaintiff at Minneapolis was introduced to him by Mr. George Shepherd, who said: 'I used to have a few deals in options, and when I was trading with him I had never made a loss;' and that the next day after the introduction the manager spoke to him in the Chamber of Commerce building, in Minneapolis, and said that 'he knew I had some trades a year ago and they had roasted me pretty hard then, but he thought it was a good chance to make something back this fall by making some scalps.' On cross-examination, witness, on being asked 'What do you mean by the word "scalps?"' said the word was used on exchange frequently when they mean 'taking a short time, buy and sell as quick as you see a profit, and when you have a loss close it out at any amount.' 'A scalp means a short deal.'

"The meaning of the word is not fully disclosed by this testimony, nor is it revealed by the 405] answer to a question of *the court, when the witness, in substance, said that an example of a 'scalp' was when a dealer, having previously bought wheat to be delivered in May, sold the same quantity to be delivered the same month and settled his deals before May."

In view of the evidence contained in the record and referred to in the opinion of the trial judge, there was no substantial error committed in the portion of charge now under review The language of the court could not reasonably be understood by the jury as meaning more than that the court was of opinion that the precise meaning of the term in question had not been clearly shown by the evidence. The observations, however, of the court were mere comment upon the evidence and were evidently not intended, and we do not think could have operated, to prevent the jury giving such weight as they saw fit to the explanatory testimony on the subject.

Assignments 8, 10, 11, and 12 may be considered together. They allege error in the following portions of the charge:

"8. It is claimed on the part of the plaintiffs that defendant was informed of the rate of commission for their services; that the contracts made for him would be subject to the rules, usages, and regulations of the Chamber of Commerce of the city of Chicago, and that in all cases actual wheat must be purchased and sold, and the margins kept up to protect them against loss."

"10. The plaintiffs' theory is, and evidence has been introduced tending to sustain it, that they were employed by defendant, through the Minneapolis office, as brokers and commission merchants, to purchase or sell wheat, for future delivery, on his account, and that such sales and purchases were to be made on the Chicago Board of Trade with the members thereof; that such contracts were to be governed by the rules and usages of such Chamber of Commerce, and that in every instance actual delivery of wheat was intended by the parties to the contracts made for the defendant's account, and that these contracts were closed and settled up by the plaintiffs in accordance with these terms, and at the defendant's *request, and advances were made [406 and their own money paid out for his benefit.

"11. All optional contracts, however, are not illegal under the statute which was read to you. If the option is to sell or purchase at a future time, then it is illegal and a wager; but if the option consists merely of a delivery within a specified time, the contract is valid, and what was done by putting up margins amounts to nothing unless the contract itself is illegal. The validity of an option contract depends upon the mutual intention of the parties thereto, and if a sale or purchase of actual wheat for future delivery is intended, it is valid. If the contract is lawful, the putting up of margins to cover losses which might accrue from fluctuations in prices in final settlement of the transactions, according to the rules and usages of the Board of Trade of the city of Chicago, is entirely proper and legitimate. These rules have been read to you by counsel for plaintiffs, and there is nothing in these rules on their face that indicates that they are in violation of the laws of Illinois or contrary to public policy.

"12. Courts, however, must recognize from necessity the methods of carrying on business at the present day, and apply well-settled principles of the common law to enforce contracts, unless they are forbidden by statute or violate some rule of public policy. The daily mercantile business of the country, mercantile deals—and by that I mean the sale and purchase of personal property—could not be successfully carried on if merchants and dealers were unable to sell something which they did not have, but which they intended to get in the market and buy before the day of delivery. A trader has a right to sell, to deliver at some future time, that which he then has not, but which he expects to go into the market and buy; and the parties may agree mutually that there need not be a present delivery, but that such delivery may take place at some other time. Such future-delivery contracts, however, must be in good faith; there must be an intention to make an actual sale and delivery of the article dealt in."

The sole objection made upon the argument to these several instructions was, in substance, that under the evidence in the *case the [407 court was not warranted in assuming, or the jury in finding, that the transactions between Boyd & Bro. and Hansen might be valid. Obviously, however, such an objection cannot prevail in the absence of a motion on behalf of defendant at the close of the whole evidence for an instruction in his favor. Nor, if such motion had been made, could we review a ruling upon it in the condition of the record in this case, as the bill of exceptions does not purport to contain all the evidence.

Assignment No. 18 covers instructions in

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which the court repeated plaintiffs' theory of the transactions, stated the rules of law governing the question as to when a contract was void as a wagering or gambling contract, and the facts necessary to be proved to the satisfaction of the jury before they could properly return a verdict to that effect. These instructions embraced a half dozen paragraphs of the charge, one paragraph in particular being very lengthy, and cover more than a page and a half of the printed record.

The exception noted to this part of the charge was, "that there is nothing in the pleadings, evidence, or record in this action to support or justify the theory of the plaintiffs stated by the court in this part of its charge here excepted to; that the portion of said charge here excepted to is prejudicial to the defendant and is misleading to the jury, is error in the charge and error in law on all the evidence and facts in the case." The assignment is without merit. As all the evidence is not shown to be contained in the record, we must assume that there was evidence in the case tending to support plaintiffs' theory of the case stated by the court. The exception is moreover too general, uncertain, and indefinite to merit detailed consideration.

Assignment No. 14 asserts that the court erred in giving the following instruction:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the Board of Trade of Chicago, offsets between persons and dealers connected with that board through whom these [408] plaintiffs operated, that is *not evidence of their illegality. The mode of settlement of bona fide contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take, and deliver the actual wheat at the time specified when the contracts were made."

The exception taken to this instruction was "that the offsets and modes of settlement stated and referred to in the part of the charge here excepted to belong to the jury as proper and competent evidence, to be considered by them in determining the entire intentions of the plaintiffs in respect thereto, and as affecting and showing the original intention with which said contracts were made and were to be executed and closed; that said charge here excepted to characterizes said evidence as no evidence and virtually takes the same from the jury; that said charge here excepted to is prejudicial to the defendant, is misleading to the jury, and is otherwise error in law."

We are referred by counsel for plaintiff in error, in his brief, to the language of the exception, as his argument upon this assignment.

The court had informed the jury what was the theory of plaintiffs upon which they claimed a right to recover. (See 10th assignment of error, *supra.*) Pursuant to their theory plaintiffs contended that the purchases and sales of wheat on account of the defendant were to be made on the Chicago Board of Trade with the members thereof, and the contracts of defendant were to be governed by the rules and usages of such board, and that, in every instance, an actual delivery of wheat was intended. The contracts referred to in the criticised instruction were the contracts claimed to have been entered into by plaintiffs on account of defendant with members of the Board of Trade at Chicago. Just before giving the instruction the court had said to the jury:

"These memoranda which have been offered in evidence and the entries on the plaintiffs' books of these contracts are not conclusive evidence of their character. You are to determine what these contracts were; you are to determine them from the evidence in the case; you can look into the *transactions themselves as [409] disclosed by the evidence and determine from the facts and circumstances attending their making and the conduct of the parties thereto with reference to them whether they are illegal within the rule laid down, or whether they are bona fide contracts for the purchase and sale of wheat to be delivered at a future time."

In determining the conduct of the parties to the contracts with reference thereto, particularly in view of other instructions of the court, we think it beyond question that the jury must have understood they were authorized to take into consideration the modes of offsets and settlements by which the contracts were canceled. We do not think the instruction was amenable to the criticism made on behalf of defendant.

The greater part of the brief of counsel for plaintiff in error is devoted to argument in support of the contention that upon the undisputed evidence in the cause a verdict should have been directed for defendant. Aside from the circumstance to which we have before called attention, that the bill of exceptions does not purport to contain all the evidence introduced at the trial, this contention is fully answered by what we have said above in disposing of the 1st assignment of error.

We are of opinion, however, that the instruction covered by the 9th assignment of error was erroneous. The instruction is as follows:

"9. Now, if you find from the evidence that the plaintiffs about April 29, 1889, informed the defendant by letter that the 40,000 bushels of May wheat in question could be at that time changed to June wheat, and that the defendant made no answer thereto, and if you further believe from the evidence that said May wheat was changed over into June, for and on account of defendant, and that the plaintiffs rendered an account, a report, and statement to defendant that said change had been made, and the defendant received such report and statement and retained it, and made no objections to said change of said May wheat to June, then such facts amount to and were a ratification on the part of defendant of the acts of the plaintiffs in making such change."

*The exception taken to this instruc- [410] tion was, "that the evidence in the case did not justify the finding by the jury that 'said May wheat was changed over into June wheat for and on behalf of the defendant,' and that the statement and form of the part of said charge excepted to is prejudicial to the defendant, and for error in law."

It was not claimed that Boyd & Bro. had a general authority, by virtue of their dealings with Hansen, to make the so-called transfer; and, just preceding the instruction quoted, the

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court had called the attention of the jury to the fact that there was conflict in the evidence as to whether or not specific authority had been given to make it. Hansen was in default for margins on the purchase of May wheat, the price of the article had fallen very greatly, and on April 29, 1889, Boyd & Bro. had the right to close out the contract.

The instruction assumes that Boyd & Bro. and Hansen were so situated with reference to each other—as was the fact—that power could have been obtained from Hansen to make the purchase of June wheat, if he had wished to give the authority, and that the authority was asked for and was not given. Under such circumstances, we are of opinion that the unauthorized voluntary act of Boyd & Bro. could not be said, as a matter of law, to have been ratified by Hansen by his mere retention, without complaint, of an account and statement rendered to him "that said change had been made," or, in other words, that Boyd & Bro. had made a new purchase for his account.

In *Marshall County Supers.* v. *Schenck*, 72 U. S. 5 Wall 772, 782 [18: 556, 559], this court said: "Ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name." The mere retention by Hansen of a report that an unauthorized purchase of 40,000 bushels of wheat had been made on his account was entirely consistent with the hypothesis that he did not approve and did not intend to adopt what he had previously declined to authorize. The mere silence of Hansen was certainly not necessarily indicative of an intention to adopt the **411**] unauthorized act of Boyd & *Bro., and it was therefore insufficient of itself to warrant an instruction that it constituted in law an adoption of such act. The question of whether the evidence established ratification should have been submitted to the jury.

The 15th assignment of error covers an instruction to the jury that if facts and circumstances introduced in evidence by the plaintiffs which tended to show that the order for the transfer of May wheat to June wheat was given, in connection with a number of other recited facts, were found by the jury to exist, they would constitute a ratification. In view of our holding with reference to assignment No. 9, it will be unnecessary to review this last assignment.

We find, therefore, that there is error in the record solely with reference to the instruction contained in the 9th assignment of error, that if certain facts were found by the jury, the defendant should be held to have ratified the purchase on April 29, 1888, of 40,000 bushels of wheat for June delivery. The question arises as to the proper judgment to be entered. The plaintiffs below recovered judgment for the full amount of their claim. The June wheat purchase and sale were distinct and separable from the other transactions upon which a recovery was had. The amount of loss arising from the purchase and sale of this wheat, including the commission charged by Boyd & Bro., is clearly ascertainable from the evidence contained in the record, while the interest thereon embraced in the judgment is matter of simple calculation. The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party in whose favor a verdict or judgment has been returned or entered to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same. *Koenigsberger* v. *Richmond S. Min. Co.* 158 U. S. 41 [39: 889], and cases cited, p. 53 [893]; *Phillips & C. Const. Co.* v. *Seymour*, 91 U. S. 646, 656 [23: 341, 345].

Following the practice pursued in the last cited case, and also in *Washington & G. R. Co.* v. *Tobriner* ("*Washington & G. R. Co.* v. [**412** *Harmon*") 147 U. S. 571, 590 [37: 284, 291], we will not reverse the judgment below, if the defendants in error will remit the excess therein in the particulars heretofore indicated, that is, the loss on the purchase and sale of the June wheat ($1,800), the commission charged in that transaction ($50), and interest on those items from June 8, 1889, to the date of the verdict.

Ordered, that if the defendants in error will within a reasonable time during the present term of this court file in the circuit court of the United States for the district of Minnesota a remittitur of such excess, and produce and file a certified copy thereof in this court, the judgment, less the amount so remitted, will be affirmed; but, if this is not done, the judgment will be reversed. In either event the costs must be paid by defendant in error.

Mr. Justice **Brewer**, not having heard the argument, took no part in the decision of this cause.

UNITED STATES, *Appt.*,
v.
JANE L. STANFORD, EXTX. of LELAND STANFORD, Deceased.

(See S. C. Reporter's ed. 412-434.)

Liability of stockholder of Central Pacific Railroad Company.

A stockholder of the Central Pacific Railroad Company of California is not liable to the United

NOTE.—*As to liability in equity of the stockholders to the creditors of an insolvent corporation for the unpaid amounts due on their stock; liability on new shares issued after claim of creditor arose; capital stock is trust fund; payment for stock, how made,*—see note to Handley v. Stutz, 35: 227.

As to individual liability of stockholders for corporate debts, see note to Hatch v. Dana, 25: 885.

As to liability of trustees of manufacturing, mining, etc., corporations or associations, under New York statute, for not filing report,—see note to Chase v. Curtis, 28: 1088.

Individual liability of stockholders for corporate debts; liability contractual; limitations; repeal of statute imposing liability; damages for torts; effect of transfer of stock; during what time liability exists; judgment against corporation.

Where the statute provides that the proportion of the stockholder's liability to the corporate in-

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States, in proportion to the stock owned and held by him, for the principal and interest of bonds received by the company from the United States under the Pacific Railroad acts of Congress, since the liability depends upon those acts rather than upon the state law, and by them the railroad company is given all the rights and privileges of, and made subject to the same terms and conditions as, the Union Pacific Railroad Company, and the only security which was stipulated for is a lien by way of mortgage on the property of the corporation, without imposing any personal liability upon the stockholders for any claim of the United States.

[No. 783.]

Argued January 28, 29, 1896. Decided March 2, 1896.

APPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming the decree of the United States Circuit Court dismissing a suit brought by the United States against Jane L. Stanford, executrix of Leland Stanford, deceased, to establish a claim against the estate of the latter as a stockholder in the Central Pacific Railroad Company for moneys due the United States by reason of an obligation of said company to pay and reimburse to the United States the principal and interest of certain bonds. *Affirmed.*

See same case below, 70 Fed. Rep. 846.

Messrs. **J. M. Dickinson**, Assistant Attorney General, and **Holmes Conrad**, Solicitor General, for appellant.

Messrs. **Joseph H. Choate** and *Russell J. Wilson* for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

The United States seeks by this suit to establish a claim against the estate of Leland Stanford for $15,237,000.

The deceased held and owned a large number of the shares of the capital stock of the Central Pacific Railroad Company of California, and the Western Pacific Railroad Company—corporations that were organized under the laws of California, and which subsequently were consolidated and became the Central Pacific Railroad Company.

Those companies received bonds of the United States that were issued under the acts of Congress known as the Pacific Railroad acts in aid of the construction of a railroad and telegraph line extending from the Missouri river to the Pacific ocean. The present demand of the government arises out of the obligation which, it is alleged, rested upon the companies receiving such bonds to pay the principal at maturity and to reimburse the United States for all interest paid thereon.

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debtedness shall be the same as the proportion of his shares to the whole number of shares, the payment by him of his part relieves him from further liability. Adkins v. Thornton, 19 Ga. 325; Belcher v. Wilcox, 40 Ga. 391; Jones v. Wiltberger, 42 Ga. 575; Branch v. Baker, 58 Ga. 502; Crease v. Babcock, 10 Met. 525; United States v. Knox, 102 U. S. 422 (26: 216).

Up to this limit a creditor of the corporation may enforce his whole claim against a single stockholder. Larrabee v. Baldwin, 35 Cal. 155; Lane v. Morris, 8 Ga. 468; Lane v. Harris, 16 Ga. 217; Bank of Poughkeepsie v. Ibbotson, 24 Wend. 473; Hatch v. Burroughs, 1 Woods. 439; Young v. Rosenbaum, 39 Cal. 646; San José Sav. Bank v. Pharis, 58 Cal. 380; Morrow v. San Francisco Super. Ct. 64 Cal. 283.

Where a bank's charter contained this proviso: "Provided also that the stockholders in this corporation shall be individually liable to the amount of their stock for all debts of the corporation,"—the stockholders are each individually liable to pay to the creditors of the bank, not merely the balance unpaid upon subscriptions for stock, but also to the extent of the nominal or face value of the stock held by them, for debts of the bank. Root v. Sinnock, 120 Ill. 350, 60 Am. Rep. 559.

"A liability to an amount equal to their stock" is generally held to render stockholders liable for a sum equal to their full subscription after the latter has been paid, and is equivalent to the phrase "to double the amount of the stock held by them," which creates a liability for twice the amount of the subscription. Wheeler v. Millar, 90 N. Y. 359; United States T. Co. v. United States F. Ins. Co. 18 N. Y. 199; Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co. 11 Humph. 1, 53 Am. Dec. 742; Lewis v. St. Charles County, 5 Mo. App. 225; Briggs v. Penniman, 8 Cow. 387, 18 Am. Dec. 454; Perry v. Turner, 55 Mo. 418; Matthews v. Albert, 24 Md. 527; Norris v. Johnson, 34 Md. 485; Schricker v. Ridings, 65 Mo. 208; Gay v. Keys, 30 Ill. 415.

But a provision for liability "to an amount equal to the amount unpaid on the stock" imposes no obligation to pay beyond par value. Patterson v. Lynde, 106 U. S. 519 (27: 265); Stephens v. Fox, 33 N. Y. 313; Mills v. Stewart, 41 N. Y. 384; Brundage v. Monumental Gold & S. Min. Co. 12 Or. 322; Ladd v. Cartwright, 7 Or. 329.

In some instances each stockholder is made liable for all debts of the corporation. Patterson v. Wyomissing Mfg. Co. 40 Pa. 117; Marsh v. Burroughs, 1 Woods. 463.

The usual liability of stockholders imposed by statute, *viz.*, an absolute obligation to pay, is generally held to be contractual. Lowry v. Inman, 46 N. Y. 126; Paine v. Stewart, 33 Conn. 516; Bond v Appleton, 8 Mass. 472, 5 Am. Dec. 111; Hutchins v. New England Coal Min. Co. 4 Allen, 580; Grand Rapids Sav. Bank v. Warren, 52 Mich. 557; Hodgson v. Cheever, 8 Mo. App. 321; Manville v. Edgar, 8 Mo. App. 324; Freeland v. McCullough, 1 Dento, 414. 43 Am. Dec. 685; Aultman's Appeal. 98 Pa. 505; Sackett's Harbour Bank v. Blake, 3 Rich. Eq. 225; Woods v. Wicks, 7 Lea, 40.

This species of liability accordingly falls within the provisions of a statute fixing the limitation for actions on contracts, is enforceable only in a court of law, and generally survives against the personal representatives of a decedent. Howell v. Roberts, 29 Neb. 483; Coy v. Jones, 30 Neb. 789, 10 L. R. A. 658; Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Queenan v. Palmer, 117 Ill. 619; Richmond v. Irons, 121 U. S. 27 (30: 864), 17 Am. & Eng. Corp. Cas. 71; Irons v. Manufacturers' Nat. Bank, 21 Fed. Rep. 197; Chase v. Lord, 77 N. Y. 1; Manville v. Edgar, *supra;* Child v. Coffin, 17 Mass. 64; Ripley v. Sampson, 10 Pick. 371; Dane v. Dane Mfg. Co. 14 Gray, 488; Cummings v. Wright, 11 Mo. App. 348; Donnelly v. Hodgson, 13 Mo. App. 15.

Where the liability is construed as contractual, statutes imposing it cannot be repealed to the detriment of existing creditors. Hathorn v. Calef, 69 U. S. 2 Wall. 10 (17: 776); Central Agri. & M. Asso. v. Alabama Gold L. Ins. Co. 70 Ala. 120; Provident Sav. Inst. v. Jackson Place S. & B. Bank, 52 Mo. 552; St. Louis R. S. Mfg. Co. v. Harbine, 2 Mo. App. 134; Conant v. Van Shaick, 24 Barb. 87; Woodruff v. Trapnall, 51 U. S. 10 How. 190 (13: 383).

The stockholder's liability for "debts" of the corporation includes a claim against it for damages

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414] *The bill proceeds upon the ground that by the Constitution and laws of California at the time the above corporations were organized, as well as when they received the bonds of the United States, each stockholder of a railroad corporation was liable, in proportion to the stock owned and held by him, for all of its debts and liabilities, and, consequently, that the estate of Stanford is liable to the United States in proportion to the stock owned and held by him in the corporations named.

The principal contention of the defendant is, that the question of the liability of stockholders for the debts and obligations of companies receiving bonds of the United States under the Pacific Railroad acts does not depend upon the laws of California, but is governed by the acts of Congress under which such bonds were issued; that by its legislation in aid of the construction of the Union and Central Pacific railroads Congress intended to define, control, and regulate the entire relations of the government to all of the companies receiving subsidy bonds without reference to the laws of any state; that those companies were respectively created or adopted as agencies for a great national purpose, in the accomplishment of which they were to be subject to the exclusive control of the general government; that the functions, obligations, and liabilities of all the companies participating in the bounty of the United States were to be equal and identical; and that as to each company the government looked to it alone for the performance of all that the acts imposed upon it, and did not contemplate nor intend that there should be any individual liability of stockholders in respect of the subsidy bonds issued by the United States.

If these acts of Congress have the scope and effect attributed to them by the defendant the decree may be affirmed without any expression of opinion by this court upon other questions discussed at the bar, and which, if considered, would require a construction of the laws of California relating to the personal liability of stockholders for the debts of railroad corporations.

Was it part of the contract between the United States and the corporations receiving its subsidy bonds that the *stockholders of [415 such corporations, respectively, should be personally liable for the principal and interest of those bonds? Or did the United States make provision in the acts of Congress for all the security intended to be taken for their payment? These questions cannot by answered by referring to any one section of either act, but only by examining the provisions of all of those acts in the light of the circumstances under which the United States made grants of public

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sounding in tort. Carver v. Braintree Mfg. Co. 2 Story, 432; Mill Dam Foundry Proprs. v. Hovey, 21 Pick. 417; Gray v. Bennett, 3 Met. 522; Wyman v. American Powder Co. 8 Cush. 182; Dryden v. Kellogg, 2 Mo. App. 87; Smith v. Omans, 17 Wis. 395; White v. Hunt, 6 N. J. L. 402; Chase v. Curtis, 113 U. S. 452 (28: 1038); Bohn v. Brown, 33 Mich. 257; Cable v. McCune, 26 Mo. 371, 72 Am. Dec. 214; Doolittle v. Marsh, 11 Neb. 243; Heacock v. Sherman, 14 Wend. 59; Archer v. Rose, 3 Brewst. 264; Child v. Boston & F. Iron Works, 137 Mass. 516, 50 Am. Rep. 328; Nanson v. Jacob, 93 Mo. 331; Crouch v. Gridley, 3 Hill, 250; Zimmer v. Schleehauf, 115 Mass. 52; *Re* Boston & F. Iron Works, 23 Fed. Rep. 880; Losee v. Bullard, 79 N. Y. 404, affirming Esmond v. Bullard, 16 Hun, 65; Kellogg v. Schuyler, 2 Denio, 73.

A transfer of stock, if regular and bona fide, relieves the transferrer from liability for unpaid subscriptions. Huddersfield Canal Co. v. Buckley, 7 T. R. 36; Gilmore v. Bank of Cincinnati, 8 Ohio, 62; Cole v. Ryan, 52 Barb. 168; Billings v. Robinson, 94 N. Y. 415; Wakefield v. Fargo, 90 N. Y. 213; Cowles, v. Cromwell, 25 Barb. 413; Isham v. Buckingham, 49 N. Y. 216; Stewart v. Walla Walla Print. & Pub. Co. 1 Wash. 521; Chouteau Spring Co. v. Harris, 20 Mo. 382; Miller v. Great Republic Ins. Co. 50 Mo. 55; Allen v. Montgomery R. Co. 11 Ala. 437; Haynes v. Palmer, 13 La. Ann. 240; Weston's Case, L. R. 4 Ch. 20; McKenzie v. Kittridge, 24 U. C. C. P. 1; *Re* European Bank, 41 L. J. Ch. 501; Putnam v. New Albany & S. C. J. R. Co. ("Burke v. Smith"), 83 U. S. 16 Wall. 390 (21: 361).

Transfers of stock without the required registration, or to irresponsible parties, and those incompetent to hold stock, leave the transferrer still liable. Shellington v. Howland, 53 N. Y. 376; Worrall v. Judson, 5 Barb. 210; Louisiana Ins. Co. v. Gordon, 8 La. 174; Bane v. Young, 61 Me. 160; Fowler v. Ludwig, 34 Me. 455; Davis v. Essex First Baptist Soc. 44 Conn. 582; Kellogg v. Stockwell, 75 Ill. 68; Adams v. Johnson (Bowden v. Johnson"), 107 U. S. 251 (27: 386); Bowden v. Santos, 1 Hughes, 158; Provident Sav. Inst. v. Jackson Place S. & B. Rink, 52 Mo. 557; Rider v. Morrison, 54 Md. 429; Central Agri. & M. Asso. v. Alabama Gold L. Ins. Co. 70 Ala. 120, 3 Am. & Eng. Corp. Cas. 78; Mandion v. Firemen's Ins. Co. 11 Rob. (La.) 177; Nathan v. Whitlock, 9 Paige, 152; Paine v. Stewart, 33 Conn. 517.

Cases holding stockholders liable only for debts incurred during their membership: Moss v. Oakley, 2 Hill, 269; Judson v. Rossie Galena Co. 9 Paige, 598, 38 Am. Dec. 569; Harger v. McCullough, 2 Denio, 119; Tracy v. Yates, 18 Barb. 152; Phillips v. Therasson, 11 Hun, 141; Williams v. Hanna, 40 Ind. 535; Chesley v. Pierce, 32 N. H. 388; Larrabee v. Baldwin, 35 Cal. 155; Norris v. Johnson, 34 Md. 485; Norris v. Wrenschall, 34 Md. 492; Fleeson v. Savage Silver Min. Co. 3 Nev. 157; Windham, Prov. Inst. for Savings v. Sprague, 43 Vt. 502.

Cases in which those who are stockholders at commencement of action are held liable: Middletown Bank v. Magill, 5 Conn. 28; Deming v. Bull, 10 Conn. 409; Cleveland v. Burnham, 55 Wis. 596; Ripley v. Sampson, 10 Pick. 371; Marcy v. Clark, 17 Mass. 330; McClaren v. Franciscus, 43 Mo. 452; Skrainka v. Allen, 76 Mo. 384; Longley v. Little, 26 Me. 162.

The creditor must have obtained a judgment against the corporation with a return of *nulla bona* before he may sue the stockholder. Dauchy v. Brown, 24 Vt. 209; Harper v. Union Mfg. Co. 100 Ill. 225; First Nat. Bank v. Greene, 64 Iowa, 445; Wright v. McCormack, 17 Ohio St. 86; Stewart v. Lay, 45 Iowa, 604; Toucey v. Bowen, 1 Biss. 81; Lane v. Harris, 16 Ga. 217; Drinkwater v. Portland Marine R. Co. 18 Me. 35; Cambridge Water Works v. Somerville Dyeing & B. Co. 4 Allen, 239; Means' Appeal, 85 Pa. 75; Bayliss v. Swift, 40 Iowa, 648; McClaren v. Franciscus, 43 Mo. 452; Wehrman v. Reakirt, 1 Cin. (Ohio) 230; Jackson v. Meek, 87 Tenn. 69; Nimick v. Mingo Iron Works Co. 25 W. Va. 184; Terry v. Anderson, 95 U. S. 636 (24: 367); Walser v. Seligman, 21 Blatchf. 130; Handy v. Draper, 89 N. Y. 334; New England Commercial Bank v. Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688; Wetherbee v. Baker, 35 N. J. Eq. 501; Munger v. Jacobson, 99 Ill. 349; Cutright v. Stanford, 81 Ill. 240; Remington v. Samana Bay Co. 140 Mass. 494; Priest v. Essex Hat Mfg. Co. 115 Mass. 380; Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783.

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lands and provided for the issuing of bonds in aid of the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean.

By the act of July 1, 1862, entitled "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes" (12 Stat. at L. 489, chap. 120), the Union Pacific Railroad Company was incorporated with power to lay out, locate, maintain, and enjoy a continuous railroad and telegraph from a named point in what was then the territory of Nebraska to the western boundary of what at that time was the territory of Nevada.

That company was given the right of way through the public lands for the construction of its railroad and telegraph line as well as the power and authority to take from those lands adjacent to the line of the road, earth, stone, and timber, and other materials required in the work of construction, and, so far as it was necessary to do so, to occupy the public lands for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations; the United States to extinguish the Indian titles to all lands falling under the operation of the act and required for the right of way and grants made. "For the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores," a large grant of lands was made, for which patents were directed to be issued as each 40 consecutive miles of railroad and telegraph were completed and equipped in all respects as required. §§ 2, 3, 4.

The 5th section provided that for the purposes [416] mentioned *the Secretary of the Treasury, upon the completion and equipment of 40 consecutive miles of railroad and telegraph, should issue to the company bonds of the United States, of $1,000 each, payable in thirty years after date, bearing 6 per cent per annum interest, to the amount of sixteen of said bonds per mile for such section of 40 miles; and "*to secure the repayment* to the United States, as hereinafter provided, of the amount of said bond so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto constitute a mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued;* and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, *the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default shall remain in the ownership of said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.*"

The grants referred to were made "upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government whenever required to do so by any department thereof; and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and *all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid.*" The company was entitled to pay *the United [417] States, wholly or in part, in the same or other bonds, Treasury notes or other evidences of debt against the United States, to be allowed at par; and after the road was completed, *until the bonds and interest were paid, at least 5 per cent of the net earnings of said road were required to be annually applied to the payment thereof.* § 6.

The company was required to file its assent to the act in the Department of the Interior within one year after its passage, and it was allowed until the 1st day of July, 1874, to complete its railroad and telegraph through the territories of the United States to the western boundary of the territory of Nevada, "there *to meet and connect with* the line of the Central Pacific Railroad Company of California." §§ 7, 8.

The 9th section authorized the Leavenworth, Pawnee, & Western Railroad Company of Kansas to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, "upon the same terms and conditions in all respects" as were provided in the act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude named; the route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the 100th meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. By the same section it was declared that "the Central Pacific Railroad Company of California, a corporation existing under the laws of the state of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, *upon the same terms and conditions, in all respects,* as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act."

*The 10th section provided that the [418] company chartered by the state of Kansas should complete 100 miles of its road, commencing at the mouth of the Kansas river, within two years

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after filing its assent to the conditions of the act, and 100 miles per year thereafter until the whole was completed; and the Central Pacific Railroad Company of California should complete 50 miles of its road within two years after filing its assent to the provisions of the act, and 50 miles per year thereafter until the whole was completed; and "after completing their roads, respectively, said companies, or either of them, may unite *upon equal terms* with the first-named company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines in this act hereinafter mentioned, *through the territories from the state of California to the Missouri river*, as shall then remain to be constructed, *on the same terms and conditions* as provided in this act in relation to the said Union Pacific Railroad Company." And the Central Pacific Railroad Company of California, after completing its road across that state, was authorized "to continue the construction of said railroad and telegraph *through the territories of the United States to the Missouri river*, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and *the whole of said railroad and branches and telegraph is completed.*"

By the 12th section it was declared that the "track upon the entire line of railroad and branches *shall be of uniform width*, to be determined by the President of the United States, so that, when completed, *cars can be run from the Missouri river to the Pacific coast;* the grades and curves shall not exceed the maximum grades and curves of the Baltimore & Ohio Railroad; the *whole line* of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation so far as the public and government are concerned, *as one connected, continuous line.* . . ."

419] *The 15th section gave to any other railroad company then or thereafter incorporated the right to connect with the road and branches provided for by the act, at such places and upon such just and equitable terms as the President of the United States should prescribe.

All of the railroad companies named in the act, and assenting thereto, or any two or more of them, were authorized to form themselves into one consolidated company; notice of such consolidation to be in writing, to be filed in the Department of the Interior, and the consolidated company to proceed to construct the railroad, branches, and telegraph line, *upon the terms and conditions* provided in the act. § 16.

The 17th section provided: "That in case said company *or companies* shall fail to comply with the terms and conditions of this act, by not completing said railroad and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted *to the use of the United States*, to repay all such expenditures caused by the default and neglect of said company or companies: *Provided*, That if said roads are not completed, so as to form *a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California*, by the 1st day of July, 1876, *the whole of all of said railroads* before mentioned and to be constructed under the provisions of this act, together with all their furnishings, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, *shall be forfeited to and be taken possession of by the United States: Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the 100th meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada Mountains, there *shall be reserved of each [420 part and instalment 25 per cent, to be and *remain in the United States Treasury undelivered*, until said roads *and all parts thereof provided for in this act are entirely completed;* and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment 15 per cent, *to be and to remain in the Treasury* until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States."

By the 18th section it was declared: "Whenever it appears that the net earnings of the *entire road and telegraph*, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running, and managing of said road, shall exceed 10 per cent upon its costs, exclusive of the 5 per cent, to be paid to the United States, *Congress* may reduce the rates of fare thereon if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act."

The several railroad companies named were authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, "so that the present line of telegraph between *the Missouri river and San Francisco* may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into and the transfer of said telegraph line be made in accordance therewith to the line of said *railroad and[421

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branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of the railroad companies named herein." § 19.

The act of 1862 was amended in many particulars by the act of July 2, 1864. 13 Stat. at L. 356, chap. 216. The time for designating the general route of the Union Pacific Railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, was extended one year from the time designated in the act of 1862; and the Central Pacific Railroad Company of California was required to complete 25 miles of its road "in each year thereafter, and the whole to the state line within four years, and that only one half of the compensation for services rendered for the government *by said companies* shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads." § 5.

The proviso to section 4 of the original act was modified so that the president of the United States was authorized to appoint *for each of the roads* three commissioners, as provided for in the original act; and "the verified statement of the president of the California company, required by said § 4, shall be filed in the office of the United States surveyor general for the state of California, instead of being presented to the President of the United States; and the said surveyor general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on, by the said commissioners, *and the requi-* [422] *site amount of bonds* **may be issued* and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than 20 consecutive miles of their said railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory." § 6.

So much of § 17 of the act of 1862 as provided for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads was repealed; and it was provided that the failure of any one company to comply fully with the conditions and requirements of that act, and the act of which it was amendatory, should not work a forfeiture of the rights, privileges, or franchises of any other company or companies that should have complied with the same. § 7.

To enable any one of the corporations to make convenient and necessary connections with other roads, it was authorized to establish and maintain all necessary ferries upon and across all rivers which its road might pass in its course; and authority was given each corporation to construct over all rivers for the convenience of such road bridges having suitable and proper draws for the passage of steamboats.

The 10th section provided "that § 5 of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to *participate in the construction of said road*, may, on the completion of each section of said road, as provided in this act and the act to which this is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective *roads, property, and [423] equipments, except as to the provisions of the 6th section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States. And said section is further amended by striking out the word 'forty,' and inserting in lieu thereof the words 'on each and every section of not less than twenty.'"

By the 4th section it was declared that "if any of the railroad companies entitled to bonds of the United States, or to issue their first-mortgage bonds herein provided for, has, at the time of the approval of this act, issued, or shall thereafter issue, any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority of preference of payment to the said guaranteed bonds or said first-mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied or uncanceled shall be deducted from the amount of such government and first-mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first-mortgage bonds shall be granted or permitted, as, added to such outstanding, unsatisfied, or uncanceled bonds of the company, shall make up the whole amount per mile to which the company would otherwise have been entitled. . . . *Provided, also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road, or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act and the act amended by this act."

The 12th section provided that the Leavenworth, Pawnee, & Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, should build the

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railroad from the mouth of Kansas river, by the way of Leavenworth, or, if that be not deemed the best route, then it should, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near 424] the city *of Lawrence; but to aid in the construction of said branch the company was to receive no bonds. And if the Union Pacific Railroad Company should not be proceeding in good faith to build its railroad through the territories, when the Leavenworth, Pawnee, & Western Railroad Company, or the Union Pacific Railroad Company, Eastern Division, shall have completed its road to the 100th degree of longitude, then the last-named company may proceed to make said road westward "until it meets and connects with the Central Pacific Railroad Company on the same line."

The 15th section required the several companies authorized to construct the aforesaid roads to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and government were concerned, "*as one continuous line;* and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of either or any of said companies, or adverse to the road or business of any or either of the others."

Any two or more of the companies authorized to participate in the benefits of the act were authorized, at any time, to unite and consolidate their organizations "upon such terms and conditions and in such manner as they may agree upon, and as shall not be incompatible with this act or the laws of the states in which the roads of such companies may be," and thereupon such organization, so formed and consolidated, "shall succeed to, possess, and be entitled to receive from the government of the United States *all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements* which said companies, respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively." § 16.

All the provisions of this act so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either 425]thereof, were to apply to the *consolidated organization. And if, upon the completion by the consolidated organization of the roads, or either of them, of the companies consolidated, any other of the road or roads of either of the other companies authorized and forming, or intended or necessary to form, a portion of "a continuous line" from each of the several designated points on the Missouri river to the Pacific coast shall not have constructed the number of miles of its road within the time required, the consolidated organization was authorized "to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things provided, authorized, or granted to be done by the company authorized to construct and equip the same," and shall be entitled to "*similar and like grants, benefits, immunities, guaranties, acts, and things* to be done and performed by the government of the United States, by the President of the United States, or the Secretaries of the Treasury and Interior, and by commissioners in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, *and upon the like and similar terms and conditions*, as far as the same are applicable thereto. . . . And in case any company authorized thereto shall not enter into any consolidated organization, such company, upon the completion of the road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions in this section, *and to have all the benefits thereof, as fully and completely as are herein provided*, touching such consolidated organization. And in case more than one such consolidated organization shall be *made, pursuant to this act, the terms [426 and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force, and effect to the other: *Provided, however*, That rights and interests at any time acquired by one such consolidated organization shall not be impaired by another thereof." It was further provided that "should the Central Pacific Railroad Company of California complete their line to the eastern line of the state of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward 150 miles on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and upon doing so shall enjoy *all the rights, privileges, and benefits conferred by this act on said Union Pacific Railroad Company.*" § 16.

By a subsequent act, approved March 3, 1865, the 10th section of the act of 1864 was so amended as to allow the Central Pacific Railroad Company, and the Western Pacific Railroad Company of California, the Union Pacific Railroad Company, the Union Pacific Railroad Company, Eastern Division, and all other companies provided for in the above act, to issue their 6 per cent thirty-years' bonds, to the extent of 100 miles in advance of a continuous, completed line of construction; further, that "the assignment made by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of said state, of the right to construct all that portion of said railroad and

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telegraph from the city of San José to Sacramento, was ratified and confirmed to the latter company, "with *all the privileges and benefits* of the several acts of Congress relating thereto and subject to all the conditions thereof." 13 Stat. at L. 504, chap. 88.

From this review of the legislation of Congress it appears that the acts of 1862, 1864, and 1865 all relate to the same general subject; and, when examined for the purpose of ascertaining the object of Congress in passing them, 427] they *should be regarded as one enactment. What that object was is no longer a subject of inquiry in this court. In *United States* v. *Union P. R. Co.* 91 U. S. 72 [23: 224], this court, speaking by *Mr. Justice* Davis, held that the construction of a railroad connecting the Missouri river with the Pacific ocean was a national work, because such a road would be a great national highway, under national control; that the scheme for establishing that highway originated in national necessities, the country being involved at the time in a civil war which threatened the disruption of the Union, and endangered the safety of our possessions on the Pacific; and that the enterprise required national assistance, because private capital was inadequate for an undertaking of such magnitude. It appears upon the face of the act of 1862, as amended by the act of 1864, that Congress had in view the promotion of the public interest and welfare by the construction of a railroad and telegraph line that could be used by the government at all times, but particularly in time of war, for postal, military, and other purposes, and that, so far as the government and the public were concerned, such road and telegraph were to be operated as one continuous line. These ends were to be attained through the agency of a corporation created by Congress, and of certain corporations organized under state laws which Congress selected as instruments to be employed in accomplishing the public objects specified in its legislation.

Naturally the next inquiry is whether Congress made any, and, if any, what, provision to secure the United States against liability on account of its bonds issued in aid of the construction of this national highway. The acts of 1862 and 1864 furnish the answer to this question. By the act of 1862, as we have seen, it is provided that the issuing of bonds and their delivery to the railroad company entitled to receive them should *ipso facto* constitute a mortgage on the whole line of the railroad and telegraph constructed by the company receiving the bonds, together with its rolling stock, fixtures, and property of every kind and description, and in consideration of which the bonds were issued; and upon the refusal or failure of the company to 428] redeem the bonds, or any part of *them, when required so to do by the Secretary of the Treasury in accordance with the act, the railroad, with all the rights, functions, immunities, and appurtenances appertaining thereto, and all lands granted to the company, could be taken possession of by that officer, for the use and benefit of the United States. The same act also authorized the government to retain all sums due as compensation for services rendered in its behalf by the railroad company.

These provisions were so far altered by the act of 1864 as to authorize the Union Pacific Railroad Company, or any company authorized to participate in the construction of the road from the Missouri river to the Pacific ocean, to place a first mortgage on their railroad and telegraph lines, respectively (to an amount not exceeding the bonds of the United States), to which mortgage the lien of the United States bonds was made subordinate—saving the right of the government, reserved in the act of 1862, to be preferred in the use of the railroad and telegraph for the transportation of the mails, troops, and munitions of war, and the transmission of telegraphic despatches. The act of 1864 also provided that only one half of the compensation due from the government for services rendered should be retained and applied to the payment of the bonds issued by the United States. But the act of May 7, 1878, known as the Thurman act (20 Stat. at L. 56, chap. 96, § 2), provided that the whole of such compensation might be retained, one half to be applied to the payment of interest on the bonds issued by the United States, and the other half to be turned into the sinking fund established by that act.

These and other provisions indicate the extent to which Congress deemed it necessary to make provision for the protection of the United States against liability on its bonds loaned to railroad companies for the purposes indicated in the act of 1862. The security taken by the government was of course impaired by the act of 1864, which subordinated the lien of the United States, as originally declared, to the first mortgages executed by the respective companies under the authority of that act. But if the act of 1862, fairly interpreted, excludes the idea that stockholders of the companies *receiving subsidy bonds were to [429 be personally liable to the United States for the principal and interest accruing on those bonds, the legislation of 1864, however unwise, did not have the effect of imposing such liability.

Now the important fact disclosed by the Pacific Railroad acts is that no one of them contains any clause imposing upon the stockholders of a corporation receiving subsidy bonds personal responsibility for any debt due to the United States from such corporation by reason of its failure to pay those bonds at maturity. It was, of course, competent for Congress, when incorporating the Union Pacific Railroad Company, to impose such liability upon the stockholders of that corporation. But as it did not do so, as the personal liability of stockholders for the debts of the corporation arises only from statute, it cannot be claimed, nor is it claimed, that the stockholders of *that* corporation incurred by their subscriptions of stock any liability to the United States, or to any other creditor, for the debts of that company; they were bound, of course, to make good the amount of their subscriptions, but, that being done, their personal responsibility to creditors of the corporate body ceased. *Pollard* v. *Bailey*, 87 U. S. 20 Wall. 520, 526 [22: 376, 378]; *Terry* v. *Little*, 101 U. S. 217 [25: 864]; *Free School Trustees* v. *Flint*, 13 Met. 539, 541; *Slee* v. *Bloom*, 19 Johns. 456, 474, 10 Am. Dec. 273; *Carr* v. *Iglehart*, 3 Ohio St. 458; *Seymour* v. *Sturgess*, 26 N. Y. 134, 139;

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Bohn v. *Brown*, 88 Mich. 257; *Woods* v. *Wicks*, 7 Lea, 40, 45; *Smith* v. *Huckabee*, 53 Ala. 191, 193; *Salt Lake City Nat. Bank* v. *Hendrickson*, 40 N. J. L. 52, 54; *Coffin* v. *Rich*, 45 Me. 507, 510, 71 Am. Dec. 559; 3 Thomp. Corp. § 2925, and authorities there cited. Congress, by its legislation, encouraged and invited the investment of private capital in the construction of a highway which, at that time, was deemed of vital importance to the whole country. As the stockholder of a corporation is not liable, beyond the amount of his unpaid subscription, for its debts, unless such liability is imposed by statute, and as the acts of Congress in question are silent upon that subject, every subscriber to the stock of the Union Pacific Railroad Company must be deemed to **430**] have become such upon the *condition, implied by law, that he should not be personally liable for the debts of the corporation. It is not too much to say that if the acts of 1862 and 1864 had made the stockholders of the corporations therein named personally liable, in proportion to their stock, for the repayment of the principal and interest of the bonds issued and delivered to such corporation, the accomplishing of the objects Congress had in view would have been seriously retarded, if not wholly defeated.

It is said, however, that these principles have no application to stockholders of California corporations that came into existence under constitutional and statutory provisions making a stockholder of a railroad corporation liable, in proportion to his stock, for its debts and obligations.

This position cannot be sustained except upon the theory that Congress intended to take a larger security in respect of that part of the Pacific road which the California company undertook to construct and maintain, than it took in respect of the Union Pacific railroad. But it cannot be inferred from the legislation of Congress that it intended, for the protection of the interests of the United States, to impose a heavier liability upon the stockholders of the California company than was imposed upon the stockholders of the Union Pacific Railroad Company. Why should it have so intended? Why should it be supposed that Congress would purposely make it more difficult to construct one part of the proposed national highway than another? The supreme end sought to be attained was, by means of private capital and governmental aid, to secure the construction of the whole line for the benefit, primarily, of the United States, and for the use of all the people. If, instead of making use of the Central Pacific Railroad Company of California, Congress had itself created a corporation with authority to construct a road from San Francisco through the territories of the United States, to meet the Union Pacific Railroad Company, no one would suggest that the stockholders of such a corporation would have been liable for its debts, unless Congress expressly imposed liability upon them. In respect of the liability of stockholders to the United States, on account of its sub-**431**] sidy bonds, *we cannot believe that Congress intended to apply to the stockholders of the state corporation, selected to participate in the great work of establishing railroad and telegraphic communication between the Missouri river and the Pacific ocean, any rule that it did not prescribe for stockholders of a national corporation created for the purpose of accomplishing the same object.

As Congress contemplated the construction of one connected, continuous line from the Missouri river to the Pacific ocean to be used for governmental and public purposes; as it recognized "the necessity of uniting, by iron bands, the destiny of the Pacific and Atlantic states," as its enactments disclose an intention to grant national aid to the corporations named, upon terms and conditions applicable alike to all of them, we cannot impute to it the purpose to make a discrimination against one part of that line that would necessarily have retarded the accomplishment of the important public object which it had in view. Throughout the whole of the acts referred to is manifest the purpose that the California corporation and other state corporations named should enjoy the rights, immunities, benefits, and privileges given to them, upon the same terms and conditions as were prescribed for the Union Pacific Railroad Company. But the imposition of liability upon the stockholders of the California corporation for the debt of that corporation arising out of the bonds it received from the United States, when no such liability was imposed upon the stockholders of the Union Pacific Railroad corporation on account of like bonds received by it, would be inconsistent with that equality in terms and conditions which Congress prescribed for the corporations that were invited or permitted to participate in the grants, rights, benefits, privileges, and immunities granted by the general government to the corporation created by it.

It should be remembered that the question here is not whether the stockholders of the California company can be made liable for its debts to the United States arising in some other way than under the Pacific railroad acts and by the acceptance of United States bonds in aid of the construction *of its road. [**432** Nor are we now to decide whether the adoption of the California corporation as an instrument of the national government in accomplishing a national object exempted its stockholders from liability under the Constitution and laws of California to ordinary creditors. The question before us relates only to the liability of the stockholders of the California corporation on account of a claim of the United States arising out of particular acts of Congress which authorized the issuing and delivery of bonds to that corporation, and made such provision for the security of the United States as Congress deemed necessary and proper, but which did not reserve any right to look to the stockholders of that corporation if it failed or refused to meet the obligation imposed upon it in respect of those bonds.

Touching the obligation of the several railroad companies to pay at maturity the bonds received from the United States in aid of the construction of a railroad and telegraph line to the Pacific ocean, there are cogent reasons, apart from the words of the act of Congress, why a rule should not be applied to the stockholders of the Central Pacific Railroad Com-

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pany which confessedly cannot be applied to stockholders of the Union Pacific Railroad Company. Both corporations participated in the execution of the purposes of Congress. Each received franchises and powers from the Federal government to be exerted for objects of national concern. Although the Central Pacific Railroad Company of California became an artificial being, under the laws of that state, its road owes its existence to the national government; for, all that was accomplished by the corporation that constructed and owns it was accomplished in the exercise of privileges granted by, and because of the aid derived from, the United States. "By the act of 1862," this court has said, "Congress granted this corporation a right to build a road from San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of the state, and thence through the territories of the United States, until it met the road of the 433] *Union Pacific Company. For this purpose all the rights, privileges, and franchises were given this company that were granted the Union Pacific Company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company. The land grants and subsidy bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved. Each of the companies was required to file in the Department of the Interior its acceptance of the conditions imposed before it could become entitled to the benefits conferred by the act. This was promptly done by the Central Pacific Company, and in this way that corporation voluntarily submitted itself to such legislative control by Congress as was reserved under the power of amendment." Again, in the same case: "But for the corporate powers and financial aid granted by Congress it is not probable that the road would have been built." *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 710, 727 [25: 496, 504]. And in *California* v. *Central P. R. Co.* 127 U. S. 1, 38 [32: 150, 156], 2 Inters. Com. Rep. 153. *Mr. Justice* Bradley, delivering the opinion of the court, referred to the Pacific Railroad acts, relating to the Central Pacific Railroad, and said: "Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given, by the acts of 1862 and the subsequent acts, to construct a railroad from the Pacific ocean across the state of California and the Federal territories until it should meet the Union Pacific, which it did meet at Ogden in the territory of Utah." The relations between the California corporation and the state were of no concern to the national government at the time the purpose was formed to establish a great highway across the continent for governmental and public use. Congress chose this existing artificial being as an instrumentality to accomplish national ends, and the relations between the United States and that corporation ought to be determined by the enactments which established those relations; and if those enactments do not expressly nor by implication subject the stockholders of such corporation to liability for its debts, it is to be presumed that Congress intended to waive its right to impose any such liability.

The views we have expressed render it unnecessary to *consider any other question [434 in the case. We are of opinion that the bill filed by the United States was properly dismissed, and that the order of the circuit court of appeals affirming such dismissal was correct.

The judgment is therefore affirmed.

CITY OF EVANSVILLE, *Plff. in Err.*, *v.* WILLIAM S. DENNETT.

(See S. C. Reporter's ed. 434-446.)

Municipal bonds—recitals—estoppel—bona fide purchaser.

1. The recital in the bonds of a city issued by it in payment of subscription to a railroad company, that they were issued "in pursuance of an act of the legislature of the state and ordinances of the city council of said city passed in pursuance thereof," does not put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued.
2. The recital in bonds of a city issued to a railroad company, that they were issued "by virtue of a resolution of said city council passed May 23, 1870," does not put a purchaser upon inquiry as to the terms of that resolution, nor charge him with knowledge of its terms.
3. Recitals in city bonds that they were issued by virtue of the city's charter (which provided that they might be issued for stock subscribed upon a petition of two thirds of the resident freeholders), and also by virtue of a subsequent law and upon a vote in favor thereof by a majority of the qualified voters which was the authority provided in said law for their issue, estop the city from asserting, as against a bona fide purchaser for value in an action on the bonds, that they were not issued for stock subscribed upon a petition of two thirds of the resident freeholders, in compliance with the city's charter, although no such petition was in fact presented and the bonds were issued in attempted compliance with said subsequent law, which was adjudged invalid.
4. Under the recitals in said bonds a bona fide purchaser for value was not put upon inquiry to ascertain whether a petition of two thirds of the resident freeholders of the city had been presented to the common council before that body had subscribed for stock in said railroad company.
5. A bona fide purchaser for value of said bonds was not charged by the recitals in said bonds

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NOTE.—*As to municipal bonds: power to issue; amount; in aid of railroads; ratifying; conditions of issue; rights of bona fide holders; recitals; effect of overissue; validity,*—see note to Sutliff v. Lake County Comrs. 37: 145.

As to recitals in negotiable bonds or securities as evidence of the fact recited and as an estoppel, see note to Mercer County v. Hackett, 17: 148.

As to negotiability of railroad bonds, see note to White v. Vermont & M. R. Co. 16: 221.

As to mandamus to compel city, town, or county to levy tax to pay bonds or interest on bonds, see note to Davenport v. United States, 19: 704.

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with notice that they were issued in pursuance of an invalid act and in pursuance of an election under it, but such purchaser had a right to assume from the recitals that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds.

[No. 509.]

Submitted May 2, 1895. Decided March 2, 1896.

ON A CERTIFICATE from the United States Circuit Court of Appeals, District of Indiana, Seventh Circuit, certifying certain questions to this court for decision in an action brought by William S. Dennett against the city of Evansville to recover the amount of coupons of bonds of said city. *Questions answered part in the negative and part in the affirmative.*

The facts are stated in the opinion.

Mr. **George A. Cunningham** for plaintiff in error.

Messrs. **A. W. Hatch, George A. Sanders,** and *Wm. R. Bowers* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This case is here upon a certificate by the judges of the United States circuit court of appeals for the seventh circuit.

It appears from the statement of facts accompanying the questions propounded to this court that, on May 1, 1868, the city of Evansville issued its bonds, bearing date on that day, to the amount in the aggregate of $300,000, in payment of its subscription to the stock of the Evansville, Henderson, & Nashville Railroad Company.

Each bond was for the sum of $1,000, was made payable to the bearer thirty years after date, with interest on presentation of the coupons attached, and was of the tenor and effect following:

$1,000. No.——.

United States of America.

City of Evansville, State of Indiana.

On account of stock subscription on the Evansville, Henderson, & Nashville Railroad Company.

The city of Evansville, in the state of Indiana, promises to pay to the bearer thirty (30) years after date the sum of $1,000, at the office of the Farmers' Loan & Trust Company, of New York, with interest thereon at the rate of 7 per cent per annum, payable semi-annually at the office of the Farmers' Loan & Trust Company, in the city of New York, on the first day of November and the first day of May of each year, on presentation and delivery of the interest coupons hereto attached. This being one of a series of three hundred bonds of like tenor and date issued by the city of Evansville, in payment of a subscription to the Evansville, Henderson, & Nashville Railroad Company, made in pursuance of an act of the legislature of the state of Indiana and 436] *ordinances of the city council of said city, passed in pursuance thereof. The city of Evansville hereby waives all benefit from valuation or appraisement laws.

In testimony whereof, the said city of Evansville has hereunto caused to be set its corporate seal, and these presents to be signed by the mayor of said city, and countersigned by the clerk thereof.

Dated the 1st of May, 1868.

William H. Walker, Mayor.

A. M. McGriff, City Clerk.

On December 1, 1870, the city also issued bonds amounting in the aggregate to $300,000, in payment of its subscription to the stock of the Evansville, Carmi, & Paducah Railroad Company, each bond being dated December 1, 1870, for the sum of $1,000, payable to the Evansville, Carmi, & Paducah Railroad Company or bearer, December 1, 1895, with interest on presentation of the coupons attached. Each of those bonds was in the following form:

Total amount authorized, $300,000.

No.—. $1,000.

City of Evansville, State of Indiana.

Evansville, Carmi, & Paducah Railroad Company.

By virtue of an act of the general assembly of the state of Indiana, entitled "An Act Granting to the Citizens of the Town of Evansville, in the County of Vanderberg, a City Charter," approved January 27, 1847; and by virtue of an act of the general assembly of the state of Indiana, amendatory of said act, approved March 11, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing $300,000 to the capital stock of the Evansville, Carmi, & Paducah Railroad *Com- [437 pany, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed $300,000, bearing interest at the rate of 7 per cent per annum, for the purpose of paying the subscription as authorized above. The said city of Evansville hereby acknowledges to owe and promises to pay to the Evansville, Carmi, & Paducah Railroad Company, or bearer, $1,000, without relief from valuation or appraisement laws, payable on the 1st day of December, A. D. 1895, at the Farmers' Loan & Trust Company, in the city of New York, with interest from the date thereof, at the rate of 7 per cent per annum, said interest payable semi annually on the first day of June and the first day of December on presentation of the proper coupons for the same at said bank. The faith and credit and real estate revenues and all other resources of the said city of Evansville are hereby solemnly and irrevocably pledged for the payment of the principal and interest of this bond.

In testimony whereof, the mayor of the city of Evansville has hereunto set his hand and affixed the corporate seal of the said city, and

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the city clerk of said city has countersigned these presents this 1st day of December, 1870.

Wm. Baker, Mayor.

Wm. Helder, City Clerk.

The charter of Evansville, approved January 27, 1847, in the 40th clause of § 80 thereof, gave the city power "to take stock in any chartered company for making roads to said city, or for watering said city, and in any company authorized or empowered by the commissioners of Vanderburg county to build a bridge on any road leading to said city; and to establish, maintain, and regulate ferries across the Ohio river from the public wharves of said city: *Provided*, That no stock shall be subscribed or taken by the common council in any such company, unless it be on the petition of two thirds of the residents of said city, who are free-438] holders *of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed: *And provided, also*, That in all cases where such stock is taken the common council shall have power to borrow money and levy and collect taxes on all real estate (either inclusive or exclusive of improvements, at their discretion) for the payment of said stock." Ind. Laws (Local) 1846–'47, chap. 1, p. 14.

This clause of the original charter of Evansville was, in form, amended by the act of the legislature of the state of Indiana, approved December 21, 1865, entitled "An Act to Amend the 40th Clause of § 80 of an Act Entitled 'An Act Granting to the Citizens of the Town of Evansville, in the County of Vanderburg, a City Charter,' approved January 27, 1847, and declaratory of the meaning of the 2d section of the same act." Ind. Laws (Called Session) 1865, pp. 76, 83.

The certificate before us states that "under the decisions of the supreme court of Indiana, this act was repugnant to the Constitution and invalid, in that it did not set out the entire section as amended."

In 1867 the legislature of Indiana attempted to amend the act of 1865, above referred to, by an act approved March 11, 1867, entitled "An Act to Amend the 1st Section of an Act Entitled 'An Act to Amend the 40th Clause of § 80 of an Act Entitled "An Act Granting to the Citizens of the Town of Evansville, in the County of Vanderburg, a City Charter," Approved January 27, 1847, and Declaratory of the Meaning of the 2d Section of the Same,' approved December 21, 1865, so as to authorize the common council of the city of Evansville to subscribe for and take stock in the Evans-439] ville, *Henderson, & Nashville Railroad Company, or any other company or corporation organized under and by virtue of the laws of the commonwealth of Kentucky for the purpose of constructing a railroad leading from Nashville, in the state of Tennessee, to a point on the Ohio river at or near Evansville, Indiana." Ind. Laws 1867, chap. 52, p. 121.

This act authorized subscriptions for stock in the Evansville, Henderson, & Nashville Railroad Company, or other railroad companies, by the city of Evansville, when a majority of the qualified voters of the city who were also taxpayers should vote therefor.

It is certified to us that under the decision of the supreme court of the state of Indiana this latter act was invalid because amendatory of a prior invalid act.

The bonds in question, of both series, were in fact issued in attempted compliance with the act of March 11, 1867, referred to in the recitals in the bonds issued to the Evansville, Carmi, & Paducah Railroad Company.

The ordinances of the city council of the city of Evansville authorizing the issue of both series of bonds disclose that they were issued pursuant to an election by the legal voters of the city of Evansville, but do not recite that any petition of resident freeholders of the city was presented to the common council, as required by the charter; and no such petition was, in fact, in either case made or presented to the common council of the city of Evansville.

The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity and for value, and is a bona fide holder thereof.

This suit is brought upon matured coupons of both series of bonds.

The questions propounded are these:

1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson, & Nashville Railroad Company, that they were issued "in pursuance of an act of the legislature of the state of Indiana and ordinances of the city council of said city, passed in pursuance thereof" put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued.

2. Does the recital in the series of bonds issued to the Evansville, Carmi, & Paducah Railroad Company, that they were issued "by virtue of a resolution of said city council passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?

*3. Do the recitals in the bonds issued [440 to the Evansville, Carmi, & Paducah Railroad Company, as against a bona fide purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued for stock subscribed, upon a petition of two thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed?

4. Under the recitals in the bonds issued to the Evansville, Carmi, & Paducah Railroad Company was a bona fide purchaser for value put upon inquiry to ascertain whether a proper petition of two thirds of the residents of Evansville, freeholders of that city, had been presented to the common council, before that body had subscribed for stock in the said railroad company?

5. Was a bona fide purchaser for value of the bonds issued to the Evansville, Carmi, & Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it, or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?

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Such is the case made by the statement of facts. By that statement we are informed that the act of the legislature of Indiana of December 21, 1865, purporting to amend the 40th clause of § 30 of the charter of Evansville granted in 1847, as well as the act of March 11, 1867, amendatory of the above act of December 21, 1865, were adjudged by the supreme court of Indiana to be unconstitutional and invalid. And, upon that basis, this court is asked to answer the questions embodied in the certificate from the judges of the circuit court of appeals.

Under this presentation of the case, we put aside the acts of 1865 and 1867 as giving no support to the rights of the plaintiff, and look alone to the charter of 1847.

It cannot be doubted that the power given by the charter of 1847 "to take stock in any 441] chartered company for making *roads to said city," authorized the city to subscribe to the capital stock of the Evansville, Henderson, & Nashville Railroad Company, as well as the Evansville, Carmi, & Paducah Railroad Company. In *Aurora* v. *West*, 9 Ind. 74, 85, one of the questions was whether the authority given to the city council of Aurora, in the state of Indiana, "to take stock in any chartered company for making roads to said city," was authority to subscribe to the stock of a railroad company. The supreme court of Indiana said: "Here, the power is expressly granted, and the question is merely whether the road in which the stock was subscribed is one contemplated by the charter. We think, also, that a company chartered to build a railroad is chartered to build a road. We think a railroad is a road as properly as a turnpike road or a plank road is a road; and one of these kinds was contemplated by the charter, and not common public highways, as the latter are not constructed by chartered companies, while the former are, and the stock is to be taken by the city in a chartered company. A railroad would accommodate the people of the city more than a plank or a turnpike road, and the stock would be of more value."

It is true that the city charter provided that "no stock shall be subscribed or taken by the common council in such company, unless it be on the petition of two thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed." But these were only conditions which the statute required to be performed or met before the power given was exercised. That there was legislative authority to subscribe to the stock of these companies cannot be questioned, although the statute declared that the power should not be exercised except under the circumstances stated in the statute.

Was a bona fide purchaser of bonds issued in payment of a subscription of stock—the power to subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were not performed? If the bonds had not contained any recitals im-442] porting a performance of such *conditions before the power to subscribe was exercised, then it would have been open to the city to show, even as against a bona fide purchaser, that the bonds were issued in disregard of the statute, and therefore did not impose any legal obligation upon it. *Buchanan* v. *Litchfield*, 102 U. S. 278 [26: 138]; *Independent School Dist.* v. *Stone*, 106 U. S. 183, 187 [27: 90, 91].

But the bonds issued on account of subscription to the stock of the Evansville, Henderson, & Nashville Railroad Company recite that the subscription was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof." This imports, not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised.

The bonds issued to the Evansville, Carmi, & Paducah Railroad Company recite that they were issued "by virtue of" the city's charter of January 27, 1847, and that recital imports compliance with the provisions of the charter. The additional recitals that the bonds were issued by virtue of the act of March 11, 1867, as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription, and of a resolution ordering the issuing of bonds, did not, as between the city and a bona fide purchaser for value, prevent the latter from assuming the truth of the recital that the bonds were issued by virtue of, that is in compliance with, the city's charter.

In *Independent School Dist.* v. *Stone*, above cited, the court said: "Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been *complied with, recitals, by such officers, [443 that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of' the statute, have been held in favor of bona fide purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued." *Coloma* v. *Eaves*, 92 U. S. 484 [23: 579]; *Douglas County Comrs.* v. *Bolles*, 94 U. S. 104 [24: 46]; *Mercer County* v. *Hackett*, 68 U. S. 1 Wall. 83 [17: 548]; *Anderson County Comrs.* v. *Beal*, 113 U. S. 227, 238, 239 [28: 966, 970], and authorities there cited; *Cairo* v. *Zane*, 149 U. S. 122 [27: 673].

The charter of the city of Evansville gave authority to subscribe to the stock of these railroad corporations, and as held by the supreme court of Indiana in *Evansville, I. & C. S. L. R. Co.* v. *Evansville*, 15 Ind. 395, 412, the express power given to borrow money necessarily implied "the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness."

As, therefore, the recitals in the bonds im-

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port compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had in fact been performed. With such recitals before them, they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature. The charter of 1847 contemplated a petition of two thirds of the resident freeholders of the city. The act of 1867 provided for an election by the qualified voters, who were also taxpayers. Notwithstanding the provisions of the charter of 1847 the city council before subscribing for the stock might well have ascertained what were the wishes of taxpayers, who were also qualified voters. So far as the recitals in the bonds are concerned, the purchaser of bonds might properly have assumed that both methods were pursued. Although, in strict law, he was chargeable with knowledge that the act of 444]* 1867 was invalid, and consequently that an election held under it could not itself authorize a subscription of stock by the city, he was entitled to stand upon the validity of the city charter, and to act upon the assurance, given by the recitals in the bonds, that the provisions of that charter had been respected, and therefore that the subscription of stock had been preceded by a petition to the city council of two thirds of the resident freeholders of the city.

The present case comes directly within *Van Hostrup* v. *Madison City*, 68 U. S. 1 Wall. 291, 297 [17: 538, 539].

The city of Madison, Indiana, was authorized by its charter "to take stock in any chartered company for making a road or roads to the said city. . . . *provided*, that no stock shall be subscribed . . . unless it be on petition of two thirds of the citizens who are freeholders," etc. *Mr. Justice* Nelson, delivering the unanimous judgment of this court, said: "It is supposed that the authority to subscribe is tied down to a chartered road, the line of which comes within the limits of the city; and that the words are to be taken in the most liberal and restrictive sense. But this, we think, would be not only a very narrow and strained construction of the terms of the clause, but would defeat the manifest object and purpose of it. The power was sought and granted with the obvious idea of enabling the city to promote its commercial and business interests by affording a steady and convenient access to it from different parts of the interior of the state, and thus to compete with other cities on the Ohio river and in the interior which were or might be in the enjoyment of railroad facilities." Touching another issue in that case—and a similar issue is presented in the present litigation—the court said: "Another objection taken is, that the proviso requiring a petition of two thirds of the citizens who were freeholders of the city was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to *subscribe the stock and issue [445 the bonds, as has been repeatedly held by this court. Our conclusion upon the whole case is that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of bona fide purchasers for value, we should have felt bound to acquiesce in it."

The case before us cannot be distinguished from the one just cited.

It may be added that the questions here presented were carefully examined by Judge Woods in the case of *Moulton* v. *Evansville*, 25 Fed. Rep. 382, 388, where will be found a full review of the adjudged cases. That was an action to recover the amount of coupons of bonds of the same class as those here involved. The conclusion there reached was that the purchaser of the bonds had a right to rely on the recital as showing that a proper petition of freeholders was presented to the council before the subscription was ordered. The court said: "The purchaser, it is clear, was bound to know that the act of 1867, and the election ordered and held in compliance with it, were void, and that the law of 1847 required a petition of freeholders as a condition precedent to the right of the common council to make such stock subscriptions; but while bound by legal construction to know these things for himself, he, for the same reason, had a right to presume that the common council and officials of the city who ordered and made the bonds had the same knowledge; that they ordered and held the election as matter of precaution merely, and without the omission of any requirement of the act of 1847, as they must have intended to certify, if they acted honestly, as they are presumed to have acted intelligently, in ordering the bonds issued."

It is contended that the defense is sustained by *Barnett* v. *Denison*, 145 U. S. 135, 139 [36: 652, 653]. That case has no application to the issues here presented. The only point there decided was that the requirement of its charter, that all bonds issued by *the city [446 of Denison "shall specify for what purpose they were issued," was not satisfied by a bond that purported on its face to be issued by virtue of an ordinance, the date of which was given, but not its title or contents.

The conclusion we have reached upon legal grounds, and in accordance with our former decisions, is the more satisfactory, because of the long time which elapsed before any question was raised by the city as to the validity of the bonds. The city having authority, under some circumstances, to put these bonds upon the market, and having issued them under the corporate seal of the city, and under the attestation of its highest officer, certifying that they were issued in payment of a subscription of stock made in pursuance of the city's charter, the principles of justice demand that the bonds, in the hands of bona fide holders for value, should be met according to their

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terms, unless some clear, well-settled rule of law stands in the way. No such obstacle exists.

The court answers the first, second, and fourth questions in the negative, and the third in the affirmative. Its answer is in the negative to the first clause, and in the affirmative to the second clause, of the fifth question.

DAN K. SWEARINGEN, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 446-451.)

Wrongful use of mails.

The words "obscene," "lewd," and "lascivious," as used in U. S. Rev. Stat. § 3893, respecting the wrongful use of the mails, signify that form of immorality which has relation to sexual impurity, and have the same meaning given them at common law in prosecutions for obscene libel, and therefore do not extend to language, although it may be exceedingly coarse and vulgar and plainly libelous, if it has not a lewd, lascivious, and obscene tendency calculated to corrupt and debauch the mind and morals.

[No. 567.]

Submitted October 21, 1895. Decided March 9, 1896.

IN ERROR to the District Court of the United States for the District of Kansas to review a judgment convicting Dan K. Swearingen under the provisions of U. S. Rev. Stat. § 3893, for depositing in the postoffice, to be conveyed by mail and delivered to certain persons, a certain publication or newspaper containing a certain article of an obscene, lewd, and lascivious character. *Reversed, with instructions to award a new trial.*

Statement by *Mr. Justice* **Shiras**:

In the district court of the United States for [447] the district *of Kansas, November term, 1895, DAN K. Swearingen was indicted, under the provisions of U. S. Rev. Stat. § 3893, for depositing in the postoffice of the United States at Burlington, Kansas, to be conveyed by mail and delivered to certain named persons, a certain publication or newspaper, entitled "The Burlington Courier," dated September 21, 1894, and containing a certain article †charged to be of an obscene, lewd, and lascivious character, and nonmailable matter.

The indictment contained three counts, differing only in the names of the persons to whom copies of the newspapers *were addressed. In each count the article was [448] charged to be of an obscene, lewd, and lascivious nature. The defendant moved to quash the indictment because the same did not state or charge a public offense, and because there were several offenses improperly joined in each count. This motion was overruled. The defendant pleaded not guilty; a trial was had; and a verdict of guilty was rendered. Thereupon the defendant filed a motion in arrest of judgment and for a new trial. These motions were overruled, and the defendant was sentenced to be imprisoned at hard labor in the penitentiary for the period of one year, to pay a fine of $50, and to pay the cost of the prosecution. Thereupon a writ of error was sued out to this court.

Mr. **J. D. McCleverty** for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

The record discloses that the defendant below was, in the month of September, 1894, the editor and publisher of a newspaper called "The Burlington Courier," and was indicted for having mailed several copies of the paper, containing the article set forth in the previous statement, addressed to different persons.

The bill of exceptions shows that, at the trial, the government offered the article in question in evidence, and that the defendant objected for the reasons that no public offense was stated in the indictment, that there was a misjoinder of offenses, and that the words of said newspaper article did not constitute unmailable matter. These objections were overruled, and an exception was allowed. The article was then read to the jury, and evidence was offered and received tending to show that on September 21, 1894, copies of a newspaper containing the said article were mailed by employees of the defendant, addressed severally to Riggs, Cowgill, and *Lane, who were regular [449] subscribers to the paper, and whose names were on the mail list. The defendant, on the ground of its insufficiency, moved to strike out the evidence as to the mailing of any paper to Lane or Cowgill. This motion was overruled, as was likewise a motion to compel the

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†The article was in the following language:

"About the meanest and most universally hated and detested thing in human shape that ever cursed this community is the red-headed mental and physical bastard that flings filth under another man's name down on Neosho street. He has slandered and maligned every Populist in the state, from the governor down to the humblest voter. This black hearted coward is known to every decent man, woman, and child in the community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion. He is a contemptible scoundrel and political blackleg of the lowest cut. He is pretending to serve Democracy and is at the same time in the pay of the Republican party. He has been known as the companion of negro strumpets and has reveled in lowest debauches. He has criminally libeled and slandered such men as . . . . and dozens of others whom we might name, who are recognized by all parties as among the oldest and most respected citizens of the county. His soul, if he has a soul, is blacker than the blackest shades of hell. He is the embodiment of treachery, cowardice, and dishonor, and hasn't the physical nor moral courage to deny it. He stands to-day hated, despised, and detested as all that is low, mean, debased, and despicable. We propose to have done with the knave. We have already devoted too much valuable space to him. Time and again has he been proven a wilful, malicious, and cowardly liar, and instead of subsiding he has redoubled his lies. He lies faster than ten men could refute; and for what? A little Republican slush-money. He is lower, meaner, filthier, rottener than the rottenest strumpet that prowls the streets by night. Again we say, we are done with him. The sooner Populists and Populist newspapers snub him, quit him cold, ignore him entirely, the sooner will he cease to be thought of only as a pimp that any man can buy for $1 or less. He is too little and rotten to merit the notice of men. We have been wrong in noticing the poltroon at all, and henceforth are done."

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district attorney to elect upon which count of the indictment he would rely. The defendant offered no evidence, and the court charged the jury that the newspaper article in evidence, which the defendant admitted he published, was obscene and unmailable matter, and that the only thing for the jury to pass upon was whether the evidence satisfied them, beyond a reasonable doubt, that the defendant deposited, or caused to be deposited, in the postoffice at Burlington, Kansas, newspapers containing said article. To the rulings of the court overruling the motions and to the charge exceptions were taken and allowed.

As we think that the court erred in charging the jury that the newspaper article in question was obscene and unmailable matter, it will not be necessary for us to consider the merits of those assignments which allege error in the admission of evidence.

This prosecution was brought under U. S. Rev. Stat. § 3893, which declares that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, or other publication of an indecent character . . . are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice, nor by any letter carrier; and any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall, for each and every offense, be fined not less than $100 nor more than $5,000, or be imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

450] *The indictment contained three counts, in each of which the offense charged was the mailing of a copy of a newspaper containing the article described in the previous statement, and which was alleged to be "an obscene, lewd, and lascivious article."

As already stated, the court charged the jury that the newspaper article was obscene and unmailable matter, and that the only question for the jury to pass upon was whether the defendant deposited the same in the postoffice at Burlington, Kansas.

The language of the statute is that "every obscene, lewd, *or* lascivious book or paper" is unmailable, from which it might be inferred that each of those epithets pointed out a distinct offense. But the indictment alleges that the newspaper article in question was obscene, lewd, *and* lascivious. If each adjective in the statute described a distinct offense, then these counts would be bad for duplicity, and the defendant's motion in arrest of judgment for that reason ought to have been sustained. We, however, prefer to regard the words "obscene, lewd, or lascivious," used in the statute, as describing one and the same offense. That was evidently the view of the pleader and of the court below, and we think this is an admissible construction.

Regarding the indictment as charging, in each count, a single distinctive offense, to wit, the mailing of an obscene, lewd, and lascivious paper, we think the court below erred in charging the jury that the evidence, so far as the character of the paper was concerned, sustained the charge, and that the only duty of the jury was to find whether the defendant knowingly deposited or caused to be deposited in the postoffice newspapers containing the article so described.

Assuming that it was within the province of the judge to determine whether the publication in question was obscene, lewd, and lascivious, within the meaning of the statute, we do not agree with the court below in thinking that the language and tenor of this newspaper article brought it within such meaning. The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to *circulate or deliver matter to corrupt [451 the morals of the people. The words "obscene," "lewd," and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.

Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious, and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.

The judgment of the court below is reversed, and the cause remanded, with instructions to set aside the verdict and award a new trial.

Justices **Harlan, Gray, Brown,** and **White** dissented.

UNION PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.
NORA O'BRIEN.

(See S. C. Reporter's ed. 451-458.)

Evidence—exclusion of question—leading questions—contributory negligence—instruction—risks assumed by employee—error—duty of railroad company—engineer.

1. It is not error to include on cross-examination a question to a witness the answer to which would be an inference which it was for the jury to draw from the facts.
2. In an action against a railroad company for negligence in permitting sand to be deposited on

NOTE.—*As to freedom of plaintiff from contributory negligence necessary to entitle him to recover,* see note to Stokes v. Saltonstall, 10: 115.

As to who are coemployees or coservants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant, see note to Hough v. Texas & P. R. Co. 25: 612.

As to fellow servants and their negligence, who are fellow servants; vice principal; superior servant; liability of master,—see note to Baltimore & O. R. Co. v. Baugh, 37: 773.

As to liability of railroad companies to switchmen or brakemen for injuries while coupling cars; violation of rules,—see note to Kohn v. McNulta, 37: 150.

As to impeaching witness by proof of character;

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the track in a cut, causing derailment, it is not error to exclude the question to a witness, whether the cut was not constructed in the ordinary way, as railway cuts are not made on any recognized pattern, and as it was not shown that the surroundings of other cuts were similar to those of the cut where the accident happened.

3. It is within the discretion of the trial court to permit leading questions to be propounded for the purposes of impeachment.

4. The burden of proof is not upon the plaintiff in an action for causing death to show in the first instance that the person killed was in the exercise of due care at the time of the accident.

5. An instruction is properly refused which confuses two distinct propositions, one relating to risks assumed by an employee and another relating to the vigilance to be exercised under the circumstances,—especially if the instruction is not justified by the evidence.

6. The risks assumed by an engineer on a line of road running at the foot of a mountain range do not include unnecessary risks and dangers arising from the failure of the company to construct and maintain its track and roadbed in proper condition.

7. It is not error in the trial court to decline to give an instruction to the jury which has already been fully covered in the charge.

8. A railroad company owes to its trainmen the duty to exercise the care which the exigencies reasonably demand in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations.

9. An engineer on a railroad train cannot be held to knowledge of the danger lurking in a narrow seam in a mountain side, by whose inequalities its sinuosities were hidden, so as to be held to have taken the hazard thereof.

[No 119.]

Argued and Submitted December 13, 1895. Decided March 9, 1896.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming a judgment of the Circuit Court in favor of plaintiff, Nora O'Brien, against the Union Pacific Railway Company for damages for the death of her husband, John O'Brien, on account of the negligence of the company. *Affirmed.*

See same case below, 4 U. S. App. 221.

Statement by *Mr. Chief Justice* **Fuller**:

This was an action brought by Nora O'Brien against the Union Pacific Railway Company, in the circuit court for the district of Colorado, to recover damages for the death of her hus-

scope of inquiry as to character and time,—see note to Teese v. Huntingdon, 16: 479.

As to evidence of contradictory statements made by witnesses to impeach; in regard to what facts inquired of on cross-examination, the witnesses may be contradicted,—see note to Ellicott v. Pearl, 9: 475.

As to the scope and limits of a cross-examination, see note to Rea v. Missouri, 21: 707.

Liability of railroad company for its failure to provide suitable and safe materials and structures in the construction and operation of its road and a safe place for its employees to work; and its duty in respect thereto.

That a hole in a railroad track was concealed from sight by slush will not excuse the railroad company from liability to a brakeman for injuries received from stepping into it. Northern P. R. Co. v. Teeter, 63 Fed. Rep. 527.

A railroad company is liable for injuries to a switchman from the derailing of an engine of extraordinary size at a curve of 14 degrees, constructed without elevating the outer or depressing the inner rail, where frequent derailments have occurred at the same place. St. Louis Bridge Co. v. Fellows, 52 Ill. App. 504.

A railroad company is not liable to an employee for an injury resulting from slipping upon a piece of decayed sapwood on a tie over which he was passing in pursuance of his duty, where the tie was otherwise sufficiently safe for the use for which it was intended. East Tennessee, V. & G. R. Co. v. Reynolds, 93 Ga. 570.

A railroad company is not liable for the death of an employee caused by a car leaving the track at a place where it was out of repair. Pidgeon v. Long Island R. Co. 87 Hun, 43.

The duty of a railroad company to its employees, of blocking its switches, imposed by statute, is not met by adopting a method which the use of the road renders ineffectual within two or three days, where a simple, inexpensive, and efficient method is in common use. Eastman v. Lake Shore & M. S. R. Co. 101 Mich. 597.

A railroad company which erects, pursuant to the direction of the United States authorities, a mail crane with a stationary arm, for use in taking mail bags into a mail car while the latter is in motion, is not liable for an injury to a brakeman by collision with such arm, where similar cranes are used by extensive lines of railroad, and it could not be placed further from the track and perform the service for which it is designed. Sisco v. Lehigh & H. R. R. Co. 145 N. Y. 296.

Failure of a railway company to place a wire strung across a side track high enough to avoid an employee or mechanic making repairs on the roof of a passenger car is negligence, if it can be reasonably anticipated by the company that at some time a passenger car may pass under the wire while such repairs are being made. Stoltenburg v. Pittsburg & L. E. R. Co. 165 Pa. 377.

A railroad company is not liable for the death of a fireman in jumping from the engine upon discovering a log across the track, where the engineer acted as a prudent man and did all that was possible to be done under the circumstances. Lake Shore & M. S. R. Co. v. Brazzill, 2 Ohio Dec. 691.

A railroad company is liable to a section hand for injuries received by a car upon which he is riding in the discharge of his duty coming in contact with a car upon a side track, negligently left by the station agent having control of such tracks so projecting that a collision was inevitable. St. Louis, A. & T. H. R. Co. v. Biggs, 53 Ill. App. 550.

A railroad company owes to its employees, in respect to a locomotive charged with steam, the duty of using due care in seeing that the engine is kept and maintained in a safe and proper condition, in proportion to the consequences liable to follow from the want of such care and skill. Texas & P. R. Co. v. Barrett, 67 Fed. Rep. 214.

A railroad company is liable for an injury to an employee from the sudden starting of a locomotive by reason of leaky valves, where he was free from contributory negligence, although it may not have had actual notice of such defective condition, under Ohio act 1890, providing that where an injury occurs to an employee by reason of defective machinery the company shall be presumed to have had notice of the defect and to have been negligent. Lake Shore & M. S. R. Co. v. Raitz, 10 Ohio, C. C. 70.

A railroad company which requires a competent and experienced workman and assistant to subject the stay bolts in a boiler to the best test known, to discover if they are whole and sound, is not liable

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band, John O'Brien, who was in the employment of the defendant as a locomotive engineer, running on the South Park division of the company's line, and was killed by the derailment of his engine. The evidence tended to show that at the time of his death O Brien, who had been an engineer upon the road for seven or eight years, was bringing a freight train of twenty-three cars from Como, Colorado, to Denver, and was running through that part of the mountains known as Platte Cañon: that O'Brien left Como at 7 or 8 o'clock on the evening of September 3, 1890, and that the accident occurred at 1 o'clock in the morning of September 4; that the line of railway followed the course of the South Platte river, and that there were numerous cuts thereon caused by the intersection of the line with the spurs projecting from the foot hills along which the line was built; that the locomotive was derailed by reason of sand and gravel which had been deposited on the track to a depth of some 7 or 8 inches and to the extent of from 10 to 20 feet; that this deposit was in a cut, approached by a curve to the left, and then curving to the right as the track entered the cut, a double curve; that the river bank of the cut was about 7 or 8 feet high, the other bank being much higher and very steep, sloping back up the mountain side; that down the upper bank ran a narrow gully which in rainy weather brought down water, carrying sand and disintegrated rock; that this gully had had an outlet into the river before the track was constructed across it; that there was no opening or culvert under the railroad track through which the water and material brought down could escape; that a small ditch ran alongside the roadbed, but if the water coming down was greater in quantity than this ditch could carry, then the *surplus[453 would run over and upon the tracks of the railroad; and that rain had fallen the evening previous to the accident, and the water rushing down the gully had deposited this mass of sand and gravel upon the track. There was some evidence that the gully was narrow, crooked, and concealed by the hills.

One Hall, a locomotive engineer, familiar with the road, testified that there were many

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for the death of an engineer from an explosion of the boiler, due to broken stay bolts, eight days after such inspection. Chicago & A. R. Co. v. DuBoise, 56 Ill. App. 181.

The duty of a railroad company towards a brakeman to furnish a sufficient supply of sound and suitable stakes to hold a load of ties on a platform car is not discharged by furnishing suitable lumber and entrusting the preparation of the stakes to sufficient men. McIntyre v. Boston & M. R. Co. 168 Mass. 189.

A railroad company does not fulfil its duties toward a brakeman on a train by providing on another train a decayed, rotten, dozy stake to hold the binders of lumber upon a car, and is liable for injuries from such brakeman's being struck by a board projecting from such car. Ryan v. New York C. & H. R. R. Co. 88 Hun, 269.

A railroad company is not liable to an employee injured by falling from a hand car which he was assisting to operate, due to the breaking of a handle by which the lever was worked, owing to a defect in such a place relatively to the socket of the lever through which the handle passed as not to be apparent, in the absence of actual knowledge of the defect by the company. Louisville & N. R. Co. v. Hinder, 16 Ky. L. Rep. 841.

A railroad company is liable for the death of an employee engaged in coupling cars, by being struck by timbers projecting from a car through their shifting after they were reloaded because they had previously shifted, where no means were adopted to prevent such shifting. Illinois C. R. Co. v. Reardon, 56 Ill. App. 542.

A railroad company is under no duty to a brakeman to have the end gate of a gondola car, properly constructed for the purpose for which it was intended, securely fastened so as to allow him to use it as a hand hold in attempting to alight from the car in motion. Graham v. Chicago, St. P. M. & O. R. Co. 62 Fed. Rep. 896.

The fact that a car is received from another road for transportation does not relieve a railroad company from the duty toward employees of using ordinary and reasonable care to see that it is furnished with such car handles, ladders, or safeguards as are in common use. Dooner v. Delaware & H. Canal Co. 164 Pa. 17.

A railroad company is under no legal duty not to expose its employees to danger arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted to its train. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72 (39: 624).

Employees of a contractor engaged in taking earth away from cars for a consignee, who, to facilitate the work, dump the earth from the car on the request of the railroad crew, are not volunteers so as to preclude recovery from the railroad company for injury by the tipping over of a car, due to defects therein and to improper loading. O'Donnell v. Main C. R. Co. 86 Me. 552, 25 L. R. A. 658.

A railroad company is not liable for an injury to the employee of a coal company, caused by the defective brakes on a car loaded with coal and delivered to the latter company, on the ground of a failure to furnish an employee with safe machinery. Rehm v. Pennsylvania R. Co. 164 Pa. 91.

A railroad company is liable for an accident to a brakeman, free from contributory negligence, caused by the absence of a nut from the top of a brake staff which held the lever fast to it, notwithstanding an imperfect inspection made a short time before the injury. Hayden v. Platt, 84 Hun, 487.

A railroad company which fails to provide an inspector for its cars, or to furnish a crooked link necessary in many cases to the coupling of cars having drawheads of different heights received from other roads, cannot be said as a matter of law to have performed its whole duty towards a brakeman in its employ, required to couple such cars. Bennett v. Greenwich & J. R. Co. 84 Hun, 216.

Car buffers of different heights, overlapping in coupling so as to afford no protection to the person making the coupling, constitute a defect in the arrangement of the plant, within the meaning of the Ontario statute providing for compensation for injuries to brakemen. Bond v. Toronto R. Co. 22 Ont. App. Rep. 78.

The use by a railroad company of cars of another company having double deadwoods, such as are at the time in use on other roads, if in good condition and free from defects, is not negligence towards a brakeman, although it may enchance the risk to which he is exposed in making couplings. Northern P. R. Co. v. Blake, 68 Fed. Rep. 45.

The use by a railroad company of cars with double buffers is not negligence towards an employee, although greater care is required in coupling them. Illinois C. R. Co. v. Harris, 53 Ill. App. 592.

A railroad company is chargeable with negligence in using a chain to connect cars, in the ab-

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cuts on the line; that sand was frequently found thereon in several places; that there were usually rains about the latter part of August or September, and that in rainy weather on account of the steepness of the mountains more or less material would be deposited on the track. Defendant then propounded this question on cross-examination, "Are the engineers here aware of that fact?" to which plaintiff's counsel interposed an objection, which was sustained, and defendant excepted. The witness had also testified that a culvert would have added to the safety of this cut, and was asked this question by defendant: "You said you thought the culvert would make it much safer, but is not that cut constructed there, and the water run out of it, exactly as the cuts are ordinarily constructed on roads running through such places?" The question was objected to, the objection sustained, and defendant excepted.

George Warnick, the locomotive fireman who was on the engine when the accident happened, gave evidence on defendant's behalf tending to show negligence on the part of deceased, and was asked on cross-examination whether he had in answer to certain specified questions put to him at the hospital on the Sunday following stated that neither he nor the engineer was to blame for the accident. This he denied and leading questions were permitted to be propounded to a witness called in rebuttal to contradict him, to which exceptions were saved.

Defendant asked the court to give the jury the following instructions:

"1. The court is asked to instruct the jury that the burden of proof is upon the plaintiff to show that the accident occurred by reason of the negligence of the defendants, and *that [454 the plaintiff was in the exercise of due care at the time of the accident, and that due care in such a case required of the deceased that he be vigilant and watchful to avoid such danger as his experience of the road must have made him aware he must expect in such places as the place where the accident occurred, and under the circumstances detailed by the witnesses, to wit: at time when heavy rains had been met with, and that there has been offered no evidence whatever upon that point by the plaintiff, not even a reputation for care, but

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sence of a drawhead, by reason whereof the cars come in contact, injuring an employee engaged in unloading one of them. Lucco v. New York C. & H. R. R. Co. 87 Hun, 612.

A railroad company who employs two able-bodied men to transfer a box weighing 250 pounds from one car to another 5 feet away is not guilty of negligence in failing to provide planks or skids upon which to slide such box. Gowen v Harley, 56 Fed. Rep. 973.

A railroad company is not liable for an accident to an employee, caused by the fall of a gang plank while unloading a car, on the ground that safe appliances were not furnished, where gang planks of the same character had been used for more than fifteen years without any accident. La. Pierre v. Chicago & G. T. R. Co. 99 Mich. 212.

A railroad company is liable for an injury received by an employee while riding in a baggage car in which it was his duty to be, where such baggage car is wrecked by the company's negligence in failing to provide a reasonably safe bridge, although if he had been riding in a passenger car he would not have been injured. San Antonio & A. P. R. Co. v. Adams, 6 Tex. Civ. App. 102.

A railroad company is not, in the absence of any agreement, bound to furnish a better track to its employees than such as are in general use by other companies. Atchison, T. & S. F. R. Co. v. Alsdurf, 47 Ill. App. 200.

A railroad company is not liable for the death of an engineer caused by the unlawful act of other parties in loosening a rail on the track. Illinois C. R. Co. v. Quirk, 51 Ill. App. 607.

A railroad company is not liable to a brakeman for injuries from the catching of his foot between a guard rail and the main rail, notwithstanding the space between is not blocked, where the blocking of guard rails upon railroads is not in universal use. McNeil v. New York, L. E. & W. R. Co. 71 Hun, 24.

A railroad company is not liable for the death of an employee caused by the absence of blocking from the guard rail whereby his foot was caught, unless it had actual notice of its absence for a sufficient length of time before the accident to replace it, or it was such a length of time as to constitute constructive notice. Haskins v. New York C. & H. R. R. Co. 79 Hun, 159.

A railroad company, although required by law to erect and maintain a cattle guard at a certain point, must make it safe as a crossing for employees, if it so locates its switch yards that they are constantly required to cross it. Ford v. Chicago, R. I. & P. R. Co. (Iowa) 24 L. R. A. 657.

It is inexcusable negligence on the part of a railroad company to use, especially in the nighttime, for shifting purposes in its yard, an engine unprovided with any safeguards or protection to the person who attempts to couple it to a car, and upon which he is required to stand on one foot, with his lantern on his arm and both hands engaged. Smith v. Buffalo, R. & P. R. Co. 72 Hun, 545.

A railroad company is not liable for injuries to a fireman through the turning of a step upon the engine while he was carefully alighting from the moving engine, where the accident resulted from his unnecessarily leaving the engine while in motion, or the defect was not discoverable on inspection and the employer had no notice thereof, or the accident was due to the failure of the engineer to discover or report that the step was out of order. Texas & P. R. Co. v. Patton, 61 Fed. Rep. 239.

A railroad company is not liable for an injury to an employee caused by its failure to furnish a safe and suitable car, if it has exercised reasonable and proper care and caution in furnishing it. Galveston, H. & S. A. R. Co. v. Davis, 4 Tex. Civ. App. 468.

The owner of a quarry using a car furnished by a railroad company to convey stone from its quarry to the railroad owes the same duty to its employees in respect to such car as though the car were owned by it. Spaulding v. W. N. Flynt Granite Co. 159 Mass. 587.

A railway conductor may recover damages against the company for injuries caused by his stepping, in a dark tunnel, off the back end of a car negligently left unprotected, although he knew there were but three cars in the train, where he had momentarily forgotten that fact in taking up tickets. Fiero v. New York C. & H. R. R. Co. 71 Hun, 218.

A railroad company is not excused from its duty to inspect its cars, by the sufficiency of the number of its inspectors and their competency. Union P. R. Co. v. Snyder, 152 U. S. 684 (see 597).

An employee of a railroad company may recover for injuries resulting from an accident occasioned by a defect in a brakerod, which an investigation pursuant to a rule of the company would have revealed in time to prevent the accident. Bailey v. Rome, W. & O. R. Co. 139 N. Y. 302.

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there has been evidence offered by defendant that he was not in the exercise of due care; nor has there been any evidence offered as to whether if the sand had been discovered at the time it might have been discovered he could or could not have applied the air in time to prevent the accident.

"2. The court is asked to instruct the jury that a party taking employment as an engineer in running a locomotive assumes the risks that are incident to the employment and to the running of locomotives over the roads operated by his employer, and if the jury believe that the country through which this road ran and its location were such that sand was frequently deposited on the track, then the deposit of sand on the track when heavy rains occurred must be taken as one of the ordinary risks of his employment, and the duty of the engineer was to be vigilant in avoiding it; and if the jury believe that the lack of such vigilance on the part of deceased contributed to the accident, then the plaintiff cannot recover.

"3. The court is asked to instruct the jury that the duty that an employer owes to the employee is to exercise ordinary care in providing the employee a safe place in which to work, and what is ordinary care is such care as men of ordinary prudence use in similar circumstances in the same employment.

"4. The court is asked to instruct the jury that there is no evidence to show that the construction of a culvert at the place where the accident happened would have avoided or would probably have avoided the accident."

455] *The court refused to give each of these instructions, and defendant excepted.

The court then charged the jury at large, leaving to them the issues of negligence on the part of the company in not properly constructing the track in that no outlet was provided for the water, which would be liable to come down on the track and deposit sand and other obstructions thereon, and of contributory negligence.

The court advised the jury, among other things, that, as the road at the place where the accident occurred was built across the mouth of a gulch and from all the circumstances it would seem that it would have been practicable to make a culvert under the track at that place keeping open the channel towards the river through which the sand might have washed out, and in that manner obstruction might have been avoided, if they believed from the evidence, taking into consideration the size of the requisite opening and the quantity of sand and gravel coming down through the gulch, and all the circumstances, the track might have been built at reasonable expense so as to avoid the possibility of the sand coming upon the track and obstructing it, they were at liberty to find that the company was negligent in respect to the manner of building the track at that place. And also that independently of the testimony of Hall on that subject, the jury, "having regard to the testimony before you, the situation of the road and the topography of the ground, the gulch coming down in the way described by the witnesses," might on their own judgment and knowledge of such matters determine in their own minds "whether it was practicable to make a culvert there with reasonable cost, which would have the effect of carrying away the sand and gravel so it would not be an obstruction upon the track."

To these parts of the charge defendant excepted.

The jury found in favor of plaintiff, and judgment having been entered on the verdict, the company carried the case to the circuit court of appeals for the eighth circuit, which affirmed the judgment. 4 U. S. App. 221.

Thereupon this writ of error was brought.

Messrs. **John M. Thurston** and *John F. Dillon* for plaintiff in error.

Messrs. **C. S. Thomas** and *H. E. Luthe* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The circuit court of appeals held that as to the first question which the circuit court declined to allow to be put to Hall the answer would have been purely an inference based upon facts previously proved, and an inference which it was for the jury to draw from those facts, and therefore that it was properly excluded; that as to the second question addressed to that witness and excluded, namely, whether the cut was not constructed as cuts were ordinarily constructed on roads running through such places, the court did not err in its exclusion, because railway cuts are not made upon any recognized pattern, and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially similar to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead; and that it was within the discretion of the trial court to permit leading questions to be propounded for the purposes of impeachment. It was also held that the circuit court did not err in refusing the first instruction asked for defendant because the burden of proof was not upon plaintiff to show in the first instance that he was in the exercise of due care at the time of the accident; that the second instruction was properly refused because it confused two distinct propositions, that relating to the risks assumed by an employee in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances, and because, furthermore, the instruction was not justified under the evidence; that while it was true that persons employed on lines of railway constructed at the foot of mountain ranges are necessarily subjected to greater dangers than those employed upon railroads *passing over prairie country, and that an [457 engineer on a line running at the foot of a mountain range assumes the increased risk due to this fact, yet the employee does not assume the risks and dangers that are caused by negligence on the part of the company, but has a right to expect that the company will construct and maintain its track and roadbed in such a condition as not to subject its employees to unnecessary risks and dangers; and that it is the duty of such company to use due care to construct its roadbed at a place where it crosses a waterway so that it may be reasonably safe for

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use, and if it has not done that, a jury may be justified in finding negligence on its part.

And also that there was no error in declining to give the third instruction, inasmuch as it was fully covered in the charge; nor in refusing the fourth instruction because it was not proper under the evidence; nor in those parts of the charge complained of.

In our opinion the circuit court of appeals committed no error in its rulings and in affirming the judgment of the court below, and we are not inclined to restate the reasons for the conclusions reached by that court, which are fully set forth in the case as reported.

The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations. *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 [25: 612]; *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 [36: 829]; *Gardner* v. *Michigan C. R.* 458] *Co.* *150 U. S. 349, 359 [37: 1107, 1110]; *Union P. R. Co.* v. *Snyder*, 152 U. S. 634 [38: 597]; *Chicago & N. W. R. Co.* v. *Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Toledo, P. & W. R. Co.* v. *Conroy*, 68 Ill. 560; *Stoher* v. *St. Louis, I. M. & S. R. Co.* 91 Mo. 509; *Paulmier* v. *Erie R. Co.* 34 N. J. L. 151; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282; *Smith* v. *New York & H. R. Co.* 19 N. Y. 127, 75 Am. Dec. 305; *Patterson* v. *Pittsburg & C. R. Co.* 76 Pa. 389, 18 Am. Rep. 412.

It is the duty of the company in employing persons to run over its road to exercise reasonable care and diligence to make and maintain it fit and safe for use, and where a defect is the result of faulty construction which the employer knew or must be charged with knowing, it is liable to the employee, if the latter use due care on his part, for injuries resulting therefrom.

There are cases in which, if the employee knows of the risk and the danger attendant upon it, he may be held to have taken the hazard by accepting or continuing in the employment; but this case, as left to the jury under the particular facts, is not one of them. This engineer was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect of latent defects, if there were any, in the construction, for such was its duty, and he cannot be held to knowledge of the danger lurking in this narrow seam in the mountain side by whose inequalities its sinuosities were hidden. We agree with the circuit court of appeals that the circuit court properly instructed the jury in this regard, and that no error was committed in allowing the jury to consider the evidence in the light of their own judgment and knowledge, taking into consideration all the facts bearing on the defective construction in question.

Judgment affirmed.

Mr. Justice **Brewer** and *Mr. Justice* **Peckham** took no part in the consideration and decision of this case.

THE DELAWARE.

(See S. C. Reporter's ed. 456-474.)

Inland waters—duty of steamers approaching each other—single blast—when vessel is not in fault—act of February 13, 1893—petition, when evidence.

1. The dredged entrance to a habor is as much a part of the inland waters of the United States as the harbor, within the entrance, within the meaning of the act of March 3, 1885, which adopted the Revised International Code as to the high seas and coast waters, but allowed the original code to remain in force as to harbors and inland waters.
2. Where two steamers are approaching each other upon crossing courses, the one having the other on her starboard side is bound to keep out of the way of the other, and there is a corresponding obligation on the part of the latter to keep her course.
3. Where vessels are upon crossing courses in inland waters, a single blast given by the preferred steamer means nothing more than that she intends to comply with her legal obligation to keep her course and throw upon the other steamer the duty of avoiding her.
4. The vessel having the right of way in a harbor or inland waters, when vessels are on crossing courses, is not in fault, after giving a signal that she intends to keep her course, for failing to stop and reverse because the other vessel is taking no measures to avoid her if there is nothing to show that she will not do so until a collision becomes inevitable.
5. The liability of one vessel to another in case of collision is not affected by the act of Congress of February 13, 1893, limiting the liability of a vessel, her owner, agent, or charterer, for damage or loss resulting from errors in navigation or management of the vessel, if due diligence has been exercised to make her seaworthy; but the object of the act is to modify the relations between the vessel and the cargo.
6. A petition addressed by a trade association in Great Britain to the Marquis of Salisbury, and embodied in a report of a committee of the House of Representatives, may, as a part of the history of the times, be a proper subject of consideration by the court in construing an act of Congress.

[Nos. 555, 570.]

Argued January 10, 1896. Decided March 2, 1896.

NOTE.—*As to navigable waters; what are, in United States*, see note to United States v. The Montello, 22: 391.

As to collision, rules for avoiding; steamer meeting steamer,—see note to Williamson v. Barrett, 14: 68.

As to rights of steam and sailing vessels with reference to each other and in passing and meeting, see note to St. John v. Paine, 13: 537.

As to damages, where two vessels are at fault, for injury to another, see note to The City of Hartford v. Rideout, 24: 980.

As to measure of damages for collision, see notes to Smith v. Condry, 11: 35; The Amiable Nancy, 4: 456.

As to collision; rules of navigation; steam vessels meeting; steam vessel and sail vessel meeting; speed; liability for collision,—see note to The E. A. Packer v. New Jersey Lighterage Co. 35: 453.

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ON WRIT OF CERTIORARI to the Circuit Court of Appeals for the Second Circuit to bring up the whole record in a suit in admiralty instituted by Charles H. Winnett, the owner and master, and the crew of the tug Talisman against the steamship Delaware to recover damages for a collision between these vessels, in Gedney's channel off Sandy Hook at the outer entrance of New York harbor. Certain questions were certified to this court by the Circuit Court of Appeals, and a writ of certiorari was granted to bring up the whole record upon the application of the owner of the Delaware. *Affirmed.*

See same case below, 61 Fed. Rep. 525.

Statement by *Mr. Justice* **Brown:**

This was a suit in admiralty instituted by Charles H. Winnett, the owner and master, and the crew of the tug Talisman against the steamship Delaware, to recover damages for a collision between these vessels, which occurred on September 16, 1893, about 10 o'clock in the morning, in Gedney's channel off Sandy Hook, at the outer entrance of New York harbor, and within 3 miles from land.

In the district court the Delaware was held solely in fault (61 Fed. Rep. 525), and a decree was entered against her for $21,318.70. Her owner thereupon appealed to the circuit court of appeals, which affirmed the decree of the district court as to the fault of the steamship, and certified to this court certain questions as to whether she was absolved from liability by the provisions of the act of February 13, 1893 (27 Stat. at L. 445), entitled "An Act Relating to Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties, and Rights in Connection with the Carriage of Property." This certificate was docketed as a separate cause. The owner of the Delaware thereupon applied for and was granted a writ of certiorari to bring up the whole record, upon the ground that the circuit court of appeals erred in failing to find contributory negligence on the part of the Talisman.

The first three sections, containing the material provisions of the act in question, commonly known as the "Harter act," are printed in the margin.†

Mr. **J. Parker Kirlin** for appellant.
Mr. **Harrington Putnam** for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

There are two questions involved in this case: First, whether the tug Talisman was guilty of a fault contributing to the collision; and, second, whether the Delaware is exonerated from liability under the act of February 13, 1893, known as the Harter act, by the fact that her owners had used due diligence to make her seaworthy, and provide her with competent officers and crew.

1. Gedney's channel, in which the collision took place, is a dredged passage about 1,100 feet in width, running from the open ocean in a direction about W. N W. ¼ W., and constituting the main entrance to New York harbor. It is defined by *red buoys, bearing [462 even numbers, along its northerly side, at intervals of 2,000 feet, and corresponding black buoys, bearing odd numbers, on the southerly side, at the same distance apart. Two iron can buoys, sometimes called fairway buoys, the northerly one red and the southerly one black, mark the outer entrance to the channel. About a mile out to sea beyond the channel entrance an automatic whistling buoy marks the prolongation of the central axis of the channel. Directly outside the entrance is located the station pilot boat, which anchors near black buoy No. 1, and sends out small boats to take off pilots who have been taking vessels to sea through the channel. Within the bar at the other end of the channel the water widens and the Swash channel diverges from the main ship channel, as shown in diagram at top of opposite page.

*Counsel upon one if not upon both [463 sides have assumed, upon the authority of *The Aurania* and *The Republic*, 29 Fed. Rep. 98, and *Singlehurst* v. *La Compagnie Générale Transatlantique*, 11 U. S. App. 693, that Gedney's channel is within the "coast waters of the United States," and therefore that the vessels involved were subject to the Revised International Regulations of March 3, 1885 (23 Stat. at L. 438). We think that they are mistaken in this assumption.

†An Act Relating to Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties, and Rights in Connection with the Carriage of Property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

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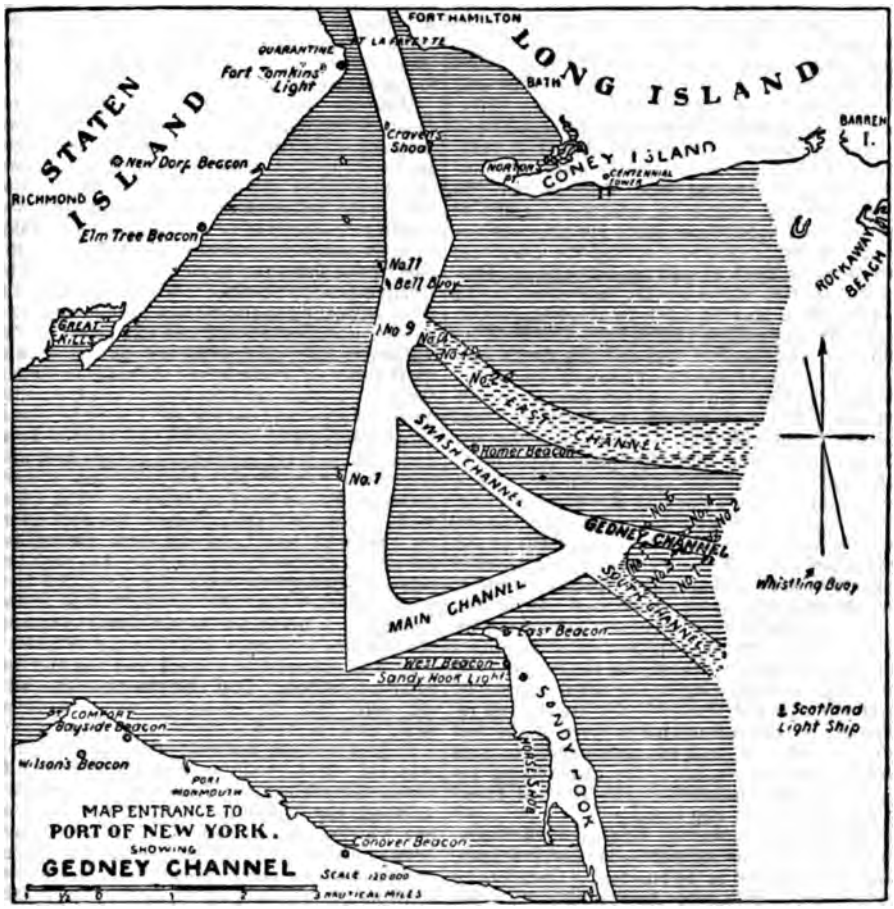

The International Code for Preventing Collisions was first adopted by act of April 29, 1864, now incorporated into the Revised Statutes, as § 4233, and was made applicable generally to the "vessels of the Navy and of the mercantile marine of the United States." This Code remained substantially unaffected by congressional legislation until March 3, 1885, when the Revised International Regulations for preventing collisions at sea were adopted by act of Congress, and made applicable to "the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States." By § 2 all laws inconsistent with these rules were repealed, *except* as to the navigation of such vessels within the *harbors*, lakes, and *inland waters* of the United States. As to such waters, the original Code of 1864 still remains in force, explained and supplemented by the rules of the supervising inspectors.

The act of 1885 did not attempt to draw the line between the high seas and the coast waters of the United States, on the one hand, and the harbors and inland waters, on the other. Nor was it possible by any general legislation to do so. We are of opinion, however, that the dredged entrance to a harbor is as much a part of the inland waters of the United States within the meaning of this act as the harbor within the entrance, and that the real point aimed at by Congress was to allow the original Code to remain in force so far as it applied to pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot. It is important that a pilot, while conducting a vessel in or out of a harbor, should not traverse waters governed by two inconsistent codes of signals, and if there are to be two codes the line *should be drawn between the high seas [464 and the inland waters, wherein the services of a local pilot are requisite for safe navigation. If, as has been suggested, ocean steamers were authorized or compelled to observe the new revised rules until their arrival at their docks, while vessels engaged in local traffic were observing the original rules, great confusion would result, and the probabilities of collision be materially increased. It is evident that all vessels running upon the same waters should be bound by the same rules and regulations in respect to their navigation.

Recent legislation has not only established the proper practice for the future, but has ex-

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plained what must have been the intention of Congress in passing the original act. By act of February 19, 1895 (28 Stat. at L. 672), "to adopt special rules for the navigation of harbors, rivers, and inland waters of the United States," these waters are declared to be still subject to the provision of U. S. Rev. Stat. § 4233 (the original Code) and to the regulations of the supervising inspectors. §§ 4412, 4413. By § 2 the Secretary of the Treasury was authorized and directed from time to time "to designate and define by suitable bearings or ranges with lighthouses, light vessels, buoys, or coast objects, the line dividing the high seas from rivers, harbors, and inland waters." Pursuant to this authority the Secretary of the Treasury on May 10, 1895, by Department Circular 95, designated and defined the dividing line between the high seas and the rivers, harbors, and inland waters of New York as follows: "From Navesink (southerly) Light-House NE. ¼ E., easterly, to Scotland Light Vessel, thence N. NE. ¼ E. through Gedney channel whistling buoy (proposed position) to Rockaway Point life saving station." The whole of Gedney's channel is within this line.

This of course must be accepted as the dividing line as to all future cases; but as the Secretary of the Treasury was merely directed to carry out the existing law upon the subject, we think it should be treated as cogent evidence of what the law had been before, and we are therefore of the opinion that Gedney's channel should be treated, for the purposes of this case, as belonging to the inland waters of [465] the United *States. We are the less reluctant to take this course in view of the fact that the pilots of both steamers appear to have acted in contemplation of the Supervising Inspectors' Rules rather than the Revised International Rules & Regulations.

The Delaware was an English tank steamship of 2,495 tons registered, 345 feet in length, and was engaged in the business of transferring petroleum in bulk from New York to London and Liverpool. She was returning to New York in ballast only, and had taken a duly licensed Sandy Hook pilot, who was in charge of her navigation at the time of the collision. The Talisman was an ocean tug, 100 feet in length, and at the time of the collision was engaged in towing the station pilot boat Edmund Driggs, with a hawser 15 fathoms in length, from a point some distance to the northward of the northerly line of Gedney's channel, diagonally across the channel towards the pilot station outside of the black fairway buoy, on the southerly side of the channel.

During the morning of the collision the weather was cloudy and overcast, until the Delaware got within 3 or 4 miles of the outer end of the channel, when a heavy rain squall came on, which lasted for about ten minutes, during which time the vessels were lost to view of each other. About four or five minutes before the collision, and when the vessels were probably a mile or more apart, the squall passed over, and each vessel sighted the other, and kept her in sight from that time until the collision. As the squall passed over, the pilot of the steamship made the outer red buoy about half a point on his port bow, and thereupon starboarded one point to bring the buoy upon his starboard bow, and was brought into the channel upon a true course of W. by S. At the same time the Talisman was entering the channel from the northwest, upon a course about S. SE., and not far from a right angle to the course of the Delaware.

Without inquiring minutely into the respective manœuvres and courses of the two steamers, it is sufficient to say that they were approaching each other upon crossing courses, and that under the 19th rule, the steamship, having the Talisman on her starboard side, was bound to keep out of her way. By *rule [466] 23 there was a corresponding obligation on the part of the Talisman to keep her course. The Delaware made no effort to avoid the tug. Instead of porting as she entered the channel, and passing up the starboard side and astern of the Talisman, the pilot kept her on her course until about a minute before the collision, when the master, who had been below, ran hurriedly on the bridge, and seeing the Talisman about three points on his starboard bow, and close at hand, ordered the helm hard a-starboard, and the engine stopped; though both orders were given too late to be of any service. The Delaware struck the Talisman upon the port quarter, about 15 feet from the stern, listing her heavily to starboard, and continued to push her sidewise through the water for about 300 feet, when she sank near the southerly side of the channel. A fireman who was trying to cast off the tow line was drowned; Captain Winnett's arm was severely fractured; and the tug became a total loss. It is evident from the bare statement that the Delaware was grossly at fault, and no claim is made to the contrary.

2. It is insisted, however, that the Talisman was also in fault in several particulars. It seems that, when the Delaware was about a mile off, the Talisman blew a single blast of her whistle, which does not appear to have been answered. When the Delaware was from a quarter to an eighth of a mile off, and the Talisman was a little above, or near the northerly edge of the channel, she sounded another single blast, which was not answered, although three of the libelant's witnesses from the Talisman seemed to have understood that it was answered. When the Delaware was about a length off, the Talisman sounded an alarm signal of three blasts, but did not change her helm or reduce her speed before the collision.

In this connection, the Talisman was charged with a violation of the Supervising Inspector's Rules, in not porting her helm and directing her course to starboard after sounding her first signal. These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on or nearly end on, and the signals therein provided for are designed to apprise the approaching vessel of the *intention of the steamer giving the sig- [467] nal, to port or starboard, as the case may be. As applied to vessels upon crossing courses, however, it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her. Such was evidently the view taken by both parties in this case, as there is not the slightest evidence that the pilot of the Delaware was misled by these

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signals, nor is a failure to port charged in the answer, or suggested in the testimony, as a fault on the part of Talisman. These rules, so far as they require whistles to be used, ought to be construed in harmony with the International Code. If they were so construed as to require the preferred vessel to port, after having blown a blast of her whistle, it would involve a violation of article 23, which requires her to keep her course. On the other hand, if they be construed as applying chiefly to steamers meeting end on, or nearly end on, under Rule 18, they would frequently aid in solving any doubt with regard to the proposed course of the vessel giving the signal, and thus enable the meeting vessel to govern her own course accordingly. Certainly the rules should not be construed to require the steamer giving the signal to violate a plain statutory rule of navigation.

As bearing upon the proper interpretation of these rules, it is pertinent to observe that to rule 23 of the act "to Regulate Navigation upon the Great Lakes and Their Connecting and Contributory Waters," approved February 8, 1895 (28 Stat. at L. 645),—a rule which corresponds in this particular feature with the Supervising Inspectors' Regulations, and with article 19 of the Revised International Regulations,—there is added the following qualification: "But the giving or answering a signal by a vessel required to keep her course shall not vary the duties or obligations of the respective vessels."

The main fault charged upon the Talisman, however, is that of not stopping and reversing when the failure of the Delaware to take measures to avoid her became apparent. In *The Britannia* v. *Cleugh* ("*The Britannia*") 153 U. S. 130 [38: 660], which was also a case of a starboard hand collision, the preferred steam-[468] er, the Beaconsfield, was *held to have been in fault for stopping and reversing under similar circumstances—in other words, for doing what it is claimed the Talisman should have done in this case. Two members of the court dissented upon the ground that the Beaconsfield, having been brought into a position of peril by the negligence of the Britannia, was not in fault for stopping and reversing; the substance of their opinion being that, under such circumstances, the master might exercise his judgment as to the best method of avoiding a collision, and that an error in judgment should not be imputed to him as a fault. In neither opinion, however, was it intimated that, if the Beaconsfield had kept her speed, she would have been in fault for so doing.

The duty of a steamer having the right of way when approaching another steamer charged with the obligation of avoiding her has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th rule of the original International Code (Rev. Stat. § 4233), and of the 16th rule of the Revised Code of 1885, and doubtless applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way. The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and, perhaps, of American authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a "special circumstance," under rule 24, "rendering a departure" from the rules "necessary to avoid immediate danger." Some even go so far as to hold it the duty of the preferred vessel to stop and reverse, when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be *in extremis*, he is bound to hold his course and speed.

*The cases of *The Britannia* v. *Cleugh*[469 ("*The Britannia*") 153 U. S. 130 [38: 660], and *Hutchinson* v. *The Northfield*, 154 U. S. 629, Appx. [24: 680], must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. *Belden* v. *Chase*, 150 U. S. 674 [37: 1218]; *The Highgate*, 62 L. T. 841, 6 Asp. Mar. L. Cas. 512.

In the case under consideration there was really nothing to apprise the tug that the Delaware would not port and go under her stern, until the collision became inevitable. The vessels were in plain sight of each other. The Delaware was entering a channel, whose course was marked by buoys, and she could not possibly have continued her then course without soon crossing the line of black buoys, which marked the southerly edge of the channel. There was every reason to suppose that, as soon as she passed the line of red buoys at the northerly edge, she would port and take her proper course up the channel, and if for any reason she was unable to do this, it was her plain duty to apprise the tug of the fact either by blowing the starboard signal of two whistles, or any alarm whistle, to indicate that the circumstances were such as to render it impossible for her to fulfil her obligation to keep out of the way of the tug. If she had done so a different question would have been presented. Until the last moment the tug had a right to assume that she would comply with the rule. Had the tug stopped and reversed, she might not only have brought about a collision with the Delaware, but would *have incurred[470 the danger of a collision with her own tow. It is true the Delaware did not answer the signals of the Talisman as she should have done, but Captain Winnett, who was in charge, testifies that he was under the impression that she an-

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swered the first whistle, and made an allegation to that effect in his libel. He appears to have been mistaken in this, but as the morning was somewhat thick he might have thought so, and was not in fault for acting upon that hypothesis. The second whistle was given so late that the vessels were evidently *in extremis* before a reasonable time had elapsed in which to answer it. In any event there is too much doubt about the fault of the Talisman to justify us in apportioning the damages.

8. Is the Delaware exempted from liability by the act of February 13, 1893. "An Act Relating to Navigation of Vessels, Bills of Lading and to Certain Obligations, Duties, and Rights in Connection with the Carriage of Property?" This is the first case in which this act, which has an important bearing upon the rights of shippers, has been called to our attention.

The 1st section declares it to be unlawful for the manager, etc., of any vessel engaged in foreign trade, to insert in any bill of lading any covenant or agreement whereby the vessel or her owner "shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery, of any and all lawful merchandise or property committed to its or their charge," and that any such clause shall be null and void. The 2d section declares it to be unlawful for any such vessel to insert in any bill of lading any covenant whereby the obligation of the owner to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make her seaworthy, and to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided. The 3d section provides that if the owner shall exercise due diligence to make her seaworthy, "neither the vessel, her owner or owners, agent, or charterers shall become or 471] be held *responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," nor shall they be "liable for losses arising from dangers of the sea, or other navigable waters, acts of God or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or saving or from attempting to save life or property at sea, or from any deviation in rendering such service." The 4th section makes it obligatory to issue to shippers a bill of lading, stating certain particulars, which document shall be prima facie evidence of the receipt of the merchandise therein described. The 5th section is penal in its character. The 6th reserves the application of the limited liability act; and the 7th excepts vessels engaged in the transportation of live animals.

Respondent relies, in this connection, upon the 1st clause of § 3: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent, not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit as far as possible the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness,*bad stowage, and negligence[472 in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time, holding the vessel for nonexcepted liabilities, new clauses were inserted in the bills of lading to meet these decisions until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand and suggested amendments to the maritime law in line with those embodied in the Harter act. The exigencies which led to the passage of the act are graphically set forth in a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury and embodied in a report of the Committee on Interstate and Foreign Commerce of the House of Representatives. As a part of the history of the times, this is a proper subject of consideration. *American Net & T. Co.* v. *Worthington*, 141 U. S. 468, 474 [35: 821, 824].

"That, taking advantage of this practical monopoly, the owners of the steamship lines combined to adopt clauses in their bills of lading very seriously and unduly limiting their obligations as carriers of the goods, and refused to accept consignments for carriage on any other terms than those dictated by themselves.

"That this policy has been gradually extended by the steamship owners until at the present time their bills of lading are so unreasonable and unjust in their terms as to exempt them from also every conceivable risk and responsibility as carriers of goods.

"For example, many of these bills of lading provide, in addition to the usual and reasonable exceptions, that the carriers shall not be liable for loss or damage occasioned by negligence of the master, pilot, stevedores, crew, or others in their employment; nor for bad stowage; nor for defect or insufficiency of the hull, machinery, or fittings of a vessel, whether occurring before or after receiving the goods on board; nor *for the admission of water [473 into the vessel by any cause, and whether for the purpose of extinguishing fire or for any other purpose, and whether occurring previously or subsequently to the vessel's sailing; nor for the

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differences between the quality, marks, or brands of flour or other goods shipped and those of the goods actually found to be on board of the steamer (the marks, numbers, or description in the bill of lading notwithstanding); nor for loss of weight; nor for detention, delay, or deviation.

"Such bills of lading also frequently exempt the carrier from any claim not intimated before delivery of the goods, and at the same time provide that the master porterage of the goods on arrival of the steamer shall be done by the steamship owners or their agents at the expense and risk of the receivers, so that the receivers have no opportunity before the delivery of their goods of ascertaining whether they are damaged or not, or how or in what part of the hold they may have been stowed.

"That bills of lading have thus become so lengthened, complex, and involved that in the ordinary course of business it is almost impossible for shippers of goods to read or check their various conditions, even if objections would be listened to, and the hardship is aggravated by the fact that new and more stringent conditions are constantly being added by the ship owners to provide for new questions or claims that have arisen.

"That a striking illustration of this is the fact that recently a clause has been added to certain steamship forms of bills of lading actually giving the ship owners a right of lien over, and the right to sell the goods entrusted to them for carriage, not only for the freight upon the goods themselves, but for all debts due, either by the shippers, or the consignees of such goods, to the carriers or their agents, though these debts may have arisen on contracts unconnected with the carriage of such goods. The effect of this clause is to render the bill of lading, which has been of such essential service on account of its negotiable character in promoting the commercial prosperity of Great Britain, a document unfit for negotiation."

474] *No complaint was made in this connection of the liability of vessels under the ordinary forms of bills of lading, or their liability to other vessels for the consequences of their negligence, the evil to be remedied being one produced by the oppressive clauses forced upon the shippers of goods by the vessel owners. It is true that the general words of the 3d section, above quoted, if detached from the context and broadly construed as a separate provision, would be susceptible of the meaning claimed, but when read in connection with the other sections, and with the remainder of § 3, they show conclusively that the liability of a vessel to other vessels with which it may come in contact was not intended to be affected.

The 1st, 2d, 4th, and 7th sections deal exclusively with bills of lading and their covenants, and the 3d section, after using the general language relied upon by the respondent here, with regard to nonliability for faults or errors in navigation or in the management of the vessel, contains a further exemption of "loss arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." These provisions have no possible application to the relations of one vessel to another, and are mainly a reenactment of certain well-known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes. The fact, too, that by § 6 the various sections of the Revised Statutes which embody the limited liability act are preserved unimpaired, would seem to indicate that the later act was not intended to receive the broad construction claimed.

The decree of the court below is therefore affirmed.

UNITED STATES, *Plff. in Err.*, [475
v.
SAMUEL ZUCKER ET AL.

(See S. C. Reporter's ed. 475-482.)

Constitutional right.

An action to recover the value of merchandise forfeited to the United States under the act of June 10, 1890, chap. 407, § 9, is not a criminal case, and defendants are not entitled to the constitutional right given in criminal cases to be confronted with the witnesses against them, but depositions of witnesses duly authenticated, taken in a foreign country, may be read in evidence on the trial against the defendants.

[No. 794.]

Argued January 14, 1896. Decided March 2, 1896.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of defendants, Samuel Zucker *et al.* in an action brought against them by the United States to recover the value of merchandise alleged to have been forfeited under the act of June 10, 1890. *Reversed, and case remanded for further proceedings.*

Mr. **Edward B. Whitney**, Assistant Attorney General, for plaintiff in error.

Messrs. **Abram J. Rose** and *Peter Zucker* for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

By the act of June 10, 1890, chap. 407, known as the customs administrative act, it is provided that "if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the

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NOTE.—*As to trial by jury; how affected by 7th Amendment to the Constitution,*—see note to New York Sup. Ct. Justices v. United States, 19: 656.

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United States shall be deprived of the lawful duties or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular arti-
476] cle or articles of merchandise to *which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding $5,000, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court." 26 Stat. at L. 131, 135, § 9.

The present action was brought to recover from the defendants the sum of $346.02 as the value of certain merchandise originally belonging to them and alleged to have been forfeited to the United States under the above statute.

The complaint, which is in the form prescribed by the New York Code of Civil Procedure, alleged that, on or about December 14, 1891, certain described merchandise was imported into the United States, at the port of New York, and when so imported was subject to the payment of duties; that the defendants, the owners, importers, and consignees of such merchandise, entered the same at the office of the collector, to whom was produced a duly certified invoice, purporting to show the actual cost of the merchandise, and also a declaration, which entry and declaration were signed and verified in the manner and form required by law; that said entry, invoice, affidavit, and paper were false and fraudulent, as the defendants well knew, in that the actual cost of such merchandise was greater than the amount stated therein; and that the defendants wilfully and wrongfully concealed the actual cost of such merchandise, whereby the United States had been deprived of the lawful duties, or a portion thereof, accruing upon the same.

The defendants made a general denial of each allegation of the plaintiff. As separate defenses they pleaded: 1. That the merchandise mentioned in the complaint was not forfeited. 2. That the action was not brought against the person making the entry of the merchandise in the complaint specified. 3. That the duties on all goods imported by them during the times specified in the complaint had been liquidated and paid by them, and such merchandise delivered to them as the owners thereof, all without fraud, and that more than one year had elapsed since the date of the entry referred to by the United States.
477] *At the trial below, the government, to sustain the issues on its part, offered to read in evidence a deposition that had been duly taken in Paris, France, and was properly authenticated and certified under letters rogatory, properly issued and returned.

The defendants objected to the admission of this testimony upon the following grounds: 1. That this action, though civil in form, was in substance a criminal case, and, under the Constitution of the United States, the defendants were entitled on the trial "to be confronted with the witnesses" against them. 2. That "the constitutional right of the defendants to be confronted with the witnesses against them is not secured by giving them notice of the execution of letters rogatory in France, and that their failure to attend on such occasion at a place 3,000 miles from the place of trial, out of the district and in a foreign country, does not operate as a waiver of their constitutional right, if it can be waived."

In answer to questions propounded by the court, the defendants admitted that the evidence was material, and placed their objection to it upon the grounds just stated.

The court thereupon sustained the objection and excluded the evidence, to which action the government excepted.

The United States having no other evidence to offer, the jury, by direction of the court, returned a verdict for the defendants, and the action was thereupon dismissed.

The only question presented for our decision is whether the court below erred in excluding the deposition which the government took in Paris, France, and the materiality of which is conceded by the defendant.

The sole ground of objection to the deposition, as we have seen, was that, in this action to recover the value of merchandise alleged to have been forfeited to the United States under the 9th section of the act of June 10, 1890, chap. 407, no deposition, wherever taken, could be read against the defendants, without their consent, but the witness must testify in person, before the court, during the progress of the trial.

This objection is supposed to be sustained by the 6th *Amendment of the Constitution, [478 which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

In support of their contention the defendants cite *Coffey* v. *United States*, 116 U. S. 436, 443 [29: 684, 686]; *Boyd* v. *United States*, 116 U. S. 616, 634 [29: 746, 752], and *Lees* v. *United States*, 150 U. S. 476 [37: 1150].

Coffey v. *United States* was a civil information on behalf of the United States against certain property that had been seized by an internal revenue officer as forfeited to the United States on account of the alleged violations of certain provisions of the Revised Statutes relating to internal revenue. U. S. Rev. Stat. §§ 3257, 3450, 3453. Coffey intervened and claimed the property. One of the defenses was that a criminal information had been filed against him in respect of the matters set forth in one or more of the counts of the declaration, and that upon a trial he had been acquitted. The principal question presented in the civil case was as to the effect of the trial, verdict, and judgment of acquittal in the criminal case. This court, after observing that the proceeding to enforce the forfeiture against the *res* named must be a pro-

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ceeding *in rem* and a civil action, while that to impose upon the offender the fine and imprisonment prescribed by statute must be a criminal proceeding, said: "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*."

That case is an authority for the proposition [479] that if the *present defendants had been proceeded against criminally on account of the same acts and facts that must be shown in order to sustain this action under the statute of 1890, and had been acquitted, the verdict and judgment of acquittal would have barred a subsequent civil proceeding, based on the same acts and facts, and instituted to enforce a forfeiture or to recover the value of the merchandise forfeited.

Boyd v. *United States*, 116 U. S. 616, 634 [29: 746, 752], was an information, in a cause of seizure and forfeiture of property, against certain merchandise seized as forfeited to the United States under the 12th section of the customs act of June 22, 1874 (18 Stat. at L. 186, 188, chap. 391). Boyd intervened and claimed the goods. On the trial it became important to show the quantity and value of the merchandise contained in certain cases previously imported. The court, on motion of the district attorney, made an order, under the 5th section of the above act, requiring the claimant to produce the invoice of those cases. The order was obeyed, the claimant, however, objecting to its validity, as well as to the constitutionality of the statute. When the invoice was offered by the government as evidence, Boyd objected to its reception on the ground that, in a suit for forfeiture, the claimant himself could not be compelled to produce evidence, and that the statute, in that particular, was invalid. This court said: "As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey* v. *United States*, 116 U. S. 436, 443 [29: 684, 686], in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the 4th Amendment of the Constitution, and of that portion of the 5th Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the [480] owner of *goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the 5th Amendment to the Constitution, and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the 4th Amendment. Though the proceeding in question is devested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose."

The principles announced in the *Boyd Case* have no application whatever to the present case. Neither the constitutional provision which protects the people in their persons, houses, papers, and effects against unreasonable searches and seizures, nor the provision that a person shall not be compelled in any criminal case to be a witness against himself, has any bearing whatever upon the inquiry whether the right of an accused, in *a criminal prosecution*, "to be confronted with the witnesses against him," is infringed by permitting a deposition of a living witness to be read against him in an action brought to recover the value of merchandise forfeited to the United States by reason of his acts in violation of law. This is so manifest that it is impossible, by any argument, to make it clearer.

Equally inapplicable to the present inquiry is the case of *Lees* v. *United States*, 150 U. S. 476 [37: 1150]. That was a civil action to recover a penalty imposed by the act of February 26, 1885 (23 Stat. at L. 332, chap. 164), for importing an alien under a contract to perform labor. Our attention has been called to that part of the opinion in that case in which it was declared, upon the authority of *Boyd* v. *United States*, 116 U. S. 616, 634 [29: 746, 752], that although the proceeding against Lees was civil in form, it was "unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself." But that principle is not involved in the present case.

No case has been cited which sustains the contention of the defendants. And we are unaware of any such case in England where the constitutional principle embodied in the 6th Amendment, and here involved, is recognized as part of the law of the land.

*The 6th Amendment relates to a prose- [481] cution of an accused person which is technically criminal in its nature. In such a proceeding, the person accused is entitled to a speedy and public trial by an impartial jury of the state, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed; whereas an action in which a judgment for money only is sought even if, in some aspects, it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction. The words in the 6th Amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled "to be confronted with the witnesses against him," has no reference to any proceeding (although the evidence therein may disclose, of necessity, the commission of a public

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offense) which is not directly against a person who is accused, and upon whom a fine or imprisonment or both may be imposed. A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the 6th Amendment, a witness against an "accused" in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant in such a case is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 [35:1110, 1113], 3 Inters. Com. Rep. 816, it was held that the provision in the 5th Amend-
482]ment that no person* "shall be compelled in any criminal case to be a witness against himself" covered, but was not limited to, criminal prosecutions; that its object was "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." In the argument of that case reference was made to the 6th Amendment in support of the proposition that an investigation before a grand jury was not a criminal case, within the meaning of the 5th Amendment, and was solely for the purpose of finding out whether a crime had been committed. But this court said that a criminal prosecution, within the meaning of the 6th Amendment, was one against a person who was accused and who was to be tried by a petit jury; that "a criminal prosecution under article 6 of the amendments is much narrower than a criminal case under article 5 of the amendments."

Of course, if the government had elected to prosecute the present defendants criminally for the offense defined in the 9th section of the act of 1890, a verdict and judgment of acquittal could have been pleaded in bar of an action to recover the value of the merchandise. *Coffey* v. *United States*, 116 U. S. 436. 443 [29: 684, 686]. But it does not follow that the defendants can demand of right, in this civil action, not directly involving their personal security, that they shall be confronted, at the trial, with the witnesses who testify in behalf of the government.

The judgment is reversed, and the case is remanded with directions to set aside the verdict and judgment, and for further proceedings in conformity with this opinion. Reversed.

HARVEY SPALDING, *Plf. in Err.*, [483
v.
WILLIAM F. VILAS.

(See S. C. Reporter's ed. 483-499.)

Payments to claimants—action against Postmaster General—liability.

1. Congress may provide that any sums ascertained to be due from the government to claimants shall be paid directly to them, and shall not pass through the hands of agents or attorneys.
2. A circular by the Postmaster General accompanying warrants for claims due to postmasters, calling attention to an enactment providing for payment directly to them, and stating that no attorney's services were necessary, and that Congress desired the proceeds to reach the person really entitled thereto, and that such claims were adjusted from the books and papers in the department without further evidence, and also to the statute making any transfer of the claim or power of attorney for receiving payment of such warrants null and void,—cannot be made the basis of a private action against him on the ground that it is unauthorized by law and beyond the scope of his official duties, even if it worked injury to an attorney for such claimants.
3. The head of an executive department cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress and in respect of matters within his authority, by reason of any personal or even malicious motive that might be alleged to have prompted his action.

[No. 81.]

Argued November 21, 1895. Decided March 2, 1896.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment of that court affirming a final order in the same court in special term sustaining a demurrer to the declaration in an action by Henry Spalding against Wm. F. Vilas and dismissing the plaintiff's action. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*As to ministerial officer protected in the execution of regular process*, see note to Erskine v. Hohnbach, 20:745.

As to when officer liable for error in judgment; for neglect or refusal to perform judicial or ministerial duty; for tort or breach of trust,—see note to Kendall v. Stokes, 11: 506.

As to judge not liable for error of judgment, though intentional; liability of officer on contract made by him,—see note to Jones v. Le Tombe, 1: 647.

As to presumption of regularity of officer's appointment and due qualification, and that he acted within his jurisdiction; certificate evidence of authority,—see note to Fenwick v. Sears, 2: 101.

As to when injunction to restrain acts of public officers will be granted, see note to Mississippi v. Johnson, 18: 437.

As to liability of sureties on official bonds, see note to United States v. Giles, 3: 709.

As to liability of sureties on postmaster's bonds, see note to Postmaster General v. Early, 6: 577.

As to postmaster's liability for loss and detention of letters and papers, see note to Dunlop v. Munroe, 3: 329.

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Mr. **W. Willoughby** for plaintiff in error.
Messrs. **J. M. Dickinson,** Assistant Attorney General, and *Judson Harmon,* Attorney General, for defendant in error.

484] *Mr. Justice* **Harlan** delivered the opinion of the court:

This writ of error brings up for review a judgment of the supreme court of the District of Columbia in general term, which affirmed a final order in the same court in special term, sustaining a demurrer to the declaration filed by the plaintiff in error Spalding against the defendant Vilas, and dismissing the plaintiff's action.

The question presented for determination is whether the plaintiff's declaration stated a valid cause of action against the defendant.

The plaintiff alleged that he was a citizen of the District of Columbia, and had been for more than twenty years an attorney at law, practising his profession in the city of Washington, and that the defendant, from March 4, 1885, until January 16, 1888, was the Postmaster General of the United States;

That "in or about the year 1871, he, the said plaintiff, was employed by a considerable number of persons who were and had been postmasters at different postoffices in the United States, to obtain a review and readjustment of their salaries, in accordance with the provisions of the act of Congress of June 12, 1866, relating thereto, and which enacted that when the quarterly returns of the postmasters of the 3d, 4th, and 5th classes, mentioned therein, showed that the salary allowed is 10 per cent less than it would be on the basis of commissions under the act of June 22, 1854, fixing their compensation, they were entitled to have their compensation reviewed and readjusted under the provisions of said act of 1854, by reason of which a large number of such postmasters had just and valid claims against the United States arising from such readjustment, and a large number of them entered into written contracts with the plaintiff, employing him, and providing a reasonable compensation to him for procuring the same, and gave to him written powers of attorney to act for them in the prosecution of said claims and to receive the drafts which might be issued in payment thereof;" and,

That "upon making and filing applications at 485] the Postoffice *Department in behalf of his clients for such readjustment and review, the same was denied, notwithstanding such act of Congress, whereupon the plaintiff took measures to procure mandatory legislation by Congress and appropriations necessary, pressing such legislation by all lawful means in his power in the different Congresses from 1871 to 1886, giving to such efforts a great amount of his time, and in the meantime procuring similar contracts and applications and powers of attorney from several thousands of postmasters of the said classes throughout different parts of the United States, and filing in the postoffice department such applications and powers of attorney, and expending a good many thousands of dollars in building up a business in the collection of such claims, relying upon the justice thereof, and finally obtaining the passage of the acts of Congress of March 3, 1883, requiring the Postmaster General of the United States, upon proper presentation of such claims, to compute and pay the same; an act of Congress of July 7, 1884, making appropriations for the payment of such claims; a further act of Congress of March 3, 1885, making a like appropriation; and a similar act of Congress of August 4, 1886, making further appropriations therefor, all of which acts were brought about in consequence of the continual and persistent efforts of the plaintiff, under which acts the plaintiff proceeded to make out papers and proofs for the presentation of such claims in behalf of his clients, and filed the same, with powers of attorney to him, as aforesaid, in the said Postoffice Department, and commenced the collection of the same, a large number of said claims prior to March, 1885, and which were good and valid, being, however, repudiated by the Postoffice Department, and the prosecution of such claims being made more difficult by great hostility of the persons managing such department to the collection of this class of claims."

The declaration also alleged that "soon after the 3d day of March, 1885, the plaintiff made application to the defendant, in his capacity of Postmaster General of the United States, to adjust and pay the said claims which had been disallowed, and also to review and readjust claims of the same character *which had [486 not before been presented, which applications were refused, and an acrimonious controversy arose between the said defendant and this plaintiff in relation thereto, the said defendant, among other things, endeavoring to obtain legislation by Congress to impair and destroy the rights of the plaintiff under the said contracts, in which, however, he failed; but to further harass the plaintiff, and to injure him in his good name and in his business, without any good reason therefor, and with malicious intent, the said defendant interposed all possible obstacles to the collection of said claims, and undertook to induce the clients of the plaintiff to repudiate the contracts they had made, and for such purpose, and with such malicious intent, caused the drafts for the payment of such claims to be sent directly to the claimants, and for the malicious purpose of causing the claimants to disregard the contracts they had made with the plaintiff for fees, and to cause them to believe that the same were null and void, and that plaintiff had rendered them no service, and that he was attempting falsely to claim for valuable services rendered under said contracts, falsely claimed to be valid, and using his official character for such purpose, thus placing the plaintiff before the country as a common swindler; and to bring him into public scandal, infamy, and disgrace, and to injure his business, with each letter of transmittal of drafts to said claimants caused to be issued and sent to them, between September, 1886, and January 17, 1888, to a great number, to wit, four thousand of the said claimants, clients of the plaintiff, residing in the states of New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and the territories of Utah, Washington, and

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Wyoming, the circular, of which the following is a copy, the same being dated and addressed to each claimant, respectively, stating the sum transmitted and the name and postoffice of such claimant, respectively, and having added thereto, in print, § 8 of the act of August 4, 1886, and U. S. Rev. Stat. § 3477, to wit:

487] *Postoffice Department,
Office of the Third Assistant Postmaster General,
Division of Finance, Washington, D. C., ——, 188-.

SIR: Herewith inclosed you will find warrant payable to your order for $——, which is in full liquidation of your claim for the balance unpaid of the readjusted salary of —— ——, postmaster at ——, state of ——.

In transmitting it I am directed by the Postmaster General to advise you that in the act of 1883, which provided for readjustments of salary, the Congress directed that all checks or warrants should be made payable to the claimants and transmitted direct to them, and that in the appropriation and enactment on this subject by Congress, a copy of which is printed at the foot of this note, the direction was repeated. This was done because no attorney's services were necessary to the presentation of the claim before the department, and the Congress desired all the proceeds to reach the person really entitled thereto. After a claim of this character is filed in the department its examination and the readjustment of the salary, if found proper, are made directly from the books and papers in the department by its officers, and without further evidence.

You are further advised that by U. S. Rev. Stat. § 3477, a copy of which is also printed at the foot of this note, any transfer of this claim or power of attorney for receiving payment of this warrant is null and void.

Yours respectfully,
J. H. Harris,
Third Assistant Postmaster General.

—— ——,
—— ——.

See statutes referred to on next leaf.

It was alleged that the said circular was intended to deceive and did deceive the said claimants, who believed what the defendant meant and intended, as hereinbefore stated, of and concerning the plaintiff, and was false in the following respects, to wit: (1) that "in the act of 1883, which provided for readjustments of 488] salary, the Congress directed that *all checks or warrants should be transmitted direct to the claimants, and that such direction was repeated in the act of 1886;" (2) that "this was done because no attorney's services were necessary to the presentation of the claim before the department;" (3) that "this was done because the Congress desired all the proceeds to reach the person really entitled thereto;" (4) that "the statement that claims of this character, after being filed in the department, were examined and readjusted directly from the books and papers in the department, without further evidence, besides being untrue, in many cases was unnecessary to protect the interests of the government or the claimant, was not required by law, and was maliciously intended to cause the claimants to believe that the plaintiff's claim for valuable services was false and fraudulent, and the same was inserted for no other purpose."

The declaration further alleged that "the reference to § 3477 in said circular and the printing of the whole of said section was for the malicious purpose only of causing the claimants to believe that the said contracts for fees, before suggested in said circular, were null and void according to a pretended official ruling of the Postoffice Department; while in truth and in fact the said section had no reference to any contracts of the kind, nor to contracts of the character hereinbefore described as made by the plaintiff with such claimants;" that "all of said false statements or irrelevant references and printing of said U. S. Rev. Stat. § 3477, were unnecessary, malicious, and without reasonable or probable cause, and intended to deceive the claimants, and to thereby induce them to repudiate the contracts they had made with the plaintiff, and they understood said circular as meant and intended, as herein stated, of and concerning the plaintiff; and they were deceived, and did repudiate their said contracts by reason thereof, to the great injury of the good name of the plaintiff and to his business, and for no other purpose;" and that "soon after commencing to issue such circulars the attention of the defendant was called by the plaintiff to the fact that the issuing of such circulars produced great injury to his business and was unjust towards him; but the said *defendant, [489 notwithstanding, maliciously continued the said issue, so long as he held the position of Postmaster General of the United States, to all the claimants he could reach, and to the number of four thousand, as aforesaid, for no other purpose than to continue the said injury to this plaintiff."

In consequence of the alleged acts of the defendant the plaintiff claimed to have been put to great trouble and expense in enforcing the said contracts, had lost the benefit of many of them, at an expense and loss of $25,000; and, besides, had suffered injury to his good name and reputation to the amount of $75,000. He prayed judgment for $100,000, besides costs and disbursements.

U. S. Rev. Stat. § 3477, referred to in the circular made part of the declaration is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it

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must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The thought which underlies the entire argument for the plaintiff is that the circular issued from the Postoffice Department by direction of the Postmaster General was beyond the scope of any authority possessed by that officer; and therefore the sending of the circular to the persons who had presented 490] claims against the government was *not justified by law, and would not protect the Postmaster General from responsibility for the injury done to the plaintiff from that act.

The statute of March 3, 1883, chap. 119, relating to the readjustment of the salaries of postmasters of certain classes, provided that every readjustment of salary, under that act, should be upon a written application, signed by the postmaster or late postmaster, or legal representative entitled to such readjustment, and that "each payment made shall be by warrant or check on the treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the postoffice within whose delivery he resides, and which address shall be set forth in the application above provided for." 22 Stat. at L. 487. And by the act of August 4, 1886, chap. 908, it was declared that the payment of all sums thereby appropriated "shall be made by warrants or checks, as provided by the said act of March 3, 1883, payable to the order of and transmitted to the persons entitled respectively thereto." 24 Stat. at L. 256, 307, 308, § 8.

Whatever may have been the value of any services rendered by the plaintiff for his clients; even if the readjustment of their salaries was wholly due to his efforts "to procure mandatory legislation by Congress, pressing such legislation by all lawful means in his power," through many years, it was competent for the legislative branch of the government to provide that any sums ascertained to be due to claimants should be paid directly to them. Such a requirement could have had no other object than to make it certain that the full amount due to those whose salaries were readjusted was received by them personally, and should not pass through the hands of agents or attorneys. No one will question the power of Congress to enact legislation that would effect such an object. *Ball* v. *Halsell*, 161 U. S. 72 [*ante*, 622]. If such legislation worked injury to the plaintiff in that it gave his clients an opportunity to evade, for a time, the payment of what they may have agreed to allow him, it was an injury from which no cause of action could arise. This view is so clear that no argument in its support is necessary.

491] *It results that the Postmaster General not only had the right, but it was his duty, to cause all checks or warrants issued under the authority of the above acts of Congress to be sent directly to the claimants. If not strictly his duty, it was his right to call the attention of claimants to the provisions of the act of 1883. Of the legislation of Congress every one is presumed to have knowledge; but all know, as matter of fact, that the larger part of the people are not informed as to the provisions of many acts of Congress. No one could rightfully complain that the Postmaster General called the attention of those having business with his department to an act of Congress that related to that business, and which would explain why checks or warrants in their favor were sent directly to them and were not delivered to agents or attorneys.

Nor did the Postmaster General exceed his authority when he informed claimants that Congress required checks or warrants to be sent to them "because no attorney's services are necessary to the presentation of the claim before the department, and Congress desired all the proceeds to reach the person really entitled thereto;" nor when he stated in his circular that "after a claim of this character is filed in the department, its examination and the readjustment of salary, if found proper, are made directly from the books and papers in the department by its officers, and without further evidence." Was it not true that any claim under these acts of Congress must be, or could properly be, sustained or rejected according to the evidence furnished by the records of the department? Besides, the statement that "no attorney's services were necessary to the presentation of the claim," if not strictly accurate, was, at most, only an expression of the opinion of the Postmaster General in the course of his official duties. As he was charged with the execution of the will of Congress in relation to the readjustment of those salaries, he was entitled to express his opinion as to the object for which the act of 1883 was passed, and to indicate what, in his judgment, was necessary to be done in order to bring claims under that act properly before the department. Indeed, the clear indication in the *act of 1883 of the de- [492 sire of Congress that the full amount awarded to claimants should be paid directly to them rendered it entirely appropriate that he should advise them of the fact that the records of the department furnished all the evidence necessary for the readjustment directed by Congress. He did not by his circular advise claimants that they could disregard any valid contract made by them with attorneys. Claimants could not have understood him as recommending a violation of the legal rights of others. He said, in substance, nothing more than that they, the claimants, were mistaken if they supposed that the services of attorneys were required for the presentation and prosecution of their claims before the department.

Equally without foundation is the suggestion that the Postmaster General exceeded his authority and duty when he called the attention of claimants to U. S. Rev. Stat. § 3477. That officer might well have apprehended that the salutary provisions of that section had been overlooked or disregarded by those interested or connected with the prosecution of these claims. If any claimant had transferred or assigned his claim, or any part of it, or any interest therein, or had executed any power of attorney, order, or other instrument for receiving payment of such claim, or any part of it, before the claim was allowed, and before its amount was ascertained and a warrant for its payment issued, such transfer, assignment,

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and power of attorney were null and void. The Postmaster General was directly in the line of duty when, in order that the will of Congress as expressed in the act of 1883 might be carried out, he informed claimants that they were under no legal obligation to respect any transfer, assignment, or power of attorney which U. S. Rev. Stat. § 3477, declared to be null and void. If the plaintiff had not taken any such transfers, assignments, or powers of attorney from his clients, he could not have been injured by the reference made by the Postmaster General to that section. If he had taken such instruments, he cannot complain that the Postmaster General called the attention of claimants to the statute on the subject, and correctly interpreted it.

493] *The act of the head of one of the departments of the government in calling the attention of any person having business with such department to a statute relating in any way to such business cannot be made the foundation of a cause of action against such officers.

If, as we hold to be the case, the circular issued by the Postmaster General to claimants under the acts of Congress in question was not unauthorized by law nor beyond the scope of his official duties, can this action be maintained because of the allegation that what that officer did was done maliciously?

This precise question has not, so far as we are aware, been the subject of judicial determination. But there are adjudged cases, in which principles have been announced that have some bearing upon the present inquiry.

In *Randall* v. *Brigham*, 74 U. S. 7 Wall. 523, 535 [19: 285, 291],—which was an action against one of the justices of the superior court of Massachusetts for an alleged wrongful removal of the plaintiff from his office of an attorney and counselor at law,—it was said that whatever might be the rule in respect of judges of limited and inferior authority, judges of superior or general authority were not liable to civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, "unless, perhaps, where the acts, in excess of jurisdiction, are done maliciously or corruptly."

But in *Bradley* v. *Fisher*, 80 U. S. 13 Wall. 335 350, 354 [20: 646, 650, 651], which was an action against a justice of the supreme court of the District of Columbia to recover damages alleged to have been sustained by the plaintiff "by reason of the wilful, malicious, oppressive, and tyrannical acts and conduct" of the defendant, whereby the plaintiff was deprived of his right to practise as an attorney in that court, it was said that the qualifying words above quoted were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction were not liable to civil suits for their judicial acts, even when such acts were in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction was made between excess of jurisdiction and the **494]** clear absence of all jurisdiction over *the subject-matter, the court observing that "where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. In this country," the court said, "the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality or maliciously or corruptly or arbitrarily or oppressively they may be called to an account by impeachment, and suspended or removed from office." Again: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."

In *Yates* v. *Lansing*, 5 Johns. 282, 291, Kent, Ch. J., said: "The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisputed current of decisions in the English courts amidst every change of policy and through every revolution of their government."

The same principle was announced in England in the case of *Fray* v. *Blackburn*, 3 Best & S. 576, in which *Mr. Justice* Crompton said: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore, the proposed allegation would not make the declaration good. The public are deeply interested *in this rule, which, in **[495** deed, exists for their benefit, and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions." The principle was applied in one case for the protection of a county court judge who was sued for slander, the words complained of having been spoken by him in his capacity as judge, while sitting in court, engaged in the trial of a cause in which the plaintiff was defendant. Chief Baron Kelly observed that a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice, and that the doctrine had been applied to the court of a coroner, and to a court-martial, as well as to the superior courts. He said: "It is essential in all courts that the judges who are appointed to administer the the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protec-

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tion or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?" *Scott* v. *Stansfield*, L. R. 3 Exch. 220.

In *Dawkins* v. *Paulet*, L. R. 5 Q. B. 94, which was an action for libel brought by an officer of the army against his superior officer to recover damages on account of a report made by the latter in relation to certain letters of the former, the defendant claimed that what he did was done in the course of and as an act of military duty. The replication stated that the libel was written by the defendant of actual malice, without any reasonable, probable, or justifiable cause, and not bona fide or in the bona fide discharge of the defendant's duty as such superior officer. The case was [496] heard on *demurrer to the replication, and it was held by all the justices (Cockburn, Ch. J., only dissenting) that the action would not lie. The case was first considered in the light of the pleadings and the admissions of the demurrer. Mellor, J., said: "I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty and not the motives from which or under which it is done. In short, it appears to me that the proposition resulting from the admitted statements in this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; and therefore upon the pleadings as they stand we might give judgment for the defendant." But, according to the report of that case, the Attorney General did not rest the defense on the effect of the admissions in the pleadings, but contended broadly that no action would lie against an officer of the army charged with duties such as those stated on the record, for the discharge of them. He likened the case to that of the judges of courts of law, to grand jurymen, petty jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it, and claimed immunity for the defendant for the acts done in the course of his duty on the highest grounds of policy and convenience. No judge, no jurymen nor witnesses, he said, "could discharge his duty freely if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him and to all officers in the same position." "There is," Mellor, J., said, "little doubt that the reasons which justify the immunity in the one case do in great measure extend to the other."

An instructive case upon the general subject of the immunity of public officers from actions for damages on account of what they may have done in the course of their official duties is *Dawkins* v. *Rokeby*, L. R. 8 Q. B. 255, 262, the *judgment in which was affirmed by the [497] House of Lords. L. R. 7 H. L. 744, 754. The defendant, a general in the English army, was called before a court of inquiry, legally assembled to inquire into the conduct of the plaintiff, also an officer in the army. He made statements in evidence, and after the close of the evidence handed in a written paper (not called for by the court, but having reference to the subject of the inquiry) as to the conduct of that officer. An action was brought in respect to those statements, which was alleged to be both untrue and malicious. That case came before the queen's bench, in the exchequer chamber, upon a bill of exceptions allowed by *Mr. Justice* Blackburn, who had instructed the jury as matter of law that the action would not lie if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military inquiry in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted *mala fide*, and with actual malice, and without any reasonable or probable cause, and with the knowledge that the statements made and handed in by him were false. The court, all the judges concurring, sustained the correctness of this ruling, and held that the statements were privileged. "The authorities," it was said, "are clear, uniform, and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law." Lord Chancellor Cairns, in the House of Lords, said: "Adopting the expressions of the learned judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a court of inquiry of this kind for the purpose of testifying there upon a matter of *military discipline con- [498] nected with the army. It is not denied that the statements which he made, both those which were made *viva voce* and those which were made in writing, were relative to the inquiry."

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between ac-

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tion taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action, for personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but **499**]he may have such*large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is therefore wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law.

The judgment of the supreme court of the District of Columbia is affirmed.

HARVEY SPALDING, *Plff. in Errr.*,
v.
DON M. DICKINSON.

(See S. C. Reporter's ed. 499.)

[No. 82.]

Argued November 21, 1895. Decided March 2, 1896.

The preceding case of *Spalding* v. *Vilas* followed.

IN ERROR to the Supreme Court of the District of Columbia.

Mr. **W. Willoughby** for plaintiff in error.

Messrs. **J. M. Dickinson,** Assistant Attorney General, and *Judson Harmon*, Attorney General, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The defendant in error succeeded Mr. Vilas in the office of Postmaster General. The declaration in the present case is, in all material respects, like that in *Spalding* v. *Vilas*, 161 U. S. 483 [*ante*, 780]. For the reasons stated in the opinion in that case *the judgment is affirmed.*

JOHN MATTHEWS, *Plff. in Errr.* and *Appt.*, [**500**
v.
UNITED STATES.

(See S. C. Reporter's ed. 500-502.)

Variance between indictment and proof.

A variance between the indictment and the proof as to the day when the alleged perjury was committed is not ground for reversal of the judgment, where the perjury was not charged to have been committed in a record, deposition, or other paper, but in giving evidence on a trial which was accurately described.

[No. 778.]

Submitted March 3, 1896. Decided March 16, 1896.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment of that court convicting John Matthews of the crime of perjury. *Affirmed.*

See same case below, 68 Fed. Rep. 880.

Statement by *Mr. Justice* **Peckham:**

The plaintiff in error was indicted in the circuit court of the United States for the southern district of New York for the crime of perjury, alleged to have been committed upon the trial of an action between the United States and one John Matthews, impleaded with others. The trial of the action in which the perjury was alleged to have been committed was had in the circuit court for the southern district of New York, and Matthews, plaintiff in error, was sworn upon the trial, and the indictment in this case alleges that he committed the perjury set forth in the indictment upon that trial "before the said judge and jury, to wit, on the 7th day of June, in the year of our Lord one thousand, eight hundred and ninety-four, and within the district aforesaid and within the jurisdiction of this court." For the purpose of proving the testimony of plaintiff in error, taken upon the original trial in which the perjury was alleged to have been committed, and by stipulation of counsel for the parties in this case, the minutes of the stenographer were read upon this trial, and from those minutes it appeared that the testimony alleged to be false was given by plaintiff in error upon the 6th instead of the 7th of June. The plaintiff in error was convicted. His counsel then made a motion for a new trial and in arrest of judgement, both of which motions

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As to sufficiency of evidence to convict of perjury, see note to United States v. Wood, 10: 527.

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501] were *denied. Upon the trial the objection was raised by counsel for defendant that there was a fatal variance existing between the indictment and the proof as to the time when the perjury was committed, and that question was reserved for the purpose of being heard on the motion for a new trial, in case the plaintiff in error was convicted. The motion for a new trial having been made on that ground and denied, the defendant below obtained a writ of error from this court, and the case is now here for review.

Messrs. **W. J. Townsend** and **Chas. A. Hess** for plaintiff in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr Justice **Peckham** delivered the opinion of the court:

The only point suggested by counsel for plaintiff in error upon which to obtain a reversal of the judgment is the fact of the variance between the indictment and the proof as to the day when the alleged perjury was committed. We think the decision of the court below was clearly right. The cases cited by counsel for plaintiff in error, in regard to the necessity for specific and accurate proof of the very day upon which the perjury was alleged to have been committed, were those in relation to records, depositions, or affidavits which were to be identified by the day on which they were made or taken. Under such circumstances a misdescription of the date of the particular record, deposition, or affidavit has been sometimes held fatal on the ground, substantially, that it has not been identified as the particular one in which the perjury is alleged to have been committed, because the record or other paper itself bears one date and the indictment describing it bears another. It is not the same record, and therefore there is variance, which has been held fatal to a conviction.

In this case there was no record which was contradicted by the proof given upon this trial. The trial was described accurately, the parties 502] to it, the court in which it took place, *the term and the time at which it was tried, and the only difference between the allegation in the indictment and the proof in the case is that during this trial, which occupied several days, the plaintiff in error swore on the 6th of June instead of on the 7th, as alleged in the indictment, to the matter which was alleged to be false. The date upon which the evidence was given, which was alleged to have been false, appeared by the stenographer's minutes, who took the evidence on the trial, to have been the 6th of June. This is no record, and it is not within the principle upon which the cases relied upon by counsel for plaintiff in error were decided. Such a variance as appears in this case is not material. *Rex* v. *Coppard*, 3 Car. & P. 59; *Keator* v. *People*, 32 Mich. 484; *People* v. *Hoag*, 2 Park. Crim. Rep. 1. It will be seen that the time was stated under a *videlicet* in this indictment, although that fact is probably not very material. The opinion written by the learned judge in denying the motion for a new trial and in arrest of judgment says all that is necessary to be said in this case, and we concur entirely in the conclusion reached by him. 68 Fed. Rep. 880.

The judgment must be affirmed.

PLUTARCO ORNELAS, Consul of the Republic of Mexico, *Appt.*,

v.

INEZ RUIZ, JESUS GUERRA, and JUAN DUQUE.

(See S. C. Reporter's ed. 502-512.)

Authority of consul—appeal—extradition proceedings, not reviewable on habeas corpus—judgment, when final.

1. A consul of the Republic of Mexico, who makes a complaint for the extradition of fugitives from that country, must by virtue of his official character be considered to have authority to prosecute an appeal on behalf of his government from a decision discharging the person accused.
2. Where the construction of a treaty between the United States and Mexico is drawn in question in a final order of the district court discharging persons from custody in extradition proceedings, an appeal may be taken directly to this court.
3. The decision by a commissioner in favor of the extradition of persons charged with murder, arson, robbery, and kidnapping during a raid by 130 or 140 men from Texas into Mexico, in which they attacked about 40 Mexican soldiers, killed and wounded some, assaulted private persons, burned houses, and carried away property, cannot be reviewed by writ of habeas corpus on the ground that the offenses were purely political, even if there is some evidence that their purpose was to fight against the government.
4. The judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law.

[No. 622.]

Argued and Submitted January 13, 1896. Decided March 16, 1896.

APPEAL from a final order of the District Court of the United States for the Western District of Texas discharging upon habeas corpus Inez Ruiz *et al.*, petitioners, from the custody of the marshal in extradition proceedings. *Reversed, and case remanded for further proceedings.*

NOTE.—*As to extradition from another state; right to try person extradited for a different crime from that for which he was surrendered; who are fugitives from justice; character of offense; demand for arrest and delivery of fugitives; surrender of fugitive,*—see note to Cook v. Hart, 36: 984.

As to extradition of persons accused of crime, on demand of foreign governments, see note to Kentucky v. Dennison, 16: 717.

As to when habeas corpus may issue, and when not, and from what courts, and by what judges; what may be inquired into by writ of,—see note to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus, see note to *Ex parte* Carll, 27: 288.

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Statement by *Mr. Chief Justice* **Fuller:**

On complaints made by Plutarco Ornelas, consul of the Republic of Mexico, charging Juan Duque, Inez Ruiz, and Jesus Guerra with the commission of murder, arson, robbery, and kidnapping, at the village of San Ygnacio, in the state of Tamaulipas, Republic of Mexico, on December 10, 1892; that they were fugitives from justice of the state of Tamaulipas and the Republic of Mexico, and had fled into the jurisdiction of the United States for the purpose of seeking an asylum; and that the alleged crimes were enumerated and embraced in the treaty of extradition then in force between the United States and the Republic of Mexico, warrants were issued by L. F. Price, commissioner of the circuit court of the United States for the western district of Texas, duly authorized, for their apprehension, on which they were arrested and brought before the commissioner to answer the premises and to be dealt with according to law and the provisions of the treaty. The cases were heard, and the **504]** *commissioner found that the evidence was sufficient in law to justify their commitment on such charges, and that they should be placed in custody to await the order of the President of the United States in the premises.

Thereupon Ruiz, Guerra, and Duque applied to the district court of the United States for the western district of Texas for writs of habeas corpus, alleging that they were unlawfully restrained of their liberty by the United States marshal for that district, and praying that they be released.

The writs were issued, and the marshal made his return, showing that he held petitioners by virtue of warrants issued by the United States commissioner on the application of the Mexican government for their extradition on the aforesaid charges. With the writs of habeas corpus were issued writs of certiorari directing the commissioner to send up the original papers and a transcript of the testimony on which the prisoners were committed. This was done, and on consideration of the cases the district court held on the evidence that the offenses with which petitioners were charged were purely political offenses, for the commission of which petitioners were not extraditable, and entered a final order discharging petitioners from the custody of the marshal on giving bond for their appearance to answer the judgment on appeal. From this final order, the consul of the Republic of Mexico prayed an appeal to this court.

The following are articles of the extradition treaty between the United States and the Republic of Mexico proclaimed June 20, 1862:

"Article I. It is agreed that the contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in article 3d of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found, within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found **505]** *would justify his or her apprehension and commitment for trial if the crime had been there committed.

"Article II. In the case of crimes committed in the frontier states or territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said states or territories, or through such chief civil or judicial authority of the districts or countries bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier states or territories, or when, from any cause, the civil authority of such state or territory shall be suspended, through the chief military officer in command of such state or territory.

"Article III. Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories, or accomplices, to wit: Murder (including assassination, parricide, infanticide, and poisoning), assault with intent to commit murder, mutilation, piracy, arson, rape, kidnapping, defining the same to be the taking and carrying away of a free person by force or deception; forgery, including the forging or making, or knowingly passing or putting in circulation counterfeit coin or bank notes, or other paper current as money, with intent to defraud any person or persons; the introduction or making of instruments for the fabrication of counterfeit coin or bank notes, or other paper current as money; embezzlement of public moneys, robbery, defining the same to be the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear; burglary, defining the same to be breaking and entering into the house of another with intent to commit felony; and the crime of larceny of cattle, or other goods and chattels, of value of $25 or more, when the same is committed within the frontier states or territories of the contracting parties.

"Article IV. On the part of each country the surrender of fugitives from justice shall be made only by the authority of the executive thereof, except in the case of crimes committed within *the limits of the frontier states or territo- **[506** ries, in which latter case the surrender may be made by the chief civil authority thereof, or such chief civil or judicial authority of the district or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier states or territories, or if, from any cause, the civil authority of such state or territory shall be suspended, then such surrender may be made by the chief military officer in command of such state or territory.

"Article V. All expenses whatever of detention and delivery effected in virtue of the preceding provisions shall be borne and defrayed by the government or authority of the frontier state or territory in whose name the requisition shall have been made.

"Article VI. The provisions of the present treaty shall not be applied in any manner to any crime or offense of a purely political character, nor shall it embrace the return of fugitive slaves, nor the delivery of criminals who, when the offense was committed, shall have been held in the place where the offense

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was committed in the condition of slaves, the same being expressly forbidden by the Constitution of Mexico; nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the 8d article committed anterior to the date of the exchange of the ratifications hereof.

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty."

Messrs. **J. H. McLeary,** *John W. Foster, S. F. Phillips,* and *F. D. McKenney* for appellant.

Messrs. **T. J. McMinn** and *W. H. Brooker* for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Republic of Mexico applied for the extradition of these petitioners by complaints made **507**] under oath by its consul at *San Antonio, Bexar county, Texas, under U. S. Rev. Stat. § 5270. The official character of this officer must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf. *Mali* v. *Hudson County Common Jailkeeper* ("*Wildenhus' Case*"), 120 U. S. 1 [30: 565]. As the construction of the treaty was drawn in question the appeal was taken directly to this court and the district court rightly required petitioners, under rule 34, to enter into recognizance for their appearance to answer its judgment.

The legislative provisions on the subject of extradition are to be found in U. S. Rev. Stat. tit. 66, §§ 5270–5280. Section 5270 provides: "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

In the extradition case of *Re Stupp*, 12 Blatchf. 501, *Mr. Justice* Blatchford, then dis-**508**] trict judge, carefully *considered the provisions of the Revised Statutes in respect of the issue of writs of habeas corpus and certiorari by the courts and judges of the United States (U. S. Rev. Stat. §§ 751–761), and the acts of Congress from which those sections were brought forward, and pointed out that the general language used is as applicable to a case where the party is in custody under process issued on a final judgment of a court of the United States on a conviction on an indictment as it is to a case where a party is in custody under any other process; that it could not be successfully contended that these provisions have the effect to authorize a court of the United States, which has no direct power given to it to review the final judgment of another court of the United States in a given case, to review such judgment on the merits under the indirect authority of a writ of habeas corpus; and that, therefore, as the statute in respect of extradition gives no right of review to be exercised by any court or judicial officer, but the magistrate is to certify his findings on the testimony to the Secretary of State that the case may be reviewed by the executive department of the government, the court issuing the writ may "inquire and adjudge whether the commissioner acquired jurisdiction of the matter by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion."

By repeated decisions of this court it is settled that a writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the *purposes of extradition, such de-[**509** cision cannot be reviewed on habeas corpus. *Oteiza y Cortes* v. *Jacobus* ("*Re Oteiza y Cortes*"), 136 U. S. 330 [34: 464]; *Benson* v. *McMahon*, 127 U. S. 457 [32: 234]; *Fong Yue Ting* v. *United States*, 149 U. S. 714 [37: 913].

As the English extradition act of 1870 (33 & 34 Vict. chap. 52), extracts from §§ 3 and 11 of which are given below,† contemplates an independent examination on habeas corpus in every case, if applied for, as in effect part of the proceedings, it has been held that the courts have power to go into the whole matter under the writ so provided for. *Re Castioni* [1891] 1 Q. B. 149; *Re Arton* [1896] 1 Q. B.

†3. "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character."

11. "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal

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108. But the legislation of Congress in respect of extradition is widely different and the scope of inquiry on the writ of habeas corpus is necessarily much narrower.

Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law.

510] *It must be assumed on this record that the commissioner was duly authorized; that petitioners were not citizens of the United States but were citizens of Mexico; that the acts charged were committed in Mexico, and were considered crimes under both governments; that no objection requiring consideration exists in the mode of procedure; and that the commissioner had jurisdiction of the person and of the subject-matter if, on the evidence, the offenses charged were within the terms of the treaty.

The release of petitioners was ordered on the sole ground that, as appears from the portion of the opinion of the learned district judge contained in the record, this raid was part of "a political movement, having for its purpose the overthrow of the existing government in Mexico, and that the offenses committed by the petitioners and their associates in their vain and visionary attempt to accomplish their purpose were purely political offenses within the meaning of the 6th article of the treaty of extradition." The evidence before the commissioner, from which this conclusion was deduced, tended to show that on December 10, 1892, a band of armed men to the number of one hundred and thirty or forty, under the leadership of one Francisco Benevides, passed over the Rio Grande from Texas into Mexico, and attacked about forty Mexican soldiers stationed at the village of San Ygnacio; killing and wounding some of them, and capturing others, who were afterwards released; burning their barracks and taking away their horses and equipments; that private citizens were also violently assaulted; horses belonging to them taken; houses burned; small sums of money extorted from women; clothes, provisions, and goods appropriated; and three citizens kidnapped and carried over the river to the Texas side, finally escaping; that these men were bandits, without uniforms or flag, but with a red band on their hats; and that Garza was not there and had nothing to do with the expedition. The band remained on the Mexican side of the river about six hours and recrossed at the village ford. Petitioners were members of the band and citizens of Mexico, as appeared from the complaints and testimony, though one of them at 511]*least had resided a large part of the time for many years in Texas. Evidence on behalf of petitioners was adduced indicating that there had been a revolutionary movement on that border under one Garza in 1891; that indictments had been found against the participants for violation of the neutrality laws; and that the aim, object, and purpose of Benevides' men was the same as Garza's, "to cross over the river and fight against the government."

In the course of his opinion the district judge referred to the views of the state department as to the transaction at San Ygnacio. We presume this reference is to the note of Mr. Secretary Gresham to the Minister of Mexico, May 13, 1893, in respect to the extradition of Benevides. The facts were reviewed therein by the Secretary, and it was held that the acts for which his extradition was asked were "not of such a purely political character as to exclude them from the operation of the treaty." The Secretary concluded his *résumé* with these words: "The idea that these acts were perpetrated with bona fide political or revolutionary designs is negatived by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas." But extradition was not granted because it appeared that Benevides was a citizen of the United States.

The district judge entertained different views from those of the Secretary, and arrived at a different result from that reached by the commissioner on the evidence on which the latter proceeded, and so was induced to substitute his judgment for that of the commissioner, in whom was reposed the authority of decision, unless jurisdiction were lacking.

Can it be said that the commissioner had no choice on the evidence but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection or a civil war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because *of the political intentions of [512 those who committed them? In our opinion this inquiry must be answered in the negative.

The contention that the right of the executive authority to determine what offenses charged are or are not purely political is exclusive is not involved in any degree; nor are we concerned with the question of the actual criminality of petitioners if the commissioner had probable cause for his action. It is enough if it appear that there was legal evidence on which the commissioner might properly conclude that the accused had committed offenses within the treaty as charged, and so be justified in exercising his power to commit them to await the action of the executive department. The rule as to probable cause was

that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus. Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a secretary of state, it shall be lawful for a secretary of state, by a warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

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thus laid down by Mr. Chief Justice Marshall, sitting as a committing magistrate, in *Burr's Case:* "On an application of this kind I certainly should not require that proof which would be necessary to convict the persons to be committed on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused. But I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it." 1 Burr's Trial, 11; *Benson* v. *McMahon*, 127 U. S. 462 [32:236]; *Re Fares*, 7 Blatchf. 345; *Re Ezeta*, 62 Fed. Rep. 972, 981.

We are of opinion that it cannot be held that there was substantially no evidence calling for the judgment of the commissioner as to whether he would or would not certify and commit under the statute, and that therefore, as matter of law, he had no jurisdiction over the subject-matter; and, this being so, his action was not open to review on habeas corpus.

The final order of the district court is therefore reversed and the case remanded for further proceedings in conformity to law.

513] JOSHUA M. DUSHANE, Assignee in Bankruptcy of ABRAHAM O. TINSTMAN, *Plff. in Err.*,

v.

ALPHEUS BEALL.

(See S. C. Reporter's ed. 513-518.)

Limitation in bankruptcy proceedings—Federal question—election by assignee.

1. The two years' limitation of U. S. Rev. Stat. § 5057, is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, in which adverse claims existed while in the hands of the bankrupt and before assignment.
2. Whether an assignee in bankruptcy is entitled to certain property of the bankrupt as against adverse claimants thereto is a Federal question.
3. The assignee of a bankrupt in an involuntary bankruptcy proceeding who fails to include a certain claim in his schedule of assets cannot be held to have elected whether he will prosecute the claim or abandon it, in the absence of any evidence of his knowledge or sufficient means of knowledge of its existence.

[No. 134.]

Submitted March 2, 1896. Decided March 16, 1896.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment of that court affirming the judgment of the Court of Common Pleas of that State for Fayette County in favor of Alpheus Beall against the Pittsburg & Connellsville Railroad Company, as garnishee, for a debt due by said garnishee to a debtor against whom an execution was issued, which was also claimed by Joshua M. Dushane, assignee in bankruptcy, a party in this suit. *Reversed, and cause remanded for further proceedings.*

See same case below, 149 Pa. 439.

Statement by *Mr. Chief Justice* **Fuller:**

This was a garnishee proceeding in the court of common pleas for Fayette county, Pennsylvania.

The record of that court shows the issue in favor of Alpheus Beall, on a judgment recovered by him against Abraham O. Tinstman, of an attachment execution, dated June 9, 1888, and service thereof accepted by the Pittsburg & Connellsville Railroad Company, as garnishee, June 15, 1888.

August 10, 1888, McCullough, assignee in bankruptcy, appeared in the garnishment proceeding and participated in the choice of arbitrators, who made an award September 25, 1888, in favor of Beall, from which award an appeal was taken. December 13, 1889, the case was continued "on account of death of assignee of A. O. Tinstman; said case not to be again placed on trial list until after appointment and appearance of another assignee in bankruptcy." April 23, 1890, "Edward Campbell, *Esq., appears for J. M. Dushane,[514 assignee in bankruptcy of A. O. Tinstman." September 11, 1890, "Joshua M. Dushane, assignee of A. O. Tinstman, appears in court and asks leave to be added to the record as defendant." Thereafter the case was submitted to the court for determination on a case stated, which embodied the following facts:

On the 5th of April, 1876, Abraham O. Tinstman was adjudicated a bankrupt in involuntary proceedings in bankruptcy, and during the same month Welty McCullough was appointed assignee, and took upon himself the duties thereof. The deed of the register in bankruptcy to the assignee conveyed the property which Tinstman possessed, was interested in, or entitled to, on the 5th day of April, but the schedule of assets filed by the assignee did not embrace the bankrupt's interest in a certain telegraph line hereinafter mentioned. Tinstman was duly discharged as a bankrupt, January 3, 1877.

In 1882, James L. Shaw instituted an action against the Pittsburg & Connellsville Railroad Company in the court of common pleas for Fayette county, Pennsylvania, to recover damages for a breach of contract relative to the maintenance and working of a line of telegraph between Uniontown and Connellsville, and on October 2, 1885, Tinstman was made one of the "use plaintiffs" therein.

After his discharge, Tinstman engaged in business, and became indebted to Alpheus Beall in the sum of $780.54, for which a judgment was rendered against him November 24, 1886, in said court of common pleas.

Shaw recovered judgment against the railroad company for a considerable amount, covering damages from January 1, 1874, to September 1, 1887. Of these damages, the sum of $947.73 was Tinstman's share on account of an interest in the line of telegraph, which be-

NOTE.—*As to bankrupt and insolvent laws of state, constitutionality of; laws of United States suspend state bankrupt laws; discharge in foreign country no bar,*—see note to Sturges v. Crowninshield, 4: 529.

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came his property "by subscription and payment therefor in the year 1865." McCullough died August 31, 1889, Joshua M. Dushane was appointed assignee in his place December 14, 1889, and intervened in this case, as such, September 11, 1890.

The court of common pleas ruled that the as-[515]signee had *lost any right to the fund by reason of delaying claim thereto for an unreasonable time; and also that the limitation of two years prescribed by U. S. Rev. Stat. § 5057, applied, and entered judgment in favor of Beall and against the railroad company as garnishee for $947.43, "the debt due by said garnishee to said Tinstman." The case was taken to the supreme court of Pennsylvania, which affirmed the judgment on the ground that the delay of the assignee was fatal to his claim. 149 Pa. 439. A writ of error from this court was then sued out.

Mr. **Edward Campbell** for plaintiff in error.

Mr. **Leoni Melick** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We concur with the supreme court of Pennsylvania that the limitation of U. S. Rev. Stat. § 5057, did not apply. That limitation is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment. *Re Conant*, 5 Blatchf. 54; *Clark* v. *Clark*, 58 U. S. 17 How. 315, 321 [15: 77, 79]; *Phelps* v. *McDonald*, 99 U. S. 298, 306 [25: 473, 475]; *French* v. *Merrill*, 132 Mass. 525.

It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefiting the estate, and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course. *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13 [35: 915, 918]; *Glenny* v. *Langdon*, 98 U. S. 20 [25: 43]; *American File Co.* v. *Garrett*, 110 U. S. 288 [28:149]; *Smith* v. *Gordon*, 6 Law Rep. 318; *Amory* v. *Lawrence*, 3 Cliff. 523; *Ex parte Houghton*, 1 Low. Dec. 554; *Nash* v. *Simpson*, 78 Me. 142; *Streeter* v. *Sumner*, 31 N. H. 542. The same principle is applicable also to re-[516]ceivers *and official liquidators. *Quincy, M. & P. R. Co.* v. *Humphreys*, 145 U. S. 82 [36: 632]; *St. Joseph & St. L. R. Co.* v. *Humphreys*, 145 U. S. 105 [36: 640]; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313 [35: 1025]; *United States Trust Co.* v. *Wabash Western R. Co.* 150 U. S. 287 [37: 1085]; *Re Oak Pitts Colliery Co.* L. R. 21 Ch. Div. 322, 330. And see *Bourdillon* v. *Dalton*, 1 Esp. 233, Peake, 312; *Turner* v. *Richardson*, 7 East, 336; 2 Domat, pt. 2, bk. 1, tit. 1, § 5.

If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in *Smith* v. *Gordon*, he, with such knowledge, "stands by without asserting his claim for a lapse of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property," then he may be held to have waived the assertion of his claim thereto.

In *Sparhawk* v. *Yerkes* we held that as the conduct of the assignees was such as to show that they did not intend to take possession of the assets in controversy; as they avoided assuming any liability in respect thereof; and as they allowed the bankrupt after his discharge by the expenditure of labor and money to save the assets and render them valuable, they could not be permitted to assert title against him. That was a suit directly against the bankrupt, and this is in effect the same, for Beall does not appear to occupy any better position than Tinstman himself. The judgment of the supreme court of Pennsylvania proceeded upon the ground that the assignee delayed too long in the assertion of his claim; that the litigation against the railroad company was protracted, uncertain, and expensive; and that as the assignee did not appear to have intervened in the matter until, as is stated, December 11, 1890, although the litigation began in the summer of 1882, he must be held to have elected to abandon the claim, and could not come in at so late a day and share in the fruits of litigation carried on by others; and on that view of the facts this conclusion would seem to be correct if the record showed on the *part of [517] Tinstman's assignee knowledge of the facts or wilful blindness in relation to them.

The supreme court manifestly referred to the intervention, in this proceeding, of Dushane, as assignee, which was, according to the case stated, September 11, 1890, but McCullough had intervened as assignee August 10, 1888, and he having died August 31, 1889, the cause was continued for the appointment and appearance of another assignee.

It is said by counsel for the assignee that the original litigation was commenced April 29, 1878, by a bill in equity, filed for the benefit of all the owners of the telegraph line, which it was decided January 9, 1882, would not lie; that thereupon the action at law, which resulted in judgment, was brought July 10, 1882, in the name of Shaw alone, the contract being under seal, but for the benefit of his assigns as well, who were very numerous; that afterwards some, but not all, of the "use plaintiffs" were added to the record; and that Tinstman's assignee just as much participated in the litigation from April, 1878, to its end in 1888, as any of the others, whether named as plaintiffs or not. The difficulty with this is that very little, if any, of the matter stated can be deduced from the record, which fails to disclose that the assignee was represented in the litigation against the railroad company, or asserted his claim to his share of the fruits thereof, whether as a party of record under Shaw or otherwise, prior to his intervention in this action, August 10, 1888.

The case stated does show that Tinstman was made one of the "use plaintiffs" in Shaw's action, October 2, 1885, but there is no explanation of how that entry came to be

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made, and nothing to indicate notice thereof to the assignee, or to charge him with notice assuming that he was ignorant of the claim.

On the other hand, the bankruptcy proceeding was involuntary, and it appears that the schedule of assets (the term "schedule" being used in the case stated as the equivalent of the inventory) was made by the assignee, the law providing that the order of adjudication should require the bankrupt to deliver a schedule of creditors and an inventory and valuation of his 518]*estate, and if the bankrupt were absent or could not be found, such schedule and inventory should "be prepared by the messenger and the assignee from the best information they can obtain." U. S. Rev. Stat. §§ 5030, 5031. And this inventory thus prepared by the assignee, the record affirmatively shows, did not embrace the bankrupt's interest in the telegraph line, as we must presume it would if the assignee had had, or been able to obtain, information in respect thereof. Nor can we find elsewhere in the record any evidence that the assignee knew or was informed of Tinstman's interest prior to August 10, 1888. Counsel for the assignee argues that the fact is that Tinstman's interest was the ownership of certain shares of stock in the telegraph company which were included in the inventory and delivered to the assignee, but the exact contrary appears from the case stated. Nor does the fact appear, which he likewise insists upon, that the assignee not only did not abandon, but actively asserted, his claim.

The question whether the assignee in bankruptcy was entitled to this claim was clearly a Federal question. *Williams* v. *Heard*, 140 U. S. 529 [35: 550]. And if all the facts stated in the record before us do not, as matter of law, warrant the conclusion at which the highest court of the state arrived upon this question, it is the duty of this court so to declare, and to render judgment accordingly.

We must take the record as we find it, and are constrained to the conclusion that the assignee should not have been held to have exercised the right of choice between prosecuting the claim and abandoning it, in the absence of any evidence whatever to justify the conclusion that he had knowledge, or sufficient means of knowledge, of its existence prior to August 10, 1888; and that therefore there was error in the judgment.

Judgment reversed, and the cause remanded, that the judgment of the court of common pleas may be reversed and further proceedings had not inconsistent with this opinion.

519] EDGAR M. GEER, *Plff. in Err.*,
v.
STATE OF CONNECTICUT.

(See S. C. Reporter's ed. 519-544.)

Transporting out of state birds which have been killed—commerce—police power—state statute.

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress; how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

1. A state has power to make it an offense to have in possession, for the purpose of transportation beyond the state, birds which have been lawfully killed within the state during the open season; and a state statute creating this offense does not violate the interstate commerce clause of the Constitution of the United States.
2. Although the killing of game and its sale within a state are allowed, it does not thereby necessarily become the subject of interstate commerce in the legal meaning of those words.
3. The source of the police power as to game birds is the duty of the state to preserve for its people a valuable food supply.
4. The police power of the state to preserve game birds as a valuable food supply for its people justifies a statute prohibiting the transportation of such birds beyond the state, even if interstate commerce may be remotely and indirectly affected thereby.

[No. 87.]

Argued November 22, 1895. Decided March 2, 1896.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment of that court affirming the judgment of the Criminal Court of Common Pleas convicting Edgar M. Geer of unlawfully receiving and having in his possession with intent to transport beyond the state certain woodcock, grouse, and quail killed within the state, and imposing a fine upon him. *Affirmed.*

See same case below, 61 Conn. 144, 13 L. R. A. 804, 3 Inters. Com. Rep. 732.

Statement by *Mr. Justice* **White**:

The statutes of the state of Connecticut provide (Revision of 1888, § 2530):

"Every person who shall buy, sell, expose for sale, or have in his possession for the purpose, or who shall hunt, pursue, kill, destroy, or attempt to kill any woodcock, quail, ruffled grouse, called partridge, or gray squirrel between the first day of January and the first day of October, the killing or having in possession of each bird or squirrel to be deemed a separate offense, . . . shall be fined not more than $30."

It is further by the statute of the same state provided (§ 2546):

"No person shall at any time kill any woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the state; or shall transport or have in possession, with intention to procure the transportation beyond said limits, of any such birds killed within this state. The reception by any person within this state of any such bird or birds for shipment to a point without the state shall be prima facie evidence that said bird or birds were killed within the state for the purpose of carrying the same beyond its limits."

An information was filed against the plaintiff in error in the police court of New London, Connecticut, charging him *with, on the [520 19th day of October, 1889, unlawfully receiving and having in his possession, with the wrongful and unlawful intent to procure the transportation beyond the limits of the state certain woodcock, ruffled grouse, and quail killed within this state after the first day of October, 1889. The trial of the charge resulted in the

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conviction of the defendant and the imposing of a fine upon him. Thereupon the case was taken by appeal to the criminal court of common pleas. In that court the defendant demurred to the information on the ground, among others, that the statute upon which that prosecution was based violated the Constitution of the United States.

The demurrer being overruled, and the defendant declining to answer over, he was adjudged guilty, and condemned to pay a fine and costs, and to stand committed until he had complied with the judgment. An appeal was prosecuted to the supreme court of errors of the state. The defendant on the appeal assigned the following errors:

"The court erred—

"1st. In holding that the allegations contained in the complaint constitute an offense in law.

"2d. In holding that said complaint was insufficient in the law without an allegation that the birds therein mentioned were killed in this state for the purpose of conveying the same beyond the limits of this state.

"3d. In refusing to hold that so much of § 2546 of the General Statutes, under which this complaint is brought as may be construed to forbid the transportation from this state of the birds therein described, lawfully killed and permitted by the laws of the state to become the subject of traffic and commerce, is unconstitutional and void.

"4th. In refusing to hold that so much of said section as may be construed to forbid the receiving and having in possession, with intent to procure the transportation thereof to another state, birds therein described, lawfully killed and permitted by the laws of this state to become the subject of traffic and commerce, is unconstitutional and void.

"5th. In holding that the defendant is guilty [521] of an offense *under said section if such birds were lawfully killed in this state and were brought by the defendant in the markets of this state, as articles of property, merchandise, and commerce, and had begun to move as an article of interstate commerce.

"6th. In not rendering judgment for defendant."

In the supreme court the conviction was affirmed. The case is reported in 61 Conn. 144, 13 L. R. A. 804, 3 Inters. Com. Rep. 782. To this judgment of affirmance this writ of error is prosecuted.

Mr. **Hadlai A. Hull** for plaintiff in error.
Mr. **Solomon Lucas** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

By the statutes of the state of Connecticut, referred to in the statement of facts, the open season for the game birds mentioned therein was from the first day of October to the first day of January. The birds which the defendant was charged with unlawfully having in his possession on the 19th of October, for the purpose of unlawful transportation beyond the state, were alleged to have been killed within the state after the first day of October. They were therefore killed during the open season. There was no charge that they had been unlawfully killed for the purpose of being transported outside of the state. The offense therefore charged was the possession of game birds for the purpose of transporting them beyond the state, which birds had been lawfully killed within the state. The court of last resort of the state held, in interpreting the statute already cited by the light afforded by previous enactments, that one of its objects was to forbid the killing of birds within the state during the open season for the purpose of transporting them beyond the state, and also additionally as a distinct offense to punish the having in possession, for the purpose of transportation beyond the state, birds lawfully killed within the state. The court found that the information did not charge the first of these offenses, and therefore that the sole offense which it covered was the *latter. It [522 then decided that the state had power to make it an offense to have in possession, for the purpose of transportation beyond the state, birds which had been lawfully killed within the state during the open season, and that the statute, in creating this offense, did not violate the interstate commerce clause of the Constitution of the United States. The correctness of this latter ruling is the question for review. In other words, the sole issue which the case presents is, Was it lawful under U. S. Const. art. 1, § 8, for the state of Connecticut to allow the killing of birds within the state during a designated open season, to allow such birds, when so killed, to be used, to be sold, and to be bought for use within the state, and yet to forbid their transportation beyond the state? Or, to state it otherwise, had the state of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the state and forbid its transmission outside of the state?

In considering this inquiry we of course accept the interpretation affixed to the state statute by the court of last resort of the state. The solution of the question involves a consideration of the nature of the property in game and the authority which the state had a right lawfully to exercise in relation thereto.

From the earliest traditions the right to reduce animals *feræ naturæ* to possession has been subject to the control of the law-giving power.

The writer of a learned article in the Repertoire of the Journal du Palais mentions the fact that the law of Athens forbade the killing of game (5 Rep. Gen. J. P. 307), and Merlin says (4 Repertoire de Jurisprudence, 128) that "Solon, seeing that the Athenians gave themselves up to the chase to the neglect of the mechanical arts, forbade the killing of game."

Among other subdivisions, things were classified by the Roman law into public and common. The latter embraced animals *feræ naturæ* which, having no owner, were considered as belonging in common to all the citizens of the state. After pointing out the foregoing subdivision, the Digest says:

*"There are things which we acquire [523 the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law, that is to say, by methods which belong to the

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government. As the law of nature is more ancient, because it took birth with the human race, it is proper to speak first of the latter. 1. Thus, all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. . . . Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property or on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so." Digest, book 41, tit. 1, *De Adquir. Rer. Dom.*

No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game of which he was the owner, in common with other citizens, to possession, although the Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property, as indeed this right was impliedly admitted by the Digest in the passage just cited. Inst. book 2, tit. 1, § 12.

This inhibition was, however, rather a recognition of the right of ownership in land than an exercise by the state of its undoubted authority to control the taking and use of that which belonged to no one in particular, but was common to all. In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals *feræ naturæ* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control. Merlin, *ubi supra*, mentions the fact that although tradition indicates that from the earliest day in France every citizen had a right to reduce a part of the common property in game to ownership by possession, yet it was also true that, as early as the Salic law, that right was 524]*regulated in certain particulars. Pothier in his treatise on Property speaks as follows:

"In France, as well as in all other civilized countries of Europe, the civil law has restrained the liberty which the pure law of nature gave to every one to capture animals who, being *in naturali laxitate*, belong to no person in particular. The sovereigns have reserved to themselves and to those to whom they judge proper to transmit it the right to hunt all game, and have forbidden hunting to other persons. Some ancient doctors have doubted if sovereigns had the right to reserve hunting to themselves and to forbid it to their subjects. They contend that as God has given to man dominion over the beasts, the prince had no authority to deprive all his subjects of a right which God had given them. The natural law, say they, permitted hunting to each individual. The civil law which forbids it is contrary to the natural law and exceeds, consequently, the power of the legislator, who, being himself submitted to the natural law, can ordain nothing contrary to that law. It is easy to reply to these objections. From the fact that God has given to human kind dominion over wild beasts, it does not follow that each individual of the human race should be permitted to exercise this dominion. The civil law, it is said, cannot be contrary to the natural law. This is true as regards those things which the natural law commands or which it forbids; but the civil law can restrict that which the natural law only permits. The greater part of all civil laws are nothing but restrictions of those things which the natural law would otherwise permit. It is for this reason, although by the pure law of nature hunting was permitted to each individual, the prince had the right to reserve it in favor of certain persons and forbid it to others." Pothier, Traité du Droit de Proprieté, Nos. 27, 28.

"The right belongs to the king to hunt in his dominion; his quality of sovereign gives him the authority to take possession above all others of the things which belong to no one, such as wild animals; the lords and those who have a right to hunt hold such right but from his permission, and he can affix to this permission such restrictions and modifications as may seem to him good." No. 32.

*In tracing the origin of the classifi- [525 cation of animals *feræ naturæ* as things common, Pothier moreover says:

"The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each have their particular portion. It was a community which those who have written on this subject have called a negative community, which resulted from the fact that those things which were common to all belonged no more to one than to the others, and hence no one could prevent another from taking of these common things that portion which he judged necessary in order to subserve his wants. Whilst he was using them others could not disturb him, but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately re-entered into the negative community, and another could use them. The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community." No. 21.

Referring to those things which remain common, or in what he qualified as the negative community, this great writer says:

"These things are those which the jurisconsults called *res communes*. Marcien refers to several kinds—the air, the water which runs in the rivers, the sea and its shores. . . . As regards wild animals *feræ naturæ*, they have remained in the ancient state of negative community."

In both the works of Merlin and Pothier, *ubi supra*, will be found a full reference to the history of the varying control exercised by the lawgiving power over the right of a citizen to acquire a qualified ownership in animals *feræ naturæ* evidenced by the regulation

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526] thereof by the Salic law, *already referred to, exemplified by the legislation of Charlemagne, and continuing through all vicissitudes of governmental authority. This unbroken line of law and precedent is summed up by the provisions of the Napoleon Code, which declare (arts. 714, 715): "The are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws." Like recognition of the fundamental principle upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and, indeed, it may be safely said in the law of all the countries of Europe. 1 St. Joseph Concordance, 58.

The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.

Blackstone, whilst pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such rights. 2 Bl. Com. 1, 12.

Referring especially to the common ownership of game he says:

"But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition, which any man may seize upon or keep for his own use or pleasure." 2 Bl. Com. 14.

"A man may lastly have a qualified property 527] in animals *feræ naturæ, propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and he may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases. . . . A man can have no absolute permanent property in these, as he may in the earth and land: since these are of a vague and fugitive nature, and therefore can only admit of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer." 2 Bl. Com. 394.

In stating the existence and scope of the royal prerogative, Blackstone further says:

"There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *feræ naturæ*, as are known by the denomination of game, with the right of pursuing, taking, and destroying them; which is vested in the King alone and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. . . . In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man from the prince to the peasant has an equal right of pursuing and taking to his own use all such creatures as are *feræ naturæ* and therefore the property of nobody, but liable to be seized by the first occupant, and so it was held by the imperial law as late as Justinian's time. . . . But it follows from the very end and constitution of society that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community." 2 Bl. Com. 410.

The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.

Undoubtedly this attribute of government to control the taking of animals *feræ naturæ*, which was thus recognized and *enforced by [528 the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution. Kent, in his Commentaries, states the ownership of animals *feræ naturæ* to be only that of a qualified property. 2 Kent, Com. 347. In most of the states laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. *Com.* v. *Hall*, 128 Mass. 410, 35 Am. Rep. 387; *Com.* v. *Wilkinson*, 139 Pa. 298; *People* v. *O'Neil*, 71 Mich. 325. There are also cases where the validity of some particular method of enforcement provided in some of the statutes has been drawn in question. *State* v. *Saunders*, 19 Kan. 127, 27 Am. Rep. 98; *Territory* v. *Evans*, 2 Idaho, 634, 7 L. R. A. 288.

The adjudicated cases recognizing the right of the state to control and regulate the common property in game are numerous. In *McCready* v. *Virginia*, 94 U. S. 395 [24: 248], the power of the state of Virginia to prohibit citizens of other states from planting oysters within the tide waters of that state was upheld by this court. In *Manchester* v. *Massachusetts*, 139 U. S. 240 [35: 159], the authority of the state of Massachusetts to control and regulate the catching of fish within the bays of that state was also maintained. See also *Phelps* v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Magner* v. *People*, 97 Ill. 320; *American Exp. Co.* v. *People*, 133 Ill. 649, 9 L. R. A. 138; *State* v. *Northern P. Exp. Co.* 58 Minn. 403; *State* v.

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Rodman, 58 Minn. 393; *Ex parte Maier*, 103 Cal. 476; *Organ* v. *State*, 56 Ark. 270; *Allen* v. *Wyckoff*, 48 N. J. L. 93; *Roth* v. *State*, 51 Ohio St. 209; *Gentile* v. *State*, 29 Ind. 415; *State* v. *Farrell*, 23 Mo. App. 176, and cases there cited; *State* v. *Saunders* and *Territory* v. *Evans*, *ubi supra*.

529]*Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin* v. *Waddell*, 41 U. S. 16 Pet. 410 [10: 1012], represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the state, are thus stated in a well considered opinion of the supreme court of California: "The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic and commerce in it, if deemed necessary for its protection or preservation, or the public good." *Ex parte Maier*, *ubi supra*.

The same view has been expressed by the supreme court of Minnesota as follows:

"We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common." *State* v. *Rodman*, *supra*.

The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the state, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the state of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it, the people of that state. The proposition 530]*that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the state has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of state commerce, as a resulting necessity such property has become the subject of interstate commerce, hence controlled by the provisions of U. S. Const. art. 1, § 8. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the state are allowed, it thereby becomes commerce in the legal meaning of that word. In view of the authority of the state to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the state, under the provision in question, created internal state commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the *control of the Constitution of the [531 United States. The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court. In *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 194 [6: 69], *Mr. Chief Justice* Marshall said:

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

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The completely internal commerce of a state, then, may be considered as reserved for the state itself."

So, again, in *The Daniel Ball* v. *United States*, 77 U. S. 10 Wall. 564 [19: 1001], this court, speaking through *Mr. Justice* Field, said:

"There is undoubtedly an internal commerce which is subject to the control of the states. The power delegated to Congress is limited to commerce 'among the several states,' with foreign nations, and with the Indian tribes. 532] This *limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state and does not extend to or affect other states."

The fact that internal commerce may be distinct from interstate commerce destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the state to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted was necessarily only internal commerce since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it. All ownership in game killed within the state came under this condition, which the state had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the state consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce.

The case in this respect is identical with *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346], 2 Inters. Com. Rep. 232. The facts there considered were briefly as follows: The state of Iowa permitted the distillation of intoxicating liquors for "mechanical, medicinal, culinary, and sacramental purposes." The right was asserted to send out of the state intoxicating liquors made therein on the ground that, when manufactured in the state, such liquors became the subject of interstate commerce, and were thus protected by the Constitution of the United States; but this court, through *Mr. Justice* Lamar, pointed out the vice in the reasoning, which consisted in presupposing that the state had authorized the manufacture of intoxicants, thereby overlooking the exceptional purpose for which alone such manufacture was permitted. So here the argument of the plaintiff in error substantially asserts that the state statute gives an unqualified right to kill game, when in fact it is only given upon the condition that the game killed be not transported beyond the state limits. It was upon this power of the state to qualify and restrict the ownership in game killed within its limits that the court below rested its conclusion, 533] and similar views *have been expressed by the courts of last resort of several of the states. In *State* v. *Rodman*, 58 Minn. 393, the supreme court of Minnesota said:

"The preservation of such animals as are adapted to consumption as food or to any other useful purpose, is a matter of public interest, and it is within the police power of the state, as the representative of the people in their united sovereignty, to make such laws as will best preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right to property in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the legislature has seen fit to impose." See also *State* v. *Northern P. Exp. Co.* 58 Minn. 403.

So also in *Magner* v. *People*, 97 Ill. 320, the supreme court of Illinois said:

"So far as we are aware, it has never been judicially denied that the government under its police powers may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year, although laws to this effect, it is believed, have been in force in many of the older states since the organization of the Federal government. . . . The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict, as in the opinions of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority, not a right inherent in each individual, and consequently nothing is taken away from the individual when *he is de-[534 nied the privilege at stated seasons of hunting and killing game. It is perhaps accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state. But in any view, the question of individual enjoyment is one of public policy and not of private right."

See also *Ex parte Maier*, 103 Cal. 476; *Organ* v. *State*, 56 Ark. 270. It is indeed true that in *State* v. *Saunders*, 19 Kan. 127, 27 Am. Rep. 98, and *Territory* v. *Evans*, 2 Idaho, 634, 7 L. R. A. 288, it was held that a state law prohibiting the shipment outside of the state of game killed therein violated the interstate commerce clause of the Constitution of the United States, but the reasoning which controlled the decision of these cases is, we think, inconclusive, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines, and the consequent power of the state to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest.

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Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346], 2 Inters. Com. Rep. 232; *Hall* v. *De Cuir*, 95 U. S. 485 [24: 547]; *Sherlock* v. *Alling*, 93 U. S. 99, 103 [23: 819, 820]; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 194 [6: 69]. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the state to preserve for its people a valuable food supply. *Phelps* v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140; 535] *Ex parte* **Maier*, *ubi supra; Magner* v. *People*, *ubi supra*, and cases there cited. The exercise by the state of such power therefore comes directly within the principle of *Plumley* v. *Massachusetts*, 155 U. S. 461, 478 [39: 223, 227]. The power of a state to protect by adequate police regulation its people against the adulteration of articles of food (which was in that case maintained), although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state and subject to the conditions which it may deem best to impose for the public good.

Judgment affirmed.

Mr. Justice **Brewer** and *Mr. Justice* **Peckham**, not having heard the argument, took no part in the decision of this cause.

Mr. Justice **Field** dissenting:

I am unable to agree with the majority of my associates in the affirmance of the judgment of the supreme court of errors of Connecticut in this case, and I will state briefly the grounds of my disagreement.

Section 2546 of the statutes of Connecticut, contained in the Revision of 1888, enacts that "no person shall, at any time, kill any woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the state; or shall transport, or have in his possession with intent to procure the transportation beyond its limits of, any of such birds killed within the state." And it adds in substance that the reception by any person within the state of any such bird or birds for shipment to a point without the state shall be prima facie evidence that the bird or birds were killed within the state for the purpose of carrying the same beyond its limits."

Section 2530 of the statutes provides that every person who shall kill, destroy, or attempt to kill, any woodcock, quail, ruffled grouse, called partridge, or gray squirrel, between the first day of January and the first day of October, shall be fined in a sum not exceeding $25.

The present proceeding was commenced by an information *presented by the assist-[536 ant district attorney of the city of New London, Connecticut, against the defendant, Edgar M. Geer, in the police court of that city, charging that he did, on the 19th of October, 1889, unlawfully receive and have in his possession certain woodcock, ruffled grouse, and quail, killed within the state after the 1st day of October, 1889, with the wrongful and unlawful intention to procure their transportation without the limits of the state.

Upon the information the judge of the police court issued to the sheriff of the county and to his deputies, a warrant for the arrest of the defendant and to have him before that court to answer the complaint. The defendant being brought before the court pleaded to the complaint that he was not guilty, but, as it is alleged, the court, having inquired into the matter, adjudged him to be guilty, and that he pay a fine of a specified amount, together with the costs of the prosecution, and stand committed until the judgment be complied with. From that decision the accused appealed to the next session of the criminal court of common pleas to be held for New London county, on the second Tuesday of December, 1889. At that court and term he appeared and demurred to the complaint on the ground, first, that the matters contained therein did not constitute an offense; second, on the ground that it did not allege that the birds were killed for the purpose of being conveyed beyond the limits of the state; third, on the ground that § 2546 of the General Statutes of Connecticut, under which the complaint was brought, was void and unconstitutional so far as it could be construed to forbid the transportation of the birds killed from the state, or having possession of them with intent to procure their transportation to another state, averring that the birds had been sold to parties in such other state, and had begun to move as an article of interstate commerce; fourth, on the ground that it appeared in the complaint that the defendant was not guilty under the section if the birds were bought by him in the markets of the state as merchandise, and had begun to move to another state as an article of interstate commerce, such facts being averred in the complaint to exist.

*The criminal court of common pleas [537 overruled the demurrer, and found that the complaint was sufficient, and the accused having declined to answer over, it was held that he was guilty of the offense charged, and he was accordingly sentenced to pay a fine of $25 and the costs of the prosecution, and to stand committed until the judgment was complied with. The defendant thereupon appealed from the judgment rendered by the criminal court of common pleas to the supreme court of errors of the state for the second judicial district, to be held at Norwich on the last Tuesday of May, 1891. On that day the supreme court of errors found that there was no error apparent in the judgment of the criminal court of common pleas, and accordingly affirmed it. An appeal was then taken from the decision of the supreme court of errors to the Supreme

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Court of the United States, in which latter court the plaintiff in error assigns the following as grounds of error in the lower court:

1st. In refusing to hold that so much of § 2546 of the General Statutes, under which the complaint was brought, as might be construed to forbid the transportation from the state of the birds described, lawfully killed and permitted by the laws of the state to become the subject of traffic and commerce, was unconstitutional and void.

2d. In refusing to hold that so much of the section as might be construed to forbid the receiving and having in possession, with intent to procure the transportation thereof to another state, the birds described, lawfully killed, and permitted by the laws of the state to become the subject of traffic and commerce, was unconstitutional and void.

3d. In holding that the defendant was guilty of an offense under the section if the birds were lawfully killed in the state, and were bought by the defendant in the market of the state as merchandise, and had begun to move as an article of interstate commerce.

And this court, notwithstanding the errors assigned, affirms the judgment of the supreme court of errors of Connecticut.

The record sent to it from the supreme court of errors of the state presents the questions, [538] supposed to be involved, in *a very confused and indistinct manner. Disentangling them from the mass of words used, it appears that the supreme court of errors held that it was an offense against the statute, upon which the information was filed in the police court of New London, for the accused to have in his possession any of the birds mentioned killed in the state within the period designated, for the purpose of transporting them without the state, and that it was to be inferred, under the law, that the birds were killed within the state for that purpose. But if that constitutes the offense at which the statute aimed, the information is defective in not alleging that the birds were killed for the purpose stated, that is, of conveying them beyond the limits of the state, and thus that they were unlawfully killed.

The transportation of birds described to another state, which were lawfully killed, does not constitute an offense under the statute. The transportation against which the statute was levied was that of birds *unlawfully* killed; the evident object of the law being to prevent birds *unlawfully* killed from being transported to the markets of another state. The law was directed against the killing of the birds within certain designated months of the year; and, in furtherance of that law, the transportation of them to another state was declared to be unlawful. The supreme court of errors held that it was not unconstitutional for the state to enact that birds might be killed and sold or held for domestic consumption only; and that although the birds became a lawful subject of property when killed within the state for the purpose of food, that it was competent for the state to limit their sale for that purpose to the needs of domestic consumption. And this court, in affirming the judgment of the supreme court of errors, appears to sanction that doctrine; but to its soundness I cannot yield assent.

When any animal, whether living in the waters of the state or in the air above, is lawfully killed for the purpose of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one state to the exclusion of citizens of another state. Although *there are [539] declarations of some courts that the state possesses a property in its wild game, and when it authorizes the game to be killed and sold as an article of food it may limit the sale only for domestic consumption, and the supreme court of errors of Connecticut in deciding the present case appears to have held that doctrine, I am unable to assent to its soundness, *where the state has never had the game in its possession or under its control or use.* I do not admit that in such case there is any specific property held by the state by which, in the exercise of its rightful authority, it can lawfully limit the control and use of the animals killed to particular classes of persons or citizens, or to citizens of particular places or states. But, on the contrary, I hold that where animals within a state, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the state in any respect, they are not the property of the state or of any one in a proper sense. I hold that until they are brought into subjection or use by the labor or skill of man, they are not the property of any one, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit. When man by his labor or skill brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them, and the ownership of others in the animals is limited by the extent and right thus acquired. This is a generally recognized doctrine, acknowledged by all states of Christendom. It is the doctrine of law, both natural and positive. The Roman law, as stated in the Digest, cited in the opinion of the majority, expresses it as follows: "That which belongs to nobody is acquired by the natural law by the person who first possesses it." A bird may fly at such height as to be beyond the reach of man or his skill, and no one can then assert any right of property in such bird; it cannot then be said to belong to any one. But when from any cause the bird is brought within the reach and control or use of man, it becomes at that instant his property, and may be an article of commerce between him and citizens of the same or of other states.

*In an opinion written by me some years [540] since I had occasion to speak of this rule of law. I there said that it was a general principle of law, both natural and positive, that where a subject, animate or inanimate, which otherwise could not be brought under the control or use of man, is reduced to such control or use by his individual labor or skill, a right of property in it is acquired. The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. He has

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reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property in the gem. He has by his own labor reduced it to possession, and in all communities and by all law his right to it is recognized. So the trapper on the plains and the hunter in the north have a property in the furs they have gathered, though the animals from which they were taken roamed at large and belonged to no one. They have added by their labor to the uses of man an article promoting his comfort which, without that labor, would have been lost to him. They have a right, therefore, to the furs, and every court in Christendom would maintain it. So when the fisherman drags by his net fish from the sea, he has a property in them, of which no one is permitted to despoil him. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 374 [28:183].

In *State* v. *Saunders*, 19 Kan. 127, 27 Am. Rep. 98, the defendant was charged, as the agent of the Adams Express Company, with receiving at Columbus, Kansas, "certain prairie chickens, which had been recently killed as game," and shipping them to the city of Chicago, in the state of Illinois. The statute under which he was prosecuted made it unlawful for any person to transport or to ship any animals or birds mentioned, among which were prairie chickens, out of the state of Kansas, and subjected him on conviction thereof to a fine of not less than ten nor more than fifty dollars. The defendant admitted the facts as alleged, but contended that such acts constituted no offense, claiming that the 541]statute of the state *under which the proceedings against him were commenced was unconstitutional and void. The district court held the statute valid, and found the defendant guilty, and sentenced him to pay a fine of $10 and costs of prosecution. From the conviction and sentence he appealed to the supreme court of Kansas, which reversed the judgment of the district court, holding "that no state can pass a law (whether Congress has already acted upon the subject or not) which will directly interfere with the free transportation from one state to another, or through a state, of anything which is or may be a subject of interstate commerce;" and referred to the case of *Welton* v. *Missouri*, 91 U. S. 275, 282 [23:347, 350], where it was held by this court that "the fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question; its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

I do not doubt the right of the state, by its legislation, to provide for the protection of wild game, so far as such protection is necessary for their preservation or for the comfort, health, or security of its citizens, and does not contravene the power of Congress in the regulation of interstate commerce. But I do deny the authority of the state, in its legislation for the protection and preservation of game, to interfere in any respect with the paramount control of Congress in prescribing the terms by which its transportation to another state, when killed, shall be restricted to such conditions as the state may impose. The absolute control of Congress in the regulation of interstate commerce, unimpeded by any state authority, is of much greater consequence than any regulation the state may prescribe with reference to the place where its wild game, when killed, may be consumed.

When property, like the game birds in this case, is reduced to possession it becomes an article of commerce, and may be the subject of sale to the citizens of one state or community, or to the citizens of several. The decision of the court, however, would limit the right of sale of such property, however *valuable[542 it may become, and whether living or killed, to the directions of the state or community in which the property is found, and would convert it from the freedom of use which belongs to property in general to the limited use of the persons or communities where found, or to a particular class to which only property possessed of special ingredients or qualities is limited. I do not think it lies within the province of any state to confine the excellencies of any articles of food within its borders to its own fortunate inhabitants to the exclusion of others, and that it may lawfully require that game killed within its borders shall only be eaten in such parts of the country as it may prescribe.

By the Constitution of the United States it has been adjudged that commerce between the states is under the absolute regulation of Congress, and that whenever an article of property begins to move from one state to another, commerce between the states has commenced, and that with its control or regulation no state can interfere. *Welton* v. *Missouri*, 91 U. S. 275 [23:347]; *Henderson* v. *Wickham*, 92 U. S. 259 [23:543]; *Chy Lung* v. *Freeman*, 92 U. S. 275 [23:550]; *Ward* v. *Maryland*, 79 U. S. 12 Wall. 418 [20:449]; *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 284 [21:164]; *Sherlock* v. *Alling*, 93 U. S. 99 [23:819].

I therefore dissent from the conclusion of the majority of my associates in affirming the judgment of the supreme court of errors of Connecticut.

Mr. Justice **Harlan** dissenting:

The statutes of Connecticut declare that "every person who shall buy, sell, expose for sale, or have in his possession for the purpose, or who shall hunt, pursue, kill, destroy, or attempt to kill any woodcock, quail, ruffled grouse, called partridge, or gray squirrel between the 1st day of January and the 1st day of October, the killing or having in possession of each bird or squirrel to be deemed a separate offense, . . . shall be fined not more than $30." They also provide that "no person shall at any time kill any woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the state; or shall transport or have in his *possess-[543 ion, with intention to procure the transportation beyond said limits, any such birds killed with-

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in this state. The reception by any person within this state of any such bird or birds for shipment to a point without the state shall be prima facie evidence that said bird or birds were killed within the state for the purpose of carrying the same beyond its limits."

The plaintiff in error was not charged with having in his possession game that had been killed "for the purpose of conveying the same beyond the limits of the state." It is admitted that the game in question was lawfully killed, that is, was killed during what is called the "open season." But the charge was that the defendant unlawfully received and had in his possession, with the wrongful and unlawful intent to procure the transportation of the same beyond the limits of the state, certain woodcock, ruffled grouse, and quail killed within the state after the 1st day of October.

I do not question the power of the state to prescribe a period during which wild game within its limits may not be lawfully killed. The state, as we have seen, does not prohibit the killing of game altogether, but permits hunting and killing of woodcock, quail, ruffled grouse, and gray squirrels between the 1st day of October and the 1st day of January. The game in question having been lawfully killed, the person who killed it and took it into his possession became the rightful owner thereof. This, I take it, will not be questioned. As such owner he could dispose of it by gift or sale, at his discretion. So long as it was fit for use as food, the state could not interfere with his disposition of it, any more than it could interfere with the disposition by the owner of other personal property that was not noxious in its character. To hold that the person receiving personal property from the owner may not receive it with the intent to send it out of the state is to recognize an arbitrary power in the government which is inconsistent with the liberty belonging to every man, as well as with the rights which inhere in the ownership of property. Such a holding would also be inconsistent with the freedom of interstate commerce which has been established by the Constitution of the United 544]States. If the *majority had not held differently in the present case, I should have said that discussion was unnecessary to show the soundness of the propositions just stated. But it seems that if the citizen, whether residing in Connecticut or elsewhere, finds in the markets of one of the cities or towns of that state game fit for food, that has been lawfully killed and is lawfully in the possession of the keeper of such market, he may without becoming a criminal buy such game and take it into his possession, provided his intention be to eat it or to have it eaten in Connecticut. But he will subject himself to a fine, as well as to imprisonment upon his failing to pay such fine, if he buys and takes possession of such lawfully killed game with intent to send it to a friend in an adjoining state.

The court cites *McCready* v. *Virginia*, 94 U.S. 395 [24:248], in which it was held that Virginia could restrict to its citizens the privilege of *planting* oysters in the streams of that state, the soil under which was owned by it. But I cannot believe that it would hold that oysters which had been lawfully taken out of such streams, and which had been lawfully planted, could not be purchased in Virginia with the intent to ship them to another state. This court, in *Plumley* v. *Massachusetts*, 155 U. S. 461 [39:228], another of the cases cited by the majority, sustained as valid a statute of Massachusetts, enacted to prevent deception in the manufacture and sale in that state of imitation butter, and which prohibited the sale of oleomargarine, artificially colored so as to cause it to look like genuine yellow butter. But I cannot suppose that this court will ever hold that a state could make it a crime to purchase with the intent to send it to another state oleomargarine or genuine yellow butter that had been lawfully manufactured within its limits.

Believing that the statute of Connecticut, in its application to the present case, is not consistent with the liberty of the citizen or with the freedom of interstate commerce, I dissent from the opinion and judgment of the court.

ST. LOUIS & SAN FRANCISCO [545 RAILWAY COMPANY, *Plf. in Err.*, *v.* ETTA JAMES.

(See S. C. Reporter's ed. 545-572.)

Citizenship of corporation.

A railroad company incorporated in Missouri, but having purchased railroads in Arkansas, does not become a citizen of the state of Arkansas so as to give the United States circuit court for the western district of Arkansas jurisdiction of an action against it brought by a citizen of Missouri, the state of its creation, by filing a certified copy of its articles of incorporation with the secretary of state of Arkansas and continuing to operate its railroad through that state, under the Arkansas law of March 13, 1889, which provides that on doing said things such railroad company shall become a corporation of Arkansas.

[No. 242.]

Submitted October 15, 1895. Decided March 2, 1896.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit certifying certain questions to be answered in an action brought by Etta James against the St. Louis & San Francisco Railway Company to recover for the death of her husband, and in which action a judgment of $5,000 was recovered for the negligence of the company. *Questions answered.*

Statement by *Mr. Justice* **Shiras**:

On December 24, 1892, Etta James, defendant in error, brought this action in the circuit court for the western *district of Arkansas [546 against the St. Louis & San Francisco Railway Company, plaintiff in error, for negligence in maintaining a switch target at

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor,—see note to M'Donald v. Smalley, 7: 287.

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Monett, in Barry county, in the state of Missouri, so near its tracks that her husband was struck and killed by it on July 8, 1889, while employed as a fireman on one of the company's engines. Her husband resided at Monett and died intestate. The defendant in error was the widow and sole heir at law of her husband, and no administrator of his estate was appointed in Arkansas. She recovered a judgment of $5,000.

Etta James, the defendant in error, resided at Monett, and was a citizen of the state of Missouri. Monett is a station in Missouri, on the railroad of the plaintiff in error, about 50 miles from the southern border of that state.

The St. Louis & San Francisco Railway Company was organized and incorporated under the laws of the state of Missouri in 1876, and soon thereafter became the owner of and has ever since owned and operated a railroad in that state extending from Monett southerly to the southern border of the state of Missouri.

Section 11 of article 12 of the Constitution of the state of Arkansas, which was adopted in 1874, provides that:

"Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law: *Provided*, That no such corporation shall do any business in this state, except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this state, they shall be subject to the same regulations, limitations, and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges, or franchises than may be exercised by like corporations of this state, nor shall they have power to condemn or appropriate private property."

Section 1 of article 17 of that Constitution provides that:

"All railroads, canals, and turnpikes shall be public highways, and all railroads and canal 547] companies shall be common *carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other road, and shall receive and transport each other's passengers, tonnage, and cars loaded or empty, without delay or discrimination."

Section 3 of an act passed by the general assembly of the state of Arkansas, entitled "An Act in Relation to Certain Railroads," approved March 16, 1881 (Ark. Laws 1881, p. 88), provides:

"That every railroad corporation incorporated under the laws of this state, whose road is wholly or in part constructed and operated, is hereby authorized to sell, lease, or otherwise dispose of the whole or any part of its roadways and rights of way, with the franchises thereto belonging, and its other property, to any connecting railroad company, or to any railroad corporation now or hereafter organized under the laws of this or any other state, upon such terms and conditions as may be agreed upon by the board of directors of said corporations, and ratified by a two-thirds vote of the issued capital stock thereof, and to receive the bonds or stock of the purchasing corporation in whole or in part payment of such purchase, and corporations may be formed for the purpose of purchasing or leasing the whole or any part of any railroad, and such purpose or object shall be stated in articles of association, which shall be executed and filed in the office of the secretary of state, the same to be as near as may be in accordance with § 4918 of Gantt's Digest. All shares of stock issued in payment of such purchase shall be deemed to be full-paid shares, and the number and amount of shares so to be issued shall be stated in the aforesaid articles of association, and said articles shall be otherwise altered, if necessary, so as to conform to the facts."

Section 5 of the same act provides that:

"Any railroad company incorporated by or under the laws of any other state, and having a line of railroad built, or *partly built, to [548 or near any boundary of this state, and desiring to continue its line of railroad into or through this state, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease or purchase the property rights, privileges, lands, tenements, immunities, and franchises of any railroad company organized under the laws of this state, which said lease or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own, and operate the said railroad so leased or purchased as fully and to the same extent as the company organized under the laws of this state might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad companies as will best subserve its purpose, and the building of said line of railroad; but before any such lease or sale shall be made by any company organized under the laws of this state, two thirds in amount of the capital stock issued shall, at a meeting of the stockholders thereof,—of which sixty days' notice shall be given in some newspaper published at the city of Little Rock, and in such other papers published elsewhere as the president and directors of said company may direct,—consent thereto; and any railroad company organized under the laws of any state, and having a line of railroad built, or partly built, to any boundary of this state, and desiring to continue its line of road or any branch thereof into or through this state, is hereby authorized and empowered so to do, when it shall have acquired by lease or purchase the corporate rights, privileges, and franchises of any railroad corporation in the manner herein provided, formed under the laws of this state; and such railroad company, upon filing a certified copy of its articles of incorporation, or the special act incorporating the same, shall have, possess, and enjoy all the rights, powers, privileges, franchises, and immunities belong-

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ing to railroad corporations formed under the general laws of this state, which are not in conflict with the Constitution or laws of this state; but nothing herein contained shall interfere with or abridge the right of any railroad [549] corporation acquired under *§ 4942 of Gantt's Digest. . . . In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads, the liabilities and forfeitures thereby imposed, and may sue and be sued in the same manner as other railroad corporations, and subject to the same service of process, and shall keep an office or offices in said state as required by § 11 of art. 12 of the Constitution of this state, and an agent or agents upon whom process may be served, with the like force and effect as is provided for the service of process in § 2 of this act."

At the time of the accident complained of the plaintiff in error owned and operated the railroad from the southern border of the state of Missouri to Fort Smith, in the state of Arkansas, in connection with its original line from Monett to the Missouri border, and these roads formed and were operated as a continuous line of railroad from Monett to Fort Smith. That portion of this continuous line of railroad which was situated in Arkansas had been built by corporations organized and incorporated under the laws of that state. In the year 1882 the St. Louis & San Francisco Railway Company purchased from these Arkansas corporations, under the act of March 16, 1881, the railroad extending from the southern border of Missouri to Fort Smith, Arkansas, and all the railways, constructed and unconstructed, and all the roads, franchises, and property, which these Arkansas corporations had. These Arkansas corporations have since maintained their separate organizations as corporations of that state, but have operated no railroads. From the time of this purchase to the present time the plaintiff in error has operated this continuous line of railroad from Monett, Missouri, to Fort Smith, Arkansas, and has owned all the rolling stock and other appurtenances used upon this railroad.

An act passed by the general assembly of the state of Arkansas, entitled "An Act Relating to the Consolidation of Railroad Companies and the Purchasing, Leasing, and Operation of Railroads, and to Repeal §§ 1, 2, 3, 4, and 5 of an Act Entitled 'An Act to Prohibit Foreign Corporations from Operating Railroads in This [550] State,' Approved March 22, 1887," *approved March 13, 1889 (Ark. Laws 1889, p. 43), provided as follows:

"Sec. 1. That sections 1, 2, 3, 4, and 5 of an act entitled 'An Act to Prohibit Foreign Corporations from Operating Railroads in This State,' approved March 22, 1887, be and the same are hereby repealed.

"Sec. 2. Any railroad company in this state, existing under general or special laws, may sell or lease its road, property, and franchises to any other railroad company duly organized and existing under the laws of any other state or territory, whose line of railroad shall so connect with the leased or purchased road by bridge, ferry, or otherwise as to practically form a continuous line of railroad, and any railroad company in this state existing under general or special laws may buy or lease, or otherwise acquire, any railroad or railroads, with all the property, rights, privileges, and franchises thereto pertaining, or buy the stocks and bonds, or guarantee the bonds of any railroad company or companies incorporated or organized within or without this state whenever the roads of such companies shall form in the operation thereof a continuous line or lines: *Provided*, That before any such lease or sale is valid, it must be approved and ratified by persons holding or representing two thirds of the capital stock of each of such companies respectively, at a stockholders' meeting called for that purpose; and any railroad company existing under the general or special laws of any other state or territory may buy or lease or otherwise acquire any railroad or railroads, the whole or part of which is in this state, with all the rights, privileges, and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company incorporated or organized under the laws of this state, whenever the roads of such companies shall form in the operation thereof a continuous line or lines: *Provided*, That the road so purchased shall not be parallel or competing with the purchasing road; and any railroad company existing under the laws of any other state or territory may extend and construct its railroad into or through this state: *Provided further*, That any agreement of any company existing under *the general or [551] special laws of this state, or of any other state or territory, to lease or buy a railroad and appurtenances, or to buy the stock or bonds, or guarantee the bonds of any railroad company incorporated and organized within this state, heretofore executed by the proper officers of such companies and ratified by the companies parties thereto, by the assent of persons holding two thirds of the capital stock in each of such companies, expressed at a meeting of such stockholders called for that purpose, shall be taken and held to be binding from the date of its execution: *Provided further*, That nothing in the foregoing provisions shall be held or construed as curtailing the right of state or counties through which said consolidated, leased, or purchased road or roads may be located to levy and collect taxes upon the same and the rolling stock thereof, *pro rata*, in conformity with the provisions of the laws of this state upon that subject: *Provided further*, That before any railroad corporation of any other state or territory shall be permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the secretary of state of this state a certified copy of its articles of incorporation, if incorporated under a general law of such state or territory or a certified copy of the statute laws of such state or territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such state; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line, and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all the laws of the state now in force or hereafter enacted, the same as

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if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation: *And provided further*, That every railroad corporation of any other state, which has heretofore leased or purchased any railroad in this state, shall, within sixty days [552] from the passage of this act, *file a duly certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall thereupon become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding; and in all suits or proceedings instituted against any such corporation process may be served upon the agent or agents of such corporation or corporations in this state in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this state organized and existing under the laws of this state.

"Sec. 3. Any foreign corporation which has heretofore constructed, purchased, leased, or acquired, or now operates, any railroad in this state, shall within sixty days after the passage of this act comply with the provisions thereof by filing a copy of its articles of incorporation or of the special act of the legislature incorporating such company in the office of the secretary of state of this state, and for every day which any such company shall fail to comply with the provisions of this act it shall pay a penalty of $1,000, which penalty may be recovered by the district attorney in a civil action instituted in the proper court in any county through which such railroad or any part thereof so owned, purchased, leased, acquired, or operated by such foreign company may be located.

"Sec. 4. This act shall take effect and be in force from and after its passage."

On May 6, 1889, the St. Louis & San Francisco Railway Company filed with the secretary of state of the state of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri, as required by said act of March 13, 1889, and has never been otherwise incorporated or organized under the laws of the state of Arkansas.

The plaintiff in error properly and seasonably raised the objection in the circuit court that that court had no jurisdiction of this action on the ground that the plaintiff in error was not a citizen of the state of Arkansas, but was a citizen of the state of Missouri, of which state the defendant in error was also a resident [553] and citizen, but the plaintiff in *error waived its personal privilege of being sued in the district of which it was an inhabitant. The question raised by that objection was, by proper exception to the ruling below, an assignment of error presented to the circuit court of appeals for determination.

And the said United States circuit court of appeals, to the end that it might properly decide this and other questions arising in this case which are duly presented by exceptions and assignments of error properly taken and filed, the said court, desired the instruction of the Supreme Court of the United States upon the following questions:

1st. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a corporation and citizen of the state of Arkansas?

2d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the western district of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the state of Missouri?

3d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the western district of Arkansas jurisdiction of this action, in which defendant in error was and is a resident and citizen of the state of Missouri, and the cause *of action accrued in the state of Mis- [554] souri, and arose from an accident that resulted from the operation of the railroad of the company in that state?

4th. In view of the facts hereinbefore set forth, did the circuit court of the United States for the western district of Arkansas have jurisdiction of this action?

Messrs. **George R. Peck, A. T. Britton, A. B. Browne,** and **E. D. Kenna** for plaintiff in error.

Messrs. **Frank W. Hackett,** *J. H. Clendening, H. C. Mechem,* and *F. A. Youmans* for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

Etta James, as a citizen of the state of Missouri, and having a cause of action against the St. Louis & San Francisco Railway Company, a corporation of the state of Missouri, could, of course, sue the latter in the courts of that state, but equally, of course, could not sue such state corporation in the circuit court of the United States for the district of Missouri. Can she, as such citizen of the state of Missouri, lawfully assert her cause of action in the circuit court of the United States for the district of Arkansas against the St. Louis & San Francisco Railway Company by showing that the latter had availed itself of the rights and privileges conferred by the state of Arkansas on railroad corporations of other states coming within her borders and comply-

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ing with the terms and conditions of her statutes?

Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature, and that the St. Louis & San Francisco Railway Company, though denying the plaintiff's right to sue it in the circuit court of Arkansas, waives its statutory privilege of being sued only in the district in which it has its habitat.

It must be regarded, to begin with, as finally settled by repeated decisions of this court [555] that, for the purpose of *jurisdiction in the Federal courts, a state corporation is deemed to be indisputably composed of citizens of such state. It is equally true that, without objection so far from the Federal authority, whether legislative or judicial, it has become customary for a state adjacent to the state creating a railroad corporation to legislatively grant authority to such foreign corporation to enter its territory with its road to make running arrangements with its own railroads to buy or lease them or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent state, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such state.

We have already said that the rule that state corporations are undisputably composed of citizens of the states creating them is finally settled. But in view of the question now before us, it may be well to briefly review some of the cases.

In the case of *Bank of United States* v. *Deveaux*, 9 U. S. 5 Cranch, 61 [3: 38], where an action had been brought against citizens of the state of Georgia in the circuit court of the United States for the district of Georgia, by a petition of "the president, directors, and company of the Bank of the United States," wherein it was alleged that the petitioners were citizens of the state of Pennsylvania, it was held that a corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the circuit court of the United States, and *Chief Justice* Marshall, in giving the opinion of the court, said: "Substantially and essentially, the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals."

Before leaving this case it should be noted that the United States Bank was not a corporation of the state of Pennsylvania, but of the United States. The decision, therefore, was to the effect that where it appeared that a corporation plaintiff, regardless of its origin, was com- [556] posed of aliens or of *citizens of a different state from the defendant, the plaintiff, through suing in its corporate name, could make the averment that the individuals who composed the corporation were such aliens or citizens of a different state, and such averment, if not traversed, would sustain the jurisdiction. The principle of the case makes the individual corporators the real parties to the suit.

In *Louisville, C. & C. R. Co.* v. *Letson*, 43 U. S. 2 How. 497 [11: 353], an action was brought in the circuit court of the United States for the district of South Carolina, by a citizen of the state of New York against a corporation whose members were alleged to be citizens of South Carolina. A plea to the jurisdiction was set up that there were members of the defendant company who were not citizens of the state of South Carolina, but of another state than New York or South Carolina. In the opinion in this case, *Bank of United States* v. *Deveaux* was said to have gone too far, and that consequences and inferences had been argumentatively drawn from it which ought not to be followed, and it was said that "a corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state," and accordingly the judgment of the circuit court, overruling the plea to its jurisdiction, was sustained.

Marshall v. *Baltimore & O. R. Co.* 57 U. S. 16 How. 314 [14: 953], was a case tried in the circuit court of the United States for the district of Maryland, wherein the plaintiff alleged that he was a citizen of the state of Virginia, and that the Baltimore & Ohio Railroad Company, the defendant, was a body corporate by an act of the general assembly of Maryland, and it was suggested, when the case came into this court, that such an averment was insufficient to show jurisdiction in the courts of the United States over the suits, and it was denied that the decision in *Louisville, C. & C. R. Co.* v. *Letson*, 43 U. S. 2 How. 497 [11: 353], sanctioned it, or, if some of the doctrines there advanced *seemed to do so, it was said that [557] they were extrajudicial, and therefore not authoritative. Several judges dissented, but the court, speaking through Mr. Justice Grier, held that "if the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the 'defendants are a body corporate by the act of the general assembly of Maryland,' is a sufficient averment that the real defendants are citizens of that state."

In *Covington Drawbridge Co.* v. *Shepherd*, 61 U. S. 20 How. 233 [15: 898], *Chief Justice* Taney, speaking for the court, said: "The question as to the jurisdiction of the courts of the United States in cases where a corporation is a party, was argued and considered in this court, for the first time, in the cases of *Hope Ins. Co.* v. *Boardman*, 9 U. S. 5 Cranch, 57 [3: 36], and of *Bank of United States* v. *Deveaux*, 9 U. S. 5 Cranch, 61 [3: 38]. These two cases were argued at the same term, and were, as appears by the report, decided at the

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same time. And in the last-mentioned case the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit brought by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators not named in the suit or the averment.

"But in the case of *Louisville, C. & C. R. Co.* v. *Letson* the court overruled as much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiffs, or defendants were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from deny-[558]ing it. And that inasmuch *as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the state from which this legal being derived its existence and its faculties and powers."

The previous cases were reviewed in *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286 [17: 130]. That was the case of an action brought in the circuit court of the United States for the district of Indiana against Wheeler, a citizen of that state, to recover the amount due on his subscription to stock of the Ohio & Mississippi Railroad Company. The declaration described the plaintiffs as "the president and directors of the Ohio & Mississippi Railroad Company, a corporation created by the laws of the states of Indiana and Ohio, and having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio." The defendant pleaded to the jurisdiction by alleging that the plaintiff company, although a corporation of the state of Ohio in the first instance, had been incorporated by an act of assembly of the state of Indiana, and thus had become a body corporate of the same state whereof he was a citizen.

The question thus raised was on a certificate of a division of opinion between the judges of the circuit court, brought to this court, and was answered as follows: "This suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must therefore be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last-mentioned state. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And in such a suit it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and *style by which they are described.[559] The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law or under the decision of this court in the case of *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 519 [10: 274]. It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio & Mississippi Railroad Company are therefore a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States. . . . And we shall certify to the circuit court that it has no jurisdiction of the case, on the facts presented by the pleadings."

Memphis & C. R. Co. v. *Alabama*, 107 U. S. 581 [27: 518], was where an action had been brought by the state of Alabama, for the use of a county of that state, in a court of that state, against a railroad corporation whose road passed through that state and county, to recover the amount of a county tax *assessed[560] upon its property; and the cause was removed into the circuit court of the United States for the northern district of Alabama; and upon motion the cause was remanded to the state court upon the ground that the defendant, although incorporated in Tennessee also, was a corporation of the state of Alabama. On error the judgment of the court below was affirmed, and this court, per *Mr. Justice* Gray, said: "The defendant, being a corporation of the state of Alabama, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and although also incorporated in the state of Tennessee, must, as to all its doings within the state of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

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In this case, *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black. 286 [17:130], and *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270 [20: 571], were cited. The former has already been noticed, and of the latter it may be said, by way of distinguishing it from the present case, that while it was held that a citizen of Illinois might sue the railroad company in the circuit court of Wisconsin, although the company had been likewise incorporated in Illinois, yet the cause of action arose in Wisconsin—nor does it appear in the report of that case what was the character of the legislation by which the Wisconsin company was created, nor was the question now before us there considered. It is also observable that in the latter case *Ohio & M. R. Co.* v. *Wheeler* was cited with approval.

One phase of the subject was before the court in the case of *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 [30: 83]. A suit had been brought in the circuit court of the United States for the district of Indiana by the St. Louis, Alton, & Terre Haute Railroad Company, alleging that it was a corporation organized under the laws of the state of Illinois, and a citizen of that state, against the Indianapolis & St. Louis company, a corporation organized under the laws of the state of Indiana, and a citizen of that state, and against other corporations mentioned in the bill **561** as citizens of Indiana, *or of other states than Illinois. An objection to the jurisdiction was made on the ground that the St. Louis, Alton, & Terre Haute Railroad Company was organized under laws of both Illinois and Indiana, and was therefore a citizen of the latter state. In treating this question this court said, by *Mr. Justice* Miller: "It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also. And so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may by permission of the state of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road by the permission of the state, without thereby becoming a corporation or a citizen of the state of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers (to enable it to use and control that part of the road within the state of Indiana) as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another state to exercise its functions in the state where it is so received. The latter class of laws is common in authorizing insurance companies, banking companies, and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of powers or privileges to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

So in *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356 [34: 363], it was held that railroad corporations, created by two or more *states, though joined in their inter- **[562** ests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; but each has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it was created, and the union of name, of officers, of business and property does not change their distinctive character as separate corporations.

To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in "controversies between citizens of different states."

It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by Congress, regarded as within the Constitutional prohibition of agreements or compacts between states.

Such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations.

The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the Federal courts in such other state as a citizen of the state of its original creation.

We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably *taken, for **[563** the purpose of Federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the state of its original creation.

We are unwilling to sanction such an exten-

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sion of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law. not to be defeated by allegation or evidence to the contrary. There we are content to leave it.

It should be observed that, in the present case, the corporation defendant was not incorporated as such by the state of Arkansas. The legislation of that state was professedly dealing with the railroad corporation of other states. The Constitution of Arkansas provides that "foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law," but "they shall not have power to condemn or appropriate private property."

Section 5 of the act of March 16, 1881, as shown in the preliminary statement, provides that "any railroad company incorporated by or under the laws of any other state, and having a line of railroad built, or partly built, to or near any boundary of this state, and desiring to continue its line of railroad into or through this state, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease or purchase the property, rights, privileges, lands, tenements, immunities, and franchises of any railroad company organized under the laws of this state, [564] which said lease *or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own, and operate the said railroad so leased or purchased as fully and to the same extent as the company organized under the laws of this state might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad company as will best subserve its purpose and the building of said line of railroad. . . . In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads, the liabilities and forfeitures thereby imposed, and may sue and be sued in the same manner as other railroad corporations, and subject to the same service of process, and shall keep an office or offices in said state as required by the Constitution of this state."

It was under the provisions of this section that the St. Louis & San Francisco Railroad Company in 1882 purchased from corporations of Arkansas the railroad already built by them, extending from the southern boundary of Missouri to Fort Smith in Arkansas. These Arkansas corporations have since maintained their separate organizations as corporations of that state, but do not operate railroads. It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation. The terms of the statute show that it merely granted rights and powers to an existing foreign corporation, which was to continue to exist as such, subject only to certain conditions—among others that of keeping an office in the state, so as to be subject to process of the Arkansas courts.

It is true that by the subsequent act of 1889 by the proviso to the 2d section, it was provided that every railroad corporation of any other state, which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a corporation of Arkansas, anything *in its articles of incor- [565 poration or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of the state. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution so as to subject it as such to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation.

It is further contended, on behalf of the defendant in error, the plaintiff below, that, as the plaintiff described herself as a citizen of Missouri, and the defendant company as a citizen of Arkansas, and as the cause of action, though arising in Missouri, was transitory in its nature, jurisdiction was thus formally conferred upon the circuit court of the United States for the district of Arkansas, and that the only question left for inquiry was whether the defendant company, alleged to be a citizen of Arkansas, was legally responsible for the conduct of the Missouri company of the same name, and such responsibility is supposed to be found in the fact that the railroad running through both states was under the common management of both companies.

But even if it be admitted that a common management of a railroad running through two states, and participation in its earnings and losses by two companies, might make both responsible, jointly and severally, for a tortious cause of action, and that such cause of action might be maintained *in the courts [566 of either state, the question of the jurisdiction of the Federal court still remains. The defendant was not content to leave that question to be decided by the plaintiff's allegations, but pleaded that it was in law a corporation of the state of Missouri, and that therefore an ac-

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tion could not be maintained against it in the Federal court by a citizen of that state. In other words, the defendant company claimed that, while it had voluntarily subjected itself to the laws of Arkansas as interpreted and enforced by the courts of that state, it still remained a corporation of the state of Missouri, disabled from suing or being sued by a citizen of that state in a Federal court, and that such disability was not and could not be removed by state legislation.

The result of these views is that *we answer the second question put to us by the circuit court of appeals in the negative*, and to render it unnecessary to answer the other questions.

Mr. Justice **Harlan** dissenting:

I am of opinion that this action is one of which the circuit court of the United States for the western district of Arkansas could properly take cognizance, and that the fourth question propounded by the circuit court of appeals should be answered in the affirmative; in which case it will become unnecessary to answer the other questions.

The statement of the case, to which the certified questions are appended, does not distinctly show whether the railway company is described in the complaint or declaration as a corporation of Missouri or as a corporation of Arkansas. But I take it that the able judges who joined in the certificate did not intend to ask this court whether the court below had jurisdiction of an action brought by a citizen of Missouri against a corporation of *that* state. It must be assumed that the defendant company, the St. Louis & San Francisco Railway Company, is sued as a corporation of Arkansas.

Is there an Arkansas corporation by the name of the St. Louis & San Francisco Railway **567**]Company? The Missouri *corporation of the same name complied with the Arkansas statute of March 13, 1889, by filing in the office of the secretary of state of Arkansas a certified copy of its articles of incorporation, and therefore, if effect be given to the statute as a valid enactment, it became also a corporation of Arkansas. This is made clear by the last proviso of § 2 of the Arkansas statute declaring: "And provided further, that every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall thereupon become *a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding*, and in all suits or proceedings instituted against any such corporation, process may be served upon the agent or agents of such corporation or corporations in this state in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this state, organized and existing under the laws of this state."

We have, then, two distinct corporations, one being the St. Louis & San Francisco Railway Company, a Missouri corporation, the other, the St. Louis & San Francisco Railway Company, an Arkansas corporation. If a citizen of Tennessee, being a passenger on the St. Louis & San Francisco Railway, as operated in Arkansas, be injured by the negligent conduct of those who operated the road in Arkansas, it is clear, if the amount in dispute be sufficient, that he could sue the St. Louis & San Francisco Railway Company, *as a corporation organized under the laws of Arkansas*, in the Federal circuit court sitting in that state. The right to maintain such a suit shows that there is an Arkansas corporation distinct as to its corporate existence from the Missouri corporation of the same name, and having for purposes of suit a citizenship in Arkansas.

In the particular just mentioned the present case is not substantially different from that of *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286, 297, 298 [17: 130, 133]. The report of that case *shows that a corporation by the [**566** name of the Ohio & Mississippi Railroad Company was chartered by the states of Indiana and Ohio. *Chief Justice* Taney said: "The president and directors of the Ohio & Mississippi Railroad Company are therefore a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be *joined* in a suit as one and the same plaintiff, or maintain a suit *in that character* against a citizen of Ohio or Indiana in a circuit court of the United States." If the present suit had been brought against the St. Louis & San Francisco Railway Company, as incorporated both in Missouri and Arkansas, the complaint, under the decision in the *Wheeler Case*, would have disclosed, upon its face, a want of jurisdiction; for one of the defendant corporations, and the plaintiff, in such a case, would be citizens of the same state. In *Baltimore & O. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 65, 82 [20: 354, 358], the court said: "Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction. That this may be done was distinctly held in *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 297 [17: 133]."

The same point arose and was decided in *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270 [20: 571]. It appears from the report of that case, but more distinctly from the original record, which I have examined, that the Chicago & Northwestern Railway Company was a corporation of Wisconsin, and also of Illinois and Michigan, respectively. The plaintiff sued in a court of Wisconsin as a citizen of Illinois. The defendant was the Chicago & Northwestern Railway Company, incorporated in Wisconsin. The question was, whether that case was removable to the Federal court, sitting in Wisconsin, upon the ground of diverse citizenship. That question was decided in the affirmative. It was objected that the Chicago & Northwestern Railway Company, although a corporation of Wisconsin, was also a corporation under the laws of Illinois, of which state the plaintiff was a citizen. This court, speaking by *Mr. Justice* Field, said: "The answer to this position is obvious. In Wisconsin the laws of Illinois have no *operation. The defendant is a cor-[**569** poration, and as such a citizen of Wisconsin by the laws of that state. It is not *there* a cor-

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poration or a citizen of any other state. Being there sued it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286 [17: 130]." Referring to the decision of the *Wheeler Case*, the court held that the Chicago & Northwestern Railroad Company must be regarded, for all purposes of jurisdiction in the Federal courts, as a distinct corporation *in each of the states* of Wisconsin, Illinois, and Michigan.

So, in *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 372, 373 [34: 363, 367], it was held that a corporation created by the laws of Massachusetts, bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes as a New Hampshire corporation, was not the same corporation with the one in New Hampshire. The court said: "Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity."

To the same effect are *Muller* v. *Dows*, 94 U. S. 444, 447 [24: 207, 208]; *Indianapolis & St. L. R. Co.* v. *Vance*, 96 U. S. 450, 453, 457 [24: 752, 754, 755]; *Clark* v. *Barnard*, 108 U. S. 436, 448, 452 [27: 780, 785, 786]; *Farnum* v. *Blackstone Canal Co.* 1 Sumn. 46; *St. Louis, A. & T. H. R. Co.* v. *Indianapolis & St. L. R. Co.* 9 Biss. 144.

I submit, with confidence, that if the defendant company is a corporation of Arkansas, and wholly distinct as a corporate body from the corporation in Missouri in the same name, the jurisdiction of the court below to determine the controversy between the present parties is not defeated by the fact that the Missouri corporation and the plaintiff are both citizens of Missouri. If this view be sound, it results that the plaintiff, a citizen of Missouri, can invoke the jurisdiction of the United States circuit court, sitting in Arkansas, to determine a 570] *controversy between her and the St. Louis & San Francisco Railway Company, a corporation of Arkansas.

We are here met with the suggestion that the cause of action arose in Missouri, and that the injuries of which the plaintiff complains were committed in Missouri by the Missouri corporation bearing the same name as that of the present defendant. But the question still remains whether, in view of the relations of the Arkansas corporation to the St. Louis & San Francisco Railway in Missouri, the Arkansas corporation could be separately sued in the Federal court, sitting in Arkansas. The *jurisdiction* of the court below existed by reason of the diverse citizenship of the parties. If, upon the facts disclosed at the trial, the court was of opinion that the Arkansas corporation was not liable to the plaintiff upon a cause of action arising in Missouri, it would not dismiss the action for want of jurisdiction, but would direct the jury to return a verdict for the defendant.

Was not the Arkansas corporation liable to the plaintiff, albeit the cause of action arose in Missouri? It appears from the record that the road from Monett, Missouri, to Fort Smith, Arkansas, is and for many years has been operated as one continuous line. The entire line is under the joint management of the Missouri and Arkansas corporations. In other words, the St. Louis & San Francisco Railway Company, as a Missouri corporation, manages the property situated in Missouri, and, as an Arkansas corporation, manages the property situated in Arkansas.

Are not both corporations liable to the plaintiff under the authority of *Pennsylvania R. Co.* v. *Jones*, 155 U. S. 333 [39: 176]? The facts in that case were these: The plaintiffs were personally injured by a railroad collision between a train of the Virginia Midland Railway Company and a train of the Alexandria & Fredericksburg Railway Company. The injury occurred near Washington but in Virginia, on the tracks of the Alexandria & Washington Railroad Company. The suit was brought against the latter company, which was then in the hands of a receiver, as well as against several other companies. One *of the ques [571 tions in the case was whether any company was liable except the one whose negligence was the immediate cause of the injury. This court, speaking by *Mr. Justice* Shiras, said: "Our views respecting the exceptions urged on behalf of the other plaintiffs in error are briefly expressed as follows: There was evidence from which the jury might properly infer that the railroad between the cities of Alexandria and Washington was managed and controlled for the common use of the Baltimore & Potomac Railroad Company (owning that portion of the route that lies between Washington and the south end of the Long Bridge), the Alexandria & Washington Railroad Company (owning that portion between the south end of the Long Bridge and St. Asaph's Junction), and the Alexandria & Fredericksburg Railway Company (owning the line between St. Asaph's Junction and Alexandria); *that the gross earnings of these companies, derived from this line between Alexandria and Washington*, including what the Virginia Midland Railway Company paid for the privilege of running its trains over these tracks and what was received for transportation of mails, *went into the hands of a common treasurer*, and were by him, after paying operating expenses, *divided among the three companies*, according to some rule not very definitely shown, but apparently in proportion to the miles of track of each road; that the operating and accounting officers of the three companies were the same; that the freight train in question was, at the time of the collision, on that portion of the road which belonged to the Alexandria & Washington Railroad Company; that the engineer and fireman were employees of the Baltimore & Potomac Railroad Company; that the engine was that of the Alexandria & Fredericksburg Railway Company; that the conductor and brakeman were employees of that company; and that the passenger train was in charge of a pilot employed and paid by the three companies, in pursuance of an arrangement to that effect." These facts, the court

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said, if proved, would warrant a finding of joint liability of the three companies to the plaintiff. Consequently, either company can be sued. I am unable to perceive why, under the 572] principles of *that case, the Arkansas corporation is not liable to the plaintiff for personal injuries received through the negligence of the Missouri corporation. The two corporations have a common management and a common treasury, and they unite in operating the lines of road, situated in Missouri and Arkansas, as one continuous road.

At first blush it may seem strange that the plaintiff did not sue the Missouri corporation in one of the courts of Missouri. But that cannot affect the jurisdiction of the court below, if the defendant is an Arkansas corporation. And her right to a judgment cannot be denied, if the Arkansas corporation is liable for injuries caused, in Missouri, by the negligence of the Missouri corporation. It may be that the line in Missouri is covered by mortgages for very large amounts, so that a judgment against the Missouri corporation would be of no real value. That perhaps is the reason why the plaintiff brought suit against the Arkansas corporation. But, as already said, this view is not at all material on the present hearing.

To sum up: There is an Arkansas corporation by the name of the St. Louis & San Francisco Railway Company; that corporation, being a citizen of Arkansas, can be sued in the court below by a citizen of Missouri; the court below has, consequently, jurisdiction to determine any controversy between those parties, citizens of different states (the amount in dispute being sufficient) which has been raised by the plaintiff's complaint; the Arkansas corporation, by reason of its relation to the Missouri corporation in the operation, as one continuous road, of the lines connecting Monett, Missouri, with Fort Smith, Arkansas, is liable for the acts and defaults of the Missouri corporation in the management of that part of the continuous road which lies in Missouri; and, even if the Arkansas corporation is held, under the evidence, not to be liable, the case should not be dismissed for want of jurisdiction in the court below, but the jury should be instructed to find for the defendant.

For these reasons I am unable to concur in the opinion of the majority.

573] CHARLES H. GILDERSLEEVE, *Appt.*, *v.* NEW MEXICO MINING COMPANY.

(See S. C. Reporter's ed. 573-582.)

Limit of review—laches.

1. On appeal from a judgment of a territorial court, where there are no exceptions to rulings on the admission or rejection of testimony, this court is limited in its review to a decision as to whether the facts found are sufficient to sustain the judgment rendered.
2. Acquiescence by heirs and their grantee in the possession of a mine and the privileges connected therewith, by the widow of their ancestor and those claiming under her, from his death in 1848 until 1880, during which time they witnessed the expenditure of large sums of money upon the property without exhibiting an intention to assert their supposed rights, constitutes such gross laches as to effectually debar their grantee from the right to the relief in equity that a share in the property is held in trust for them.

[No. 89.]

Argued December 2, 3, 1895. Decided March 16, 1896.

APPEAL from a judgment of the Supreme Court of the Territory of New Mexico affirming a decree of the Territorial District Court dismissing a suit brought by Charles H. Gildersleeve against the New Mexico Mining Company to have that company declared a trustee for his benefit of one-fourth interest in a mining grant. *Affirmed.*

See same case below, 27 Pac. 818.

Statement by *Mr. Justice* **White**:

The relief sought by appellant in the lower court was to have the New Mexico Mining Company, to whom certain letters patent were issued by the United States for a Mexican mining grant, declared a trustee for his benefit to the extent of a one-fourth interest in the land covered by said letters patent.

The territorial district court held that the statute of limitations barred the suit and therefore dismissed the bill. The supreme court of the territory affirmed the decree of dismissal (27 Pac. 818), holding the plea of the statute of limitations good, and also sustained the mining company's contention that Mrs. Ortiz, under whom they claimed, acquired title through a valid mutual will executed by herself and her husband in 1841. The cause was then brought to this court by appeal. From the findings in the record the following facts are extracted:

The property in controversy covered by the United States patent embraced a mining grant made by the government of Mexico in 1833 to José Francisco Ortiz and Ignacio Cano. This grant consisted of a gold mine or vein and a small *extent of surface ground, as also [574 commons of pasture and water to the extent of four leagues from each of the four cardinal points of the mine. Some time prior to the cession of New Mexico to the United States, under the treaty of February 2, 1848, Cano sold and transferred all his interest in the grant in question to Ortiz, his co-owner. On August 15, 1841, Ortiz and his wife executed before a Mexican alcalde and two attending witnesses a mutual will, in which it was provided that the survivor should be the universal

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NOTE.—*As to laches, when a good defense*, see note to Felix v. Patrick, 36: 720.

As to length of time as bar to relief in cases of fraud; statute of limitations as a plea in equity; state claims; cases of undiscovered fraud; when laches bars remedy,—see note to Hammond v. Hopkins, 36: 135.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

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legatee or heir of the other to all the property, both real and personal, of every kind whatsoever. Ortiz died before his wife, July 22, 1848, at Santa Fé, New Mexico, and thereupon Mrs. Ortiz entered into the possession of the mine and the enjoyment of the privileges connected therewith, and retained this possession up to December 20, 1853, when she sold and delivered the possession thereof to John Greiner, the deed to whom was recorded in the office of the probate clerk of Santa Fé county on December 29, 1853. Greiner remained in possession until August 19, 1854, when he transferred the property to Elisha Whittlesley and six others. Contemporaneous with the execution of the deed to Whittlesley *et al.*, they and one other person executed articles of association under the name of the New Mexico Mining Company, and on February 1, 1858, the members of the association were incorporated by the legislature of the territory of New Mexico under a similar designation.

On November 8, 1860, Whittlesley *et al.*, as representing the New Mexico Mining Company, petitioned the then surveyor general of the territory to examine their title to said grant. That official complied with the request and made a favorable report to Congress, which, by an act approved March 1, 1861 (12 Stat. at L. 887), confirmed the grant, the claim being designated as private land claim No. 43. A survey of the grant was thereafter made and was completed on August 14, 1861, but such survey was not approved by the Secretary of the Interior until April 22, 1876. On May 20, 1876, a patent issued in the name of the New Mexico Mining Company, the lands embraced therein [575] being stated to *contain 69,458.33 acres, less 259 acres in conflict with another grant.

In addition to the possession by Mrs. Ortiz, before stated, her grantee, Greiner, and his assigns held actual, open, and notorious possession of the property in question from the conveyance to Greiner in December, 1853, until the commencement of this litigation in 1883. Such possession was held by employing an agent or agents to live on the property at the village of Dolores, near the said mine, and by making large and extensive improvements on the property, in building a large stamp mill at Dolores, near said mine, and many other acts, open and notorious, indicative of ownership of the property. No attempt was ever made by those through whom Gildersleeve claimed to interfere with such possession or enjoyment of the property, or to actively assert any right or interest in said property, except through a suit brought in 1880 by Brevoort, as hereinafter stated. None of said parties ever intervened in the proceedings instituted before the surveyor general looking to the confirmation of the grant to the New Mexico Mining Company, nor after the surveyor general's report to Congress was an objection raised to the passage of the act confirming the grant, nor indeed at any time did the complainant or those under whom he claims object to the mining company's assertion of title to the property, or to the issuance of letters patent to the company.

The complainant bases his right to the equitable relief prayed for in his bill upon the assertion that the authentic mutual will of Ortiz and his wife heretofore referred to was void, because not executed with the formalities required by law as to the number of witnesses, etc., and that, subsequently, Ortiz died intestate, leaving no direct but certain collateral heirs, who conveyed in 1873 the interest inherited by them from Ortiz to one Brevoort who, in 1880, conveyed an undivided one-half interest in the property thus acquired by him jointly to appellant and Knaebel. The consideration of the last conveyance from Brevoort to Gildersleeve and Knaebel, they being attorneys at law, was money advanced and services rendered and to be rendered to Brevoort for the maintenance *of a suit [576] then or about to be instituted to enforce Brevoort's alleged title to the mine.

At the July, 1880, term of a district court of the territory, Brevoort, through the attorneys in question, filed a bill against the New Mexico Mining Company, asserting his equitable title to an undivided interest in the land covered by the patent, but after the taking of testimony, and the hearing of exceptions, upon the report of a master, the court on July 16, 1884, dismissed the cause.

At the February term, 1883, of the same court certain alleged heirs and legal representatives of Ignacio Cano instituted suit against the New Mexico Mining Company and others, based upon the claim that Cano had never conveyed his interest in the mine to Ortiz, and that in consequence he was seised at the time of his death of an undivided interest in the property. The court, however, sustained the plea of a former adjudication based on an action which had been instituted in 1865 by the same persons or others with whom they were in privity, and dismissed the bill. Brevoort was a party defendant to this second suit of the Cano claimants. He filed a cross bill denying the rights of the heirs of Cano and setting up title in himself to an undivided part of the mine and land covered by the patents by virtue of the conveyances aforesaid from the collateral heirs of Ortiz, and asked the same relief as that prayed for in his former suit. Subsequently, the mining company compromised their controversy with Brevoort and Knaebel, and Brevoort was dismissed from the cause. Thereupon Gildersleeve intervened and was permitted by the court to set up his rights, under the conveyance from Brevoort to himself, with the same effect as though he had originally been made a defendant. The court, treating the compromise between Brevoort and the mining company as inoperative against Gildersleeve, by its order allowed Gildersleeve to assert his rights *nunc pro tunc*, as if they had been advanced at the time Brevoort filed his cross bill.

The issue thus formed between Gildersleeve and the New Mexico Mining Company thereupon proceeded as a new action, with Gildersleeve as complainant.

*In 1880 the mining company trans- [577] ferred the property embraced in the letters patent to Stephen B. Elkins and Jerome B. Chaffee, but the greater portion of the property was reconveyed to the company in 1884.

It is not material, however, to notice the

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disposition made by Chaffee and Elkins of the land not reconveyed by them to the mining company.

The issue between Gildersleeve and the mining company, as heretofore stated, resulted adversely to complainant in the territorial courts.

Messrs. **Thomas Smith** and *H. L. Warren* for appellant.

Mr. **Joseph Larocque** for appellee.

Mr. Justice **White** delivered the opinion of the court:

The appeal being from a judgment of a territorial court, and no exceptions to rulings of the court on the admission or rejection of testimony being presented for our consideration, we are limited in our review to a determination of the question whether the facts found are sufficient to sustain the judgment rendered. *Hawes* v. *Victoria Copper Min. Co.* 160 U. S. 303, 312 [*ante*, 436, 439].

In the trial court, the controversy between Gildersleeve and the mining company was disposed of upon the ground that the statute of limitations barred complainant's right to recover. The supreme court of the territory, however, rested its judgment of affirmance not only upon the bar of the statute, but upon the further fact found by it that Ortiz and his wife had executed a valid mutual will, by which, upon the death of Ortiz, title to the mine in question vested in his widow, through whom the mining company claimed.

We shall, however, consider the case in another aspect, and shall base our conclusion that the complainant is not entitled to relief at the hands of a court of equity upon the fact **578**]that *the record exhibits such gross laches on the part of complainant, or those with whom he is in privity, and upon whose rights his own must depend, as to effectually debar him from a right to the relief which he seeks.

In *Hammond* v. *Hopkins*, 143 U. S. 224 [36:134], speaking through *Mr. Chief Justice* Fuller, this court said:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

In *Galliher* v. *Cadwell*, 145 U. S. 368 [36:738], speaking through *Mr. Justice* Brewer, it was said of the case then being considered (p. 371 [740]):

"The question of laches turns, not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all."

In *Speidel* v. *Henrici*, 120 U. S. 377 [30:718], the court said, speaking through *Mr. Justice* Gray (p. 387 [719]):

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands where the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court.'"

*In *Lane & B. Co.* v. *Locke*, 150 U. S. 193[**579** [37:1049], and *Mackall* v. *Casilear*, 137 U. S. 556 [34:776], it was declared to be correct doctrine that the mere assertion of a claim unaccompanied by any act to give effect to it could not avail to keep alive a right which would otherwise be precluded.

With the principles enunciated in these decisions to guide us, we proceed to review the pertinent facts showing the conduct of the persons in whom complainant contends the title to the mine vested upon the death of Ortiz in 1848, by reason of the alleged intestacy of the latter.

It is undisputed, if the claim of the collateral heirs of Ortiz as to the nullity of the will executed by Ortiz was well founded, whatever title Ortiz had to what is now known as the Ortiz mine vested in them upon the decease of Ortiz in 1848, subject to such confirmation by the United States as the law required. By article 8 of the treaty of Guadalupe Hidalgo of 1848 (9 Stat. at L. 927), this government agreed to respect rights of private property in the ceded territory in existence at the date of the cession. To carry into effect this agreement, Congress passed an act entitled "An Act to Establish the Office of Surveyor General of New Mexico, Kansas, and Nebraska, to Grant Donations to Actual Settlers therein, and for Other Purposes," which act was approved July 22, 1854 (10 Stat. at L. 308). By § 8 of this act it was made the duty of the Surveyor General, under rules and regulations to be established by the Secretary of Interior, to inquire into and report to Congress upon the validity or invalidity of all claims to lands within the territory ceded by Mexico which had originated before such cession, which report was to be laid before Congress for such action thereon as might be deemed to be just and proper, with a view to the confirmation of bona fide grants. This act has been considered by this court. *Stoneroad* v. *Stoneroad*, 158 U. S. 240 [39:966]; *Astiazaran* v. *Santa Rita Land & Min. Co.* 148 U. S. 80 [37:376], and cases cited in the latter case.

The finding of facts does not recapitulate the various steps in the proceedings initiated by the mining company through Whittlesley before the surveyor general under the act of 1854 *to acquire a patent to the mining grant.[**580** Knowledge in the collateral heirs of Ortiz of the passage of the act in question and of their

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right to file a claim with the surveyor general is of course to be presumed. It has not been asserted, however, that these collateral heirs ever submitted their alleged title to the surveyor general for examination, or entered objection to the validity of the claim to ownership of the entire grant filed with that official by the New Mexico Mining Company. It is also not pretended after the surveyor general had reported the entire grant to Congress for confirmation, as belonging to the New Mexico Mining Company, that the alleged collateral heirs of Ortiz ever in any way presented their pretensions to that body, or raised any objection to the confirmation by Congress of the grant in the manner and form recommended by the surveyor general, and after the grant was confirmed by Congress, in the long interval which elapsed before the issue of the patent (from 1861 to 1876), there is also no pretense that the collateral heirs of Ortiz ever, before any administrative officer of the government, asserted the existence in themselves of the rights now advanced by them as the basis for the equitable relief which they seek. Indeed, the record shows that during twenty-two years, between the passage of the act of 1854 and the issue of the patent in 1876, the collateral heirs remained supinely indifferent to the assertion of their supposed title, while during the greater portion of this time the New Mexico Mining Company was expending labor and incurring the expense connected with the obtaining of the letters patent. So, also, these alleged heirs from the date of the death of Ortiz permitted Mrs. Ortiz, Grenier, and those holding under him, including the mining company, to remain in undisturbed possession of the property and to engage in large outlay for its development without, so far as appears, even claiming rights in themselves, until more than four years had elapsed from the final granting of the patent. It is proper also to observe that when the first suit was brought in 1880 it was commenced, not on behalf of the collateral heirs of Ortiz, but was initiated for the benefit of one who, with full knowledge of all the circumstances, acquired the supposed **581**]title of such *collateral heirs, for the purpose of speculating upon the chance of wresting from the mining company the title acquired by it under the patent, although at that time the laches of the collateral heirs, whose rights the suit championed, had effectually debarred them from invoking the aid of a court of equity to relieve them from the results of their own acquiescence and neglect.

It is true, as held in *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485], that where the title to land had passed from the government, and the question becomes one of private right, courts may inquire whether the party holding the patent should be treated as owning it absolutely in his own right or as a trustee for another, and therefore that courts of equity have the power to inquire into and correct mistakes, injustice, and wrong. But when the aid of a court of equity is invoked in effect to annul the confirmation by Congress or to overrule the final conclusion of the administrative department as to the person entitled to a patent from the United States, the fact that the complainant who asks such equitable relief, theretofore possessed not only ample opportunity to assert his own claim, but also abundant occasion to contest the right of the person to whom a patent was granted, has completely failed to do either, and has been guilty of the grossest and most inexcusable laches, is necessarily a conclusive reason against the allowance of the relief asked.

When Brevoort acquired his alleged rights, in 1873, the New Mexico Mining Company was in possession of the property, and Brevoort knew this fact. When on June 30, 1880, Brevoort executed the conveyance of an undivided interest to Gildersleeve and Knaebel for the consideration of their assistance by advance of money or otherwise in contemplated litigation with the mining company, Brevoort's grantees knew the fact to be that he was not in possession, and that the New Mexico Mining Company was in actual possession.

To recapitulate, there was an uninterrupted use and enjoyment by the widow of Ortiz, and those claiming by conveyance from her, of the property in question, from the death of Ortiz in 1848; no attempt was ever made to assert rights, if *any, of the collateral heirs [**582** of Ortiz in this property until the year 1880. They stood by and witnessed the expenditure of large sums of money upon the property and did nothing exhibiting an intention to assert their supposed rights. No attempt was made in the pleading of Gildersleeve to offer any explanation of this long-continued acquiescence in the rights of those in possession of the mine and of the privilege connected therewith. Under such circumstances, we think the heirs and those claiming under them are not entitled to equitable relief. Finding at the very threshold of the case the existence of such laches on the part of complainant as debars him from obtaining the equitable relief which he invokes, we have not deemed it necessary to express any opinion on the other questions presented by the record. The court below in the concluding sentences of its opinion aptly conveyed the reasons which, apart from a consideration of the other questions by it considered, demonstrate the entire want of equity in the complainant's case. The expressions to which we refer, by O'Brien, Ch. J., are as follows:

"Ortiz dies in 1848. The widow claims and asserts her rights under the will as the absolute owner of all the property of which he died possessed; she disposes of such rights to bona fide purchasers; for nearly forty years before this suit was commenced they occupy, improve, and pay taxes on this property. Plaintiff's grantor and those through whom such grantor claims title, relatives of the deceased Ortiz, and residing in the vicinity of the grant, remain silent; acquiesce by such silence in the disposition so made of the property for so long a period, while the same is being enhanced in value by the capital and labor of honest purchasers or occupants. In fact, not a word is heard from any of the kindred in relation to the matter until they relinquish, for a trifling consideration, all their interest therein to plaintiff's grantor."

The judgment of the supreme court of the territory is affirmed.

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583] GEO. W. POST, *Plf. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 583-587.)

Criminal proceedings, when instituted—act of July 12, 1894.

1. Criminal proceedings are not instituted before the passage of an act which has a prospective operation only, merely because a bill of indictment has been submitted to the grand jury by the prosecuting attorney, and witnesses examined before the grand jury, when the indictment is not presented or any information filed in court or any complaint made before a magistrate until after the act is passed.

2. The provision for the prosecution of offenses in the division of the district in which they were committed, made by the act of Congress of July 12, 1894, chap. 132, with respect to the district of Minnesota, applies to all proceedings instituted after the act took effect, although the offenses may have been committed before that time.

[No. 694.]

Argued March 6, 9, 1896. Decided March 23, 1896.

IN ERROR to the District Court of the United States for the District of Minnesota to review a judgment convicting George W. Post of subornation of perjury. *Reversed* and case remanded, with directions to set aside the verdict and to sustain the demurrers to the indictment.

Statement by *Mr. Justice* **Gray**:

At June term, 1894, of the district court for the district of Minnesota held at St. Paul, in the third division of the district, the grand jury for the district presented on July 20, 1894, two indictments against George W. Post on U. S. Rev. Stat. § 5493, for subornation of perjury on February 8, 1894, at Duluth, in the fifth division.

To each indictment the defendant pleaded not guilty, with leave to withdraw his plea at October term, 1894, held at St. Paul, to which the cases were continued. At that term, he withdrew his plea; and demurred to each indictment, for want of jurisdiction in the court to take cognizance of the matters and things therein set forth, because the offenses were alleged to have been committed in the fifth division of the district, and the indictment was found and presented at a term held at St. Paul, in the district, and outside of that division. The demurrer was overruled; the defendant pleaded not guilty to each indictment; the two cases were consolidated by order of the court for trial; the jury returned verdicts of guilty; the defendant moved in arrest of judgment, for want of jurisdiction in the court 584] to* try him upon the indictments; the motion was overruled; and the defendant was sentenced to be imprisoned three years in the penitentiary, and to pay a fine of $2,000; and sued out this writ of error.

By stipulation in writing of counsel it was agreed that there should be added to the record, as if in obedience to a writ of certiorari for diminution thereof, an order of the district court directing the record to be amended by setting forth the following facts: The grand jury for the district of Minnesota at June term, 1894, was duly impaneled July 5, 1894, and then entered upon the discharge of its duties for the entire district of Minnesota, and was continuously in session from that day to and including July 20, 1894, and on this last day returned these two indictments, and made its final report, and was discharged by the court. All the persons whose names were indorsed upon the indictments were duly summoned in these cases before the grand jury prior to July 5, 1894, and in obedience to such summons were in actual attendance upon the court prior to July 12, 1894.

Messrs. **James K. Redington** and *S. F. White* for plaintiff in error.

Mr. **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

By the Revised Statutes, as by the previous act admitting the state of Minnesota into the Union, the whole state was constituted one judicial district. Act of May 11, 1858 (11 Stat. at L. 285, chap. 31, § 3); U. S. Rev. Stat. § 531. By the act of April 26, 1890, chap. 167, which took effect August 1, 1890, the district of Minnesota was divided into six divisions for the purpose of holding terms of court; the courts for the third division, which included St. Paul, were to be held at St. Paul on the 4th Tuesday in June and the 2d Tuesday in January, and the courts for the fifth division, which included *Duluth, were to be [585 held at Duluth on the 2d Tuesday in May and the 2d Tuesday in October; a grand jury and petit jury might be summoned at each term; and the criminal jurisdiction of the court was in no wise restricted to a particular division. 26 Stat. at L. 72.

But by the act of July 12, 1894, chap. 132, entitled "An Act Regulating the Procedure in Criminal Causes in the District of Minnesota," it was enacted, in § 1, that "all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had, and prosecuted in the division of said district in which such offenses were committed;" and in § 2, that "this act shall take effect upon its passage." 28 Stat. at L. 102.

As was said by this court in a recent case: "In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits, in any essential requirement, in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms. . . . It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses

NOTE.—*As to criminal jurisdiction of United States courts as to locality*, see note to United States v. Wiltberger, 5: 37.

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placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void." *Re Bonner*, 151 U. S. 242, 256, 257 [38: 149, 151].

The act of 1894, now in question, is doubtless to be construed as operating prospectively, and not retrospectively, upon the subject legislated upon. That subject, however, is not a matter of substantive criminal law, but is one of jurisdiction and procedure only. The act does not create any new offense, or make any change in the proof or the punishment of 586]*an offense already existing. It is but a regulation of procedure, and of procedure so far only as affects the jurisdiction of the court with regard to the different divisions into which the district is divided, and in which the court may be held. It distributes the jurisdiction among the several divisions by requiring the prosecution of offenses "arising in the district of Minnesota" to take place in that division "in which such offenses were committed." It is not limited to offenses which shall arise after it takes effect, nor does it in terms mention offenses which have already arisen; but it uses the general words "offenses arising," which naturally include both past and future offenses, as do the words "offenses committed;" and it is indisputably within the discretion of the legislature, when granting, limiting, or redistributing jurisdiction, to include offenses committed before the passage of the act. *Cook* v. *United States*, 138 U. S. 157, 180 [34: 906, 912]. The point of time at which the act is to apply to a particular case is not the time of committing the offense, but the time of instituting the proceedings. Treating the direction as operating prospectively only, that "all criminal proceedings instituted . . . shall be brought, had, and prosecuted" in a particular division, it obviously includes all proceedings which shall be, and none which have been, instituted. Without regard, therefore, to the time of the commission of an offense, all the proceedings for its prosecution, if instituted after the act of 1894 took effect, must be in the division in which the offense was committed; but if instituted before this act took effect, they might go on, as under the earlier acts, in any division.

The two cases principally relied on by the United States, of *Logan* v. *United States*, 144 U. S. 263, 297 [36: 429, 441], and *Caha* v. *United States*, 152 U. S. 211, 214 [38: 415, 416], by implication, at least, support this conclusion. In *Caha's Case* the act of Congress expressly reserved the former jurisdiction, not only over prosecutions already commenced, but also over crimes already committed. In *Logan's Case* the act of Congress, as this court observed, "does not affect the authority of the grand jury for the district, sitting at any place at which the court is appointed to be held, to 587]present indictments for offenses *committed anywhere within the district. It only requires the trial to be had, and writs and recognizances to be returned, in the division in which the offense is committed. The finding of the indictment is no part of the trial."

Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121 [37: 386, 390, 391]: *Rex* v. *Phillips*, Russ. & R. 369; *Reg.* v. *Parker*, Leigh & C. 459, 9 Cox, C. C. 475. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.

In the present case, each indictment for an offense committed in the fifth division of the district, having been first presented, after the act of 1894 took effect, to the court held in the third division, and no complaint having been previously made against the defendant, the court had no jurisdiction of the case; and for this reason, without considering the other questions argued at the bar, the

Judgment is reversed, and the case remanded, with directions to set aside the verdicts and to sustain the demurrers to the indictments.

HENRY C. ROUSE, Receiver *de Bonis Non* of the MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, *Plff. in Err.*, [588

v.

JOHN E. HORNSBY.

(See S. C. Reporter's ed. 588-591.)

Jurisdiction of Supreme Court.

On intervention for the allowance of a claim under foreclosure proceedings in a circuit court of the United States as against property or a fund being administered by that court, in which the jurisdiction originally depended wholly upon diverse citizenship, the decision of the circuit court of appeals is final under § 6 of the judiciary act of March 3, 1891.

[No. 706.]

Submitted March 2, 1896. Decided March 23, 1896.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Kansas for injuries inflicted upon John E. Hornsby through the negligence

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor,—see note to M'Donald v. Smalley, 7: 287.

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of the receiver, Henry C. Rouse, in the operation of the Missouri, Kansas, & Texas Railway. On motion to dismiss or affirm. *Dismissed.*

See same case below, 12 U. S. App. 404.

The facts are stated in the opinion.

Mr. **Nelson Case** for defendant in error, in favor of the motion.

Messrs. **James Hagerman** and **T. N. Sedgwick** for plaintiff in error in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Mercantile Trust Company, a corporation of New York, filed its bill against the Missouri, Kansas, & Texas Railway Company, a corporation of Kansas, in the circuit court of the United States for the district of Kansas, for the foreclosure of certain mortgages, and Eddy and Cross were appointed receivers, upon whose decease Rouse was substituted.

Under a general order, to which he refers, but which is not given in the record, Hornsby filed a petition of intervention in that suit, seeking damages for injuries inflicted through the negligence of the receivers in the operation of the road. To this petition the defendants interposed a demurrer upon the ground that the petition did not state facts sufficient to constitute a cause of action, which was sustained and the petition dismissed, whereupon the case was carried to the circuit court of appeals for the eighth circuit, the judgment reversed, and the case remanded. *Hornsby* v. **589**] *Eddy*, 12 U. S. *App. 404. Thereupon defendants answered on the merits and the intervener replied. Defendants moved the court for a reference to a master, "which motion," the record states, "to refer the claim of John E. Hornsby against them as set forth in the intervening petition of said Hornsby and the issues joined thereon to a master," was overruled. A jury was then impaneled on motion of the intervener, a trial had, and verdict returned, whereupon the court entered an order in these words, after setting out the verdict:

"And thereupon the court doth now approve said verdict and order and adjudge that the said intervener, John E. Hornsby, have and recover of and from the said defendants, George A. Eddy and Harrison C. Cross, as receivers of the property of the Missouri, Kansas, & Texas Railway Company, the sum of $15,000, together with interest thereon at the rate of 6 per cent per annum from this date, and also all costs herein expended by him, amounting to $——; and the property of said Missouri, Kansas, & Texas Railway Company which was heretofore in the hands of said receivers and over which this court now holds jurisdiction shall remain liable for said sum and sums, and said receivers are hereby ordered to allow, audit, and pay said sum and sums into the registry of this court for said intervener, John E. Hornsby; and if said receivers as such have not sufficient funds in their possession and under their control for that purpose, the property of said railway company remains liable therefor; to which orders and judgment of the court the said defendants, George A. Eddy and Harrison C. Cross, as such receivers, at the time excepted. It is further ordered that the said defendants, George A. Eddy and Harrison C. Cross, as such receivers, have sixty days from this date in which to prepare and present a bill of exceptions herein for allowance, and that execution in this case be stayed ten days from this date."

The petition of intervention, the answer, and the various orders were all entitled in the case of *Mercantile Trust Company of New York* v. *Missouri, Kansas, & Texas Railway Company et al.* From the final order of the court defendants *took the case to the circuit court of [**590** appeals for the eighth circuit by writ of error and also by appeal. The cause was heard in that court and the order of the court below affirmed. 67 Fed. Rep. 219. The circuit court of appeals was of opinion that the appeal should be dismissed, and that the order below should be affirmed on the writ of error, because "the intervening petition set up a cause of action exclusively cognizable at law, and was tried by a jury as such."

If, as is said, the intervener, the railroad company, and the receivers were all citizens of Kansas, and this had been an action at law, and not a petition of intervention in the equity suit, the jurisdiction of the circuit court would nevertheless have been maintainable on the ground that it was one arising under the Constitution and laws of the United States in that the receivers were appointed by the circuit court and derived their powers from and discharged their duties subject to those orders, and the right to sue them as such, without leave of the court which appointed them, was conferred by act of March 3, 1887, § 3 (24 Stat. at L. 552, chap. 373). *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 [36: 829]; *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 [38: 511].

In *Texas & P. R. Co.* v. *Cox* the objection was raised that neither of the defendants was an inhabitant of the district in which the suit was brought, and it was remarked that if the suit was regarded as merely ancillary to the receivership the objection was without force, but that, irrespective of that, the immunity was a personal privilege which might be waived, and which in that case had been waived. In the case before us the question in respect of an independent action at law is not presented since this intervention was nothing more than an application for the allowance of a claim under the foreclosure proceedings and as against the property or fund being administered by the court. *Rouse* v. *Letcher*, 156 U. S. 47 [39: 341]. Defendants raised no objection to the determination of the entire matter on the intervention, and did not ask that an action at law be directed to be brought, and the reference of the questions of fact to a jury was within the discretion of the court and did not change the character of the proceeding.

*The jurisdiction of the circuit court [**591** over the petition was clearly referable to its jurisdiction of the equity suit, which depended wholly upon diverse citizenship, and the case comes directly within recent decisions of this court holding that under such circumstances the decrees and judgments of the circuit court of appeals are made final by the judiciary act of March 3, 1891, § 6. *Rouse* v. *Letcher*, *supra*; *Gregory* v. *Van Ee*, 160 U. S. 643 [*ante*, 566];

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Carey v. *Houston & T. C. R. Co.* 161 U. S. 115 [*ante*, 638]. As the final order below was affirmed by the circuit court of appeals, we are not called upon to entertain jurisdiction simply because that affirmance was entered on the writ of error rather than the appeal.

Writ of error dismissed.

THEODORE F. BROWN, *Appt.*,
v.
JOHN W WALKER, United States Marshal.

(See S. C. Reporter's ed. 591-638.)

Constitutional guaranty of protection—accusing himself—state construction of its laws—power of President—personal disgrace—immunity from prosecution—possibility.

1. The act of Congress of February 11, 1893 (27 Stat. at L. 443), exempting a witness from any prosecution on account of any transaction to which he may testify before the Interstate Commerce Commission, sufficiently satisfies the constitutional guaranty of protection against being compelled in any criminal case to be a witness against himself.
2. Where one state adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the state from which they are taken.
3. The constitutional power of the President to grant pardons does not take from Congress the power to pass acts of general amnesty, such as the act of February 11, 1893.
4. The fact that a witness cannot be shielded by statute from the personal disgrace or opprobrium attaching to the exposure of his crime does not render a statute exempting him from prosecution therefor insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself.
5. The immunity from prosecution on account of any matter concerning which evidence is given before the Interstate Commerce Commission or in obedience to its subpœna, under the act of Congress of February 11, 1893, is not limited to prosecutions in Federal courts, but is applicable in state courts as well.
6. The bare possibility that by disclosure a witness may be subjected to the criminal laws of some other sovereignty, and that he may be put to the annoyance and expense of pleading his immunity by way of confession and avoidance, notwithstanding the law has given him immunity from prosecution therefor, is not sufficient to render such immunity insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself.

[No. 765.]

Argued January 23, 1896. Decided March 23, 1896.

APPEAL from a judgment of the Circuit Court of the United States for the Western District of Pennsylvania made upon the return of a writ of habeas corpus, remanding the prisoner Brown to the custody of the marshal, the appellee in this case. *Affirmed.*

See same case below, 70 Fed. Rep. 46, 5 Intera. Com. Rep. 300.

Statement by *Mr. Justice* **Brown**:

This was an appeal from an order of the circuit court, made upon the return of a writ of habeas corpus, remanding the petitioner Brown to the custody of the marshal, the respondent in this case.

*It appeared that the petitioner had [592 been subpœnaed as a witness before the grand jury, at a term of the district court for the western district of Pennsylvania, to testify in relation to a charge then under investigation by that body against certain officers and agents of the Alleghany Valley Railway Company, for an alleged violation of the interstate commerce act. Brown, the appellant, appeared for examination, in response to the subpœna, and was sworn. After testifying that he was auditor of the railway company, and that it was his duty to audit the accounts of the various officers of the company, as well as the accounts of the freight department of such company during the years 1894 and 1895, he was asked the question:

"Do you know whether or not the Alleghany Valley Railway Company transported for the Union Coal Company, during the months of July, August, and September, 1894, coal from any point on the low-grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?"

To this question he answered:

"That question, with all respect to the grand jury and yourself, I must decline to answer for the reason that my answer would tend to accuse and incriminate myself."

He was then asked:

"Do you know whether the Alleghany Valley Railway Company, during the year 1894, paid to the Union Coal Company any rebate, refund, or commission on coal transported by said railroad company from points on its low-grade division to Buffalo, whereby the Union Coal Company obtained a transportation of such coal between the said terminal points at a less rate than the open tariff rate or the rate established by said company? If you have such knowledge, state the amount of such rebates or drawbacks or commissions paid, to whom paid, the date of the same, and on what shipments; and state fully all the particulars within your knowledge relating to such transaction or transactions."

Answer. "That question I must also decline to answer for the reason already given."

*The grand jury reported these ques- [593 tions and answers to the court, and prayed for such order as to the court might seem meet and proper. Upon the presentation of this report, Brown was ordered to appear and show cause why he should not answer the said questions, or be adjudged in contempt; and upon the hearing of the rule to show cause, it was found that his excuses were insufficient, and he was directed to appear and answer the questions,

NOTE.—*As to effect of pardons*, see note to Armstrong's Foundry v. United States, 18: 882.

As to conditional pardons, see note to *Ex parte* Wells, 15: 421.

As to when the United States courts do not follow state decisions, see note to Butz v. Muscatine, 19: 490.

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which he declined to do. Whereupon he was adjudged to be in contempt and ordered to pay a fine of $5, and to be taken into custody until he should have answered the questions.

He thereupon petitioned the circuit court for a writ of habeas corpus, stating in his petition the substance of the above facts. The writ was issued, petitioner was produced in court, the hearing was had, and on the eleventh day of September, 1895, it was ordered that the petition be dismissed, the writ of habeas corpus discharged, and the petitioner remanded to the custody of the marshal.

From that judgment Brown appealed to this court.

Mr. **James C. Carter** for appellant.
Mr. **George F. Edmunds** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves an alleged incompatibility between that clause of the 5th Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the act of Congress of February 11, 1893 (27 Stat. at L. 443), which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeit-[594] ture. *But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or either of them, or in any such case or proceeding."

The act is supposed to have been passed in view of the opinion of this court in *Counselman* v. *Hitchcock*, 142 U. S. 547 [35: 1110], 3 Inters. Com. Rep. 816, to the effect that U. S. Rev. Stat. § 860, providing that no evidence given by a witness shall be used against him, his property or estate, in any manner, in any court of the United States, in any criminal proceeding, did not afford that complete protection to the witness which the amendment was intended to guarantee. The gist of that decision is contained in the following extracts from the opinion of *Mr. Justice* Blatchford, referring to § 860: "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." And again: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offense to which the question relates."

The inference from this language is that, if the statute does afford such immunity against future prosecution, the witness will be compellable to testify. So, also, in *Emery's Case*, 107 *Mass. 172, 185, 9 Am. Rep. 22, and in [595] *Cullen* v. *Com.* 24 Gratt. 624, upon which much reliance was placed in *Counselman* v. *Hitchcock*, it was intimated that the witness might be required to forego an appeal to the protection of the fundamental law, if he were first secured from future liability and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution. To meet this construction of the constitutional provision, the act in question was passed, exempting the witness from any prosecution on account of any transaction to which he may testify. The case before us is whether this sufficiently satisfies the constitutional guaranty of protection.

The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments, then, as he must necessarily to a large extent determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency (1 Burr's Trial, 244; *Fisher* v. *Ronalds*, 12 C. B. 762; *Reynell* v. *Sprye*, 1 DeG. M. & G. 656; *Adams* v. *Lloyd*, 3 Hurlst. & N. 351; *Merluzzi* v. *Gleeson*, 59 Md. 214; *Bunn* v. *Bunn*, 4 DeG. J. & S. 316; *Ex parte Reynolds*, L. R. 20 Ch. Div. 294; *Ex parte Schofield*, L. R. 6 Ch. Div. 230), the practical result would be, that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible,—in other words, if his testimony operate as a complete pardon for the offense to which it relates,—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.

Our attention has been called to but few cases wherein this provision, which is found with slight variation in the *Constitution [596] of every state, has been construed in connection with a statute similar to the one before us, as the decisions have usually turned upon the validity of statutes providing, as did § 860, that the testimony given by such witness should never be used against him in any criminal prosecution. It can only be said in gen-

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eral that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not to hold the law invalid unless, as was observed by *Mr. Chief Justice* Marshall in *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 128 [3: 162, 175], "the opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into [597] fatal contradictions, which *is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American, jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment.

Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and therefore constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else—much less that it shall be made use of as a pretext for securing immunity to others.

1. Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev. § 451; *Dixon* v. *Vale*, 1 Car. & P. 278; *East* v. *Chapman*, 2 Car. & P. 570, Mood. & M. 46; *State* v. *K*, 4 N. H. 562; *Low* v. *Mitchell*, 18 Me. 372; *Coburn* v. *Odell*, 30 N. H. 540; *Norfolk* v. *Gaylord*, 28 Conn. 309; *Austin* v. *Prince*, 1 Sim. 348; *Com.* v. *Pratt*, 126 Mass. 462; *Chamberlain* v. *Wilson*, 12 Vt. 491, 36 Am. Dec. 356; *Lockett* v. *State*, 63 Ala. 5; *People* v. *Freshour*, 55 Cal. 375.

So, under modern statutes permitting accused persons to *take the stand in their own be- [598] half they may be subjected to cross-examination, upon their statements. *State* v. *Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State* v. *Witham*, 72 Me. 531; *State* v. *Ober*, 52 N. H. 459, 13 Am. Rep. 88; *Com.* v. *Bonner*, 97 Mass. 587; *Com.* v. *Morgan*, 107 Mass. 199; *Com.* v. *Mullen*, 97 Mass. 545; *Connors* v. *People*, 50 N. Y. 240; *People* v. *Casey*, 72 N. Y. 393.

2. For the same reason if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer. *Parkhurst* v. *Lowten*, 1 Meriv. 391, 400; *Calhoun* v. *Thompson*, 56 Ala. 166, 28 Am. Rep 754; *Mahanke* v. *Cleland*, 76 Iowa, 401; *Weldon* v. *Burch*, 12 Ill. 374; *United States* v. *Smith*, 4 Day, 123; *Close* v. *Olney*, 1 Denio, 319; *People* v. *Mather*, 4 Wend. 229, 252-255, 21 Am. Dec. 122; *Williams* v. *Farrington*, 2 Cox, Ch. 202; *Davis* v. *Reid*, 5 Sim. 443; *Floyd* v. *State*, 7 Tex. 215; *Moloney* v. *Dows*, 2 Hilt. 247; *Wolfe* v. *Goulard*, 15 Abb. Pr. 336.

3. If the answer of the witness may have a tendency to disgrace him or bring him into disrepute, and the proposed evidence be material to the issue on trial, the great weight of authority is that he may be compelled to answer, although, if the answer can have no effect upon the case, except so far as to impair the credibility of the witness, he may fall back upon his privilege. 1 Greenl. Ev. §§ 454, 455; *People* v. *Mather*, 4 Wend. 229; *Lohman* v. *People*, 1 N. Y. 379, 49 Am. Dec. 340; *Com.* v. *Roberts*, Brightly (Pa.) 109; *Weldon* v. *Burch*, 12 Ill. 374; *Cundell* v. *Pratt*, 1 Mood. & M. 108; *Ex parte Rowe*, 7 Cal. 184. But even in the latter case, if the answer of the witness will not directly show his infamy, but only *tend* to disgrace him, he is bound to answer. 1 Greenl. Ev. § 456. The cases of *Respublica* v. *Gibbs*, 3 Yeates, 429, and *Galbreath* v. *Eichelberger*, 3 Yeates, 515, to the contrary, are opposed to the weight of authority.

The extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability is within the control of the legislature. *State* v. *Nowell*, 58 N. H. 314, 316.

*4. It is almost a necessary corollary of [599] the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect

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to such offense as if it had never been committed. *Roberts* v. *Allatt*, Mood. & M. 192, overruling *Rex* v. *Reading*, 7 How. St. Tr. 259, 296, and *Rex* v. *Earl of Shaftesbury*, 8 How. St. Tr. 817; *Reg.* v. *Boyes*, 1 Best & S. 311, 321. In the latter case it was suggested, in answer to the production by the solicitor general of a pardon of the witness under the Great Seal, that by statute no such pardon under the Great Seal was pleadable to an impeachment by the Commons in Parliament, and it was insisted that this was a sufficient reason for holding that the privilege of the witness still existed, upon the ground that, though protected by the pardon against every other form of prosecution, the witness might possibly be subjected to parliamentary impeachment. It was also contended in that case, as it is in the one under consideration, "that a bare possibility of legal peril was sufficient to entitle a witness to protection. Nay, further, that the witness was the sole judge as to whether his evidence would bring him into the danger of the law; and that the statement of his belief to that effect, if not manifestly made *mala fide*, would be received as conclusive." It was held, however, by Lord Chief Justice Cockburn that "to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer," although "if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question."

"Further than this," said the Chief Justice, "we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to **600**]influence his *conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

All of the cases above cited proceed upon the idea that the prohibition against his being compelled to testify against himself presupposes a legal detriment to the witness arising from the exposure. As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them. This is but another application of the familiar rule that where one state adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the state from which they are taken. *Cathcart* v. *Robinson*, 30 U. S. 5 Pet. 264, 280 [8: 120, 126]; *McDonald* v. *Hovey*, 110 U. S. 619 [28: 269].

The danger of extending the principle announced in *Counselman* v. *Hitchcock*, 142 U. S. 547 [35: 1110], 3 Inters. Com. Rep. 816, is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others who are desirous of seeking shelter behind his privilege.

*The act of Congress in question, secur- [**601**
ing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England (2 Taylor, Ev. § 1455, where a large number of similar acts are collated) or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this court in *Ex parte Garland*, 71 U. S. 4 Wall. 333, 380 [18: 366, 371], "it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."

In the case of *Pollock* v. *Bridgeport S. B. Co.* ("*The Laura*"), 114 U. S. 411 [29: 147], objection was made that a remission by the Secretary of the Treasury, under U. S. Rev. Stat. § 4294, of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, was ineffectual to destroy liability by reason of the fact that it involved an exercise of the pardoning power. It was held that, in view of the practice in reference to remissions by the Secretary of the Treasury and other officers, which had been sanctioned by statute and acquiesced in for nearly a century, the power vested in the President was not exclusive in the sense that no other officer could remit forfeitures or penalties incurred for the violation of the laws of the United States—citing *United States* v. *Morris*, 23 U. S. 10 Wheat. 246 [6: 314].

The distinction between amnesty and pardon is of no practical importance. It was said in *Knote* v. *United States*, 95 U. S. 149, 152 [24: 442, 443]: "The Constitution does not use the word 'amnesty,' and, except that the term is generally applied where pardon is ex-

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tended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance." Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general par-
603] don for a *past offense, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted.

While the decisions of the English courts construing such acts are of little value here, in view of the omnipotence of Parliament, such decisions as have been made under similar acts in this country are, with one or two exceptions, we believe, unanimous in favor of their constitutionality.

Thus, in *State* v. *Nowell*, 58 N. H. 314, a statute which provided that a clerk, servant, or agent should not be excused from testifying against his principal, and that he should not thereafter be prosecuted for any offense disclosed by him, was held to have deprived him of his privilege of silence. In delivering the opinion, the court observed that "the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; otherwise, the statute would be ineffectual. He is to be secured against all liability to future prosecution as effectually as if he were wholly innocent. This would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which he may be required to testify. . . . The conditional exemption becomes absolute when the witness testifies, and, being no longer liable to prosecution, he is not compelled, by testifying, to accuse or furnish evidence against himself. . . . The constitutional privilege of the witness protects, not another person against whom the witness testifies, but the witness himself. The legal protection of the witness against prosecution for crime disclosed by him is, in law, equivalent to his legal innocence of the crime disclosed. . . . The witness, regarded in law as innocent if prosecuted for a crime which he has been compelled by the statute to disclose, will stand as well as other innocent persons, and it was not the design of the common-law maxim, affirmed by the bill of rights, that he should stand any better."

603] In *Kendrick* v. *Com.* 78 Va. 490, a *statute secured to a witness, called to testify concerning unlawful gaming, immunity against prosecution for any offense committed by him at the time and place indicated, and it was held that, as it gave to the witness full indemnity and assurance against any liability to prosecution, it was his duty to testify, notwithstanding that his answer might have a tendency to disgrace him.

The same construction was given to a similar statute of Texas in *Floyd* v. *State*, 7 Tex. 215, though the opinion is brief and does little more than state the conclusions of the court.

In the recent case of *Ex parte Cohen*, 104 Cal. 524, 26 L. R. A. 423, one Steinberger was charged, under a statute of California, with allowing Cohen to be registered as a voter, knowing that he was not entitled to registration. Cohen, being called as a witness, was asked certain questions with regard to the charge, and set up his privilege. The election law of California provided, not only that the testimony given should not be used in any prosecution against the witness, but that he should not thereafter be liable to indictment, information, or prosecution for the offense with reference to which his testimony was given. The court held that it was only when his evidence might tend to establish an offense for which he might be punished under the laws of the state, that a person is a witness "against himself" in a criminal case, and the fact that, in a proceeding in which he is not the defendant, his testimony might tend to show that he had violated the laws of the state, was not sufficient to entitle him to claim this protection of the Constitution, unless he is at the same time liable to prosecution and punishment for such crime.

"If," said the court, "at the time of the transactions respecting which his testimony is sought, the acts themselves did not constitute an offense; or if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offense has been repealed; if the witness has been tried for the offense and acquitted, or, if convicted, has satisfied the sentence of the law: if the offense is barred by the statute of limitations, and there is no pending prosecution *against the [604 witness,—he cannot claim any privilege under this provision of the Constitution, since his testimony could not be used against him in any criminal case against himself, and consequently he is not compelled to be a witness 'against himself.' Equally is he deprived of claiming this exemption from giving evidence, if the legislature has declared that he shall not be prosecuted or punished for any offense of which he gives evidence. Any evidence that he may give under such a statutory direction will not be 'against himself,' for the reason that, by the very act of giving the evidence, he becomes exempted from any prosecution or punishment for the offense respecting which his evidence is given. In such a case he is not compelled to give evidence which may be used against himself in any criminal case, for the reason that the legislature has declared that there can be no criminal case against him which the evidence which he gives may tend to establish."

In *Hirsch* v. *State*, 8 Baxt. 89, the same construction was given to a similar statute in Tennessee, which exempted witnesses from prosecution for offenses as to which they had given testimony before the grand jury, the court holding that this was "an abrogation of the offense;" that the witness could neither be accused by another, nor could he accuse himself, and therefore he could not criminate himself by such testimony. It is but just to say, however, that in *Warner* v. *State*, 81 Tenn. 52, the same statute was construed as merely offering a reward to a witness for waiving his constitutional privilege, and not as compelling him to answer. But, for the reasons already given, we think that the witness cannot properly be said to give evidence against himself, unless such evidence may in some proceeding

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be used against him, or unless he may be subjected to a prosecution for the transaction concerning which he testifies. In each of the last two cases there were dissenting opinions.

In *Frazee* v. *State*, 58 Ind. 8, a section of the Criminal Code of Indiana compelling a witness to testify against another for gaming, and providing that he should not be liable to indictment or punishment in such case, was enforced, though its constitutionality was not considered at length.

605] *Finally, in *People* v. *Sharp*, 107 N. Y. 427, a section of the Penal Code declared that any person offending against certain provisions of the Code relating to bribery might be compelled to testify, but that the person testifying to the giving of a bribe, which has been accepted, shall not thereafter be liable to indictment, prosecution, or punishment for that bribery. This statute was held not to be violative of the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself. Counsel in that case seem to have pursued much the same line of argument that was made in the case under consideration, claiming that the statutory protection did not go far enough; that the indemnity that it offered to the witness was partial and not complete; that while it might save him from the penitentiary by excluding his evidence, it did not prevent the infamy and disgrace of its exposure. But that, said the court, quoting from *People* v. *Kelly*, 24 N. Y. 83, "is the misfortune of his condition, and not any want of humanity in the law."

It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but, as we have already observed, the authorities are numerous and very nearly uniform to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a 606]*criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other.

It is argued in this connection that, while the witness is granted immunity from prosecution by the Federal government, he does not obtain such immunity against prosecution in the state courts. We are unable to appreciate the force of this suggestion. It is true that the Constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several states, except so far as the 14th Amendment may have made them applicable. *Barron* v. *Baltimore*, 32 U. S. 7 Pet. 243 [8: 672]; *Fox* v. *Ohio*, 46 U. S. 5 How. 410 [12: 213]; *Withers* v. *Buckley*, 61 U. S. 20 How. 84 [15: 816]; *Twitchell* v. *Pennsylvania*, 74 U. S. 7 Wall. 321 [19: 223]; *Presser* v. *Illinois*, 116 U. S. 252 [29: 615].

There is no such restriction, however, upon the applicability of Federal statutes. The 6th article of the Constitution declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The language of this article is so direct and explicit that but few cases have arisen where this court has been called upon to interpret it, or to determine its applicability to state courts. But in the case of *Stewart* v. *Bloom*, 78 U. S. 11 Wall. 493 [20: 176], the question arose whether a debt contracted by a citizen of New Orleans, prior to the breaking out of the rebellion, *was subject in a state court to the [607 statute of limitations passed by Congress June 11, 1864, declaring that as to actions which should accrue during the existence of the rebellion, against persons who could not be served with process by reason of the war, the time when such persons were beyond the reach of judicial process should not be taken or deemed to be any part of the time limited by law for the commencement of such actions. The court held unanimously that the debt was subject to this act, and in delivering the opinion of the court *Mr. Justice* Swayne said: "But it has been insisted that the act of 1864 was intended to be administered only in the Federal courts, and that it has no application to cases pending in the courts of the states. The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. . . . The judicial anomaly would be presented of one rule of property in the Federal courts and another and a different one in the courts of the state, and debts could be recovered in the former which would be barred in the latter." This case was affirmed in *United States* v. *Wiley*, 78 U. S. 11 Wall. 508 [20: 211], and in *Mayfield* v. *Richards*, 115 U. S. 137 [29: 334]. See also

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Mitchell v. *Clark*, 110 U. S. 633 [28: 279]. The same principle has also been applied in a number of cases turning upon the effect to be given to treaties in actions arising in the state courts. *Foster* v. *Neilson*, 27 U. S. 2 Pet. 253 [7: 415]; *207 ½ lb. Papers S. Tobacco* v. *United States* ("*The Cherokee Tobacco*") 78 U. S. 11 Wall. 616 [20: 227]; *Edye* v. *Robertson* ("*Head Money Cases*"), 112 U. S. 580 [28: 798]. Of similar character are the cases in which we have held that the laws of the several states upon the subjects of pilotage, quarantines, inspections, and other similar regulations were operative only so long as Congress failed to legislate upon the subject.

The act in question contains no suggestion that it is to be applied only to the Federal courts. It declares broadly that "no person shall be excused from attending and testifying . . . before the Interstate Commerce Commission . . . on the ground . . . that [608] the testimony . . . required *of him may tend to criminate him, etc. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify," etc. It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any *transaction, matter, or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general and to be applicable whenever and in whatever court such prosecution may be had.

But even granting that there were still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in *Reg.* v. *Boyes*, 1 Best & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." Such dangers it was never the object of the provision to obviate.

The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to indemnity *against the state, or even against the pros- [609] ecutor if the action of the latter was taken in good faith and in a reasonable belief that he was justified in so doing.

In the case under consideration the grand jury was engaged in investigating certain alleged violations of the interstate commerce act, among which was a charge against the Alleghany Valley Railway Company of transporting coal of the Union Coal Company from intermediate points to Buffalo, at less than the established rates between the terminal points, and a further charge of discriminating in favor of such coal company by rebates, drawbacks, or commissions on its coal, by which it obtained transportation at less than the tariff rates. Brown, the witness, was the auditor of the road, whose duty it was to audit the accounts of the officers, and the money paid out by them. Having audited the accounts of the freight department during the time in question, he was asked whether he knew of any such discrimination in favor of the Union Coal Company, and declined to answer upon the ground that he would thereby incriminate himself.

As he had no apparent authority to make the forbidden contracts, to receive the money earned upon such contracts, or to allow or pay any rebates, drawbacks, or commissions thereon, and was concerned only in auditing accounts, and passing vouchers for money paid by others, it is difficult to see how, under any construction of § 10 of the interstate commerce act, he could be said to have wilfully done anything, or aided or abetted others in doing anything, or in omitting to do anything, in violation of the act—his duty being merely to see that others had done what they purported to have done, and that the vouchers rendered by them were genuine. But, however this may be, it is entirely clear that he was not the chief, or even a substantial, offender against the law, and that his privilege was claimed for the purpose of shielding the railway or its officers from answering a charge of having violated its provisions. To say that, notwithstanding his immunity from punishment, he would incur personal odium and disgrace from answering these questions, seems too much like an abuse of language to be worthy of serious *consideration. But, even if [610] this were true, under the authorities above cited, he would still be compelled to answer, if the facts sought to be elucidated were material to the issue.

If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the interstate commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are therefore of opinion that the witness was compellable to answer, and that *the judgment of the court below must be affirmed.*

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Mr. Justice **Shiras** dissenting:

It is too obvious to require argument that, when the people of the United States, in the 5th Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his right thereto should not be devested or impaired by any act of Congress.

Did Congress, by the act of February 11, 1893, which enacted that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture," seek to *compel* any person to be a witness against himself? And, if so, was such provision of that act void because incompatible with the constitutional guaranty?

611] *That it was the intention of the act to exact compulsory disclosure by every witness of all "testimony or evidence, documentary or otherwise, required of him," regardless of the fact that such disclosure might tend to criminate him or subject him to a penalty or forfeiture, was held by the court below, and such seems to be the plain meaning of the language of the act.

That the questions put to the witness in the present case, tended to accuse and incriminate him, was sworn to by the witness himself, and was conceded or assumed by the court below. The refusal by the witness, in the exercise of his constitutional immunity, to answer the questions put, was held by the court to be an act of contempt, and the witness was ordered to pay a fine, and to be imprisoned until he should have answered the questions.

The validity of the reasons urged in defense of the action of the court below is the matter which this court has to consider.

Those reasons are found in that other provision of the act, which enacts that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or either of them, or in any such case or proceeding;" and it is claimed that it was competent for Congress to avoid the plea by a witness of his constitutional immunity, in proceedings under the act in question, by that provision.

As the apparent purpose of the Constitution was to remove the immunity from self-accusation from the reach of legislative power, the first and natural impulse is to regard any act of Congress which authorizes courts to fine and imprison men for refusing to criminate themselves as obviously void. But it is the duty of this court, as the final expositor as well of the Constitution as of the acts of Congress, to dispassionately consider and determine this question.

It is sometimes said that, if the validity of a statute is merely doubtful, if its unconstitutionality is not plainly *obvious, the courts [612 should not be ready to defeat the action of the legislative branch of the government; and it must be conceded that when such questions arise, under the ordinary exercise of legislative power, it is plainly the duty of the courts not to dispense with the operation of laws formally enacted, unless the constitutional objections are clear and indisputable.

On the other hand, when the courts are confronted with an explicit and unambiguous provision of the Constitution, and when it is proposed to avoid or modify or alter the same by a legislative act, it is their plain duty to enforce the constitutional provision, unless it is clear that such legislative act does not infringe it in letter or spirit.

Before addressing ourselves immediately to the case in hand, it may be well to examine the authorities respectively cited.

The first case in which there was any consideration of this constitutional provision was the proceeding in the circuit court of the United States for the district of Virginia, in the year 1807, wherein Aaron Burr was indicted and tried for treason, and for a misdemeanor in preparing the means for a military expedition against Mexico, a territory of the King of Spain with whom the United States were at peace.

It appears from the report of that case, as made by David Robertson and published in two volumes by Hopkins & Earle, in Philadelphia, in 1808, that in the first place an application was made to Chief Justice Marshall sitting as a committing magistrate, by the district attorney of the United States, to commit the accused on two charges: 1st, for setting on foot and providing the means for an expedition against the territories of a nation at peace with the United States; and, 2d, for committing high treason against the United States. Burr was committed to answer the first charge only; but at the subsequent term of the court the application to commit him on a charge of high treason was renewed, testimony to sustain the charge was adduced, Burr was bound over to answer the charge, and a grand jury was impaneled and charged by the Chief Justice.

*While the grand jury was considering [613 the case, the district attorney called to be sworn Dr. Erick Bollman, with a view that he should testify before the grand jury; and, as it appeared that the facts to which he was expected to testify might involve him as an accessory, the district attorney produced and tendered the witness a pardon by the President of the United States. This pardon the witness declined to accept, and thereupon argument was had as to the operation of a pardon which the witness declined to accept, and as to whether the witness or the court was to be the judge as to the propriety of answering the questions put. Upon those points the Chief Justice reserved his decision. Nor does it appear that he made any decision—probably because Dr. Bollman went voluntarily before the grand jury and testified. 1 Burr's Trial, 190, 193. Subsequently, while the grand jury were still considering the case, one Willie was called and asked whether he had, under instructions from Aaron Burr, copied a certain paper,

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which was then exhibited to him. This question the witness refused to answer, lest he might thereby incriminate himself. The Chief Justice, observing that if the witness was to decide upon this it must be on oath, interrogated the witness whether his answering the question would criminate himself, to which he replied that it might in a certain case. Thereupon the Chief Justice withheld the point for argument. A full and able argument was had, and, after consideration, the Chief Justice expressed himself as follows: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privileges which the law allows, and which he claims. It follows necessarily, then, from this state of things, [614] *that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say, upon his oath, that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received. The counsel for the United States have also laid down this rule, according to their understanding of it, but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement, a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it might be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that might form a necessary and essential part of a crime, which is *punishable by the laws. . . . In [615] such a case, the witness must himself judge what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer." 1 Burr's Trial, 244, 245.

In *Boyd* v. *United States*, 116 U. S. 616 [29: 746], there came into question the validity of the 5th section of the act of June 22, 1874 (18 Stat. at L. 186), wherein it was provided that "in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suits in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court."

This section was held to be unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the 4th and 5th Amendments of the Constitution.

It was contended on behalf of the government that the act of February 25, 1868 (15 Stat. at L. 37), whereby it was enacted that "no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence or in any manner and against such party or witness, or his property or estate, in any *court of the United States [616] or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness," relieved the act of June 22, 1874, of the objections made. But this court said, by *Mr. Justice* Bradley: "No doubt it was supposed that in this new form, couched as it was in almost the language of the 15th section of the old judiciary act, except leaving out the restriction to cases in which the court of chancery would decree a discovery, it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained, and that the law, though very

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speciously worded, is still obnoxious to the prohibition of the 4th Amendment of the Constitution as well as of the 5th."

Other observations made by *Mr. Justice* Bradley in that case are worthy to be quoted:

"As therefore suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the 4th Amendment of the Constitution, and of that portion of the 5th Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the 5th Amendment of the Constitution, and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the 4th Amendment. Though the proceeding in question is devested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight devia-[617] tions from legal modes of *procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law." 116 U. S. 634, 635 [29: 752, 753].

In the recent case of *Counselman* v. *Hitchcock*, 142 U. S. 547, [35: 1110], 3 Inters. Com. Rep. 816, there was a proceeding before a grand jury to investigate certain alleged violations of the act to regulate commerce, and one Charles Counselman, having appeared before the grand jury and been sworn, declined to answer certain questions put to him, on the ground that the answers might tend to criminate him. The district court of the United States for the northern district of Illinois, after a hearing, adjudged Counselman to be in contempt of court, and made an order fining him, and directing that he be kept in custody by the marshal until he should have answered said questions. Thereupon Counselman filed a petition in the circuit court of the United States, setting forth the facts, and praying for a writ of habeas corpus. That court held that the district court was in the exercise of its lawful authority in doing what it had done, dismissed Counselman's petition, and remanded him to the custody of the marshal. 44 Fed. Rep. 268, 3 Inters. Com. Rep. 826. An appeal was taken to this court, by which the judgment of the circuit court was reversed, and the cause was remanded to that court with a direction to discharge the appellant from custody. *Mr. Justice* Blatchford, in delivering the opinion of the court, made a careful review of the adjudged cases, including several decisions in states where there is a like constitutional provision to that contained in *the[618] Federal Constitution, and where attempts had been made by legislation to avoid the constitutional provision by substituting provisions relieving the witness from future criminal prosecution. It is needless to here examine those cases.

The contention there made on behalf of the government was that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but this court said:

"Such is not the language of the Constitution. Its provision is that no person shall be compelled in *any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the interstate commerce act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was therefore a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the interstate commerce act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case. It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." 142 U. S. 562 [35: 1113], 3 Inters. Com. Rep. 816.

*To the argument that § 860 of the Re-[619] vised Statutes, which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture," removed the constitutional privilege of Counselman, the court

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said: "That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . . This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and, if he had refused to answer, he could not possibly have been convicted. The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of § 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso. 142 U. S. 565 [35:1114], 3 Inters. Com. Rep. 816.

620] *It is, however, now contended, and that is the novel feature of the present case, that the following provision in the act of February 11, 1893, removes the constitutional difficulty: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission." And it is surmised that this proviso was enacted in view of a suggestion to that effect in the opinion in the *Counselman Case*.

It is indeed true that *Mr. Justice* Blatchford did say that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates;" and it may be inferred from this language that there might be framed a legislative substitute for the constitutional privilege which would legally empower a court to compel an unwilling witness to criminate himself. But the case did not call for such expression of opinion, nor did *Mr. Justice* Blatchford undertake to suggest the form of such an enactment. Indeed, such a suggestion would not have comported with his previous remarks, above cited, that "legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled, in any criminal case, to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso."

Is, then, the undeniable repugnancy that exists between the constitutional guaranty and the compulsory provisions of the *act of [621 February 11, 1893, overcome by the proviso relieving the witness from prosecution and from any penalty or forfeiture "for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence?"

As already said, the very fact that the founders of our institutions, by making the immunity an express provision of the Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against *any* act professing to dispense with the constitutional privilege. It may not be said that, by no form of enactment can Congress supply an adequate substitute, but doubtfulness of its entire sufficiency, uncertainty of its meaning and effect, will be fatal defects.

What, then, is meant by the clause in this act that "*no person shall be prosecuted* . . . for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise?" How possibly can effect be given to this provision, if taken literally? If a given person is charged with a wilful violation of the interstate commerce act, how can the prosecuting officers or the grand juries know whether he has been examined as a witness concerning the same matter before the commission or some court? Nor can the accused himself necessarily know what particular charge has been brought against him, until an indictment has been found. But when an indictment has been found, and the accused has been called upon to plead to it, he assuredly has been *prosecuted*. So that all that can be said is, that the witness is *not* protected, by the provision in question, from being *prosecuted*, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea. It is no reply to this to say that his condition, in those respects, is no worse than that of any other innocent man who may be wrongfully charged. The latter has not been compelled, on penalty of *fine and imprisonment, to disclose un- [622 der oath facts which have furnished a clue to the offense with which he is charged.

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Nor is it a matter of perfect assurance that a person who has compulsorily testified before the Commission, grand jury, or court, will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of the evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design.

Again, what is the meaning of the clause of the act that "no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying?" The implication would seem to be that, except for such a clause, perjury could not be imputed to a witness who had been compelled to so testify. However that may be, and whether or not the clause is surplusage, it compels attention to the unfortunate situation in which the witness is placed by the provisions of this act. If he declines to testify on the ground that his answer may incriminate himself, he is fined and imprisoned. If he submits to answer, he is liable to be indicted for perjury by either or both of the parties to the controversy. His position in this respect is not that of ordinary witnesses testifying under the compulsion of a subpœna. His case is that of a person who is exempted by the Constitution from testifying at all in the matter. He is told by the act of Congress that he must nevertheless testify but that he shall be protected from any prosecution, penalty, or forfeiture by reason of so testifying. But he is subjected to the hazard of a charge of perjury, whether such charge be rightfully or wrongfully made. It does not do to say that other witnesses may be so charged, because if the privilege of silence, under the constitutional immunity, had not been taken away, this witness would not have testified, and could not have been subjected to a charge of perjury.

Another danger to which the witness is subjected by the withdrawal of the constitutional safeguard is that of a prosecution in the state [623] courts. The same act or *transaction which may be a violation of the interstate commerce act may also be an offense against a state law. Thus, in the present case, the inquiry was as to supposed rebates on freight charges. Such payments would have been in disregard of the Federal statute, but a full disclosure of all the attendant facts (and if he testify at all he must answer fully) might disclose that the witness had been guilty of embezzling the moneys intrusted to him for that purpose; or it might have been disclosed that he had made false entries in the books of the state corporation, in whose employ he was acting. These acts would be crimes against the state, for which he might be indicted and punished, and he may have furnished, by his testimony in the Federal court or before the commission, the very facts or, at least, clues thereto which led to his prosecution.

It is indeed claimed that the provisions under consideration would extend to the state courts and might be relied on therein as an answer to such an indictment. We are unable to accede to such a suggestion. As Congress cannot create state courts, nor establish the ordinary rules of property and of contracts, nor denounce penalties for crimes and offenses against the states, so it cannot prescribe rules of proceeding for the state courts. The cases of *Stewart* v. *Bloom*, 78 U. S. 11 Wall. 493 [20: 176]; *United States* v. *Wiley*, 78 U. S. 11 Wall. 508 [20: 211], and *Mayfield* v. *Richards*, 115 U. S. 137 [29: 334], are referred to as sustaining the proposition. Those were cases defining the scope and effect of the act of Congress of June 11, 1864, providing that as to actions which should accrue, during the existence of the rebellion, against persons who could not be served with process by reason of the war, the time when such persons were beyond the reach of process should not be taken or deemed to be any part of the time limited by law for the commencement of such actions. And it was held that it was the evident intention of Congress that the act was to apply to cases in state as well as in Federal courts, and as to the objection that Congress had no power to lay down rules of action for the state courts, it was held that the act in question was within the war power as an act to remedy an evil which was one of the *con- [624] sequences of the war, *Mr. Justice* Swayne saying:

"The war power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the power to make war and suppress insurrections. It is a beneficent exercise of this authority. It only applies coercively the principle of the law of nations, which ought to work the same results in the courts of all the rebellious states without the intervention of this enactment."

Whatever may be thought of these cases, and of the reasoning on which they proceed, it is plain that they are not applicable to the present statute. The latter does not in express terms, nor by necessary implication, extend to the state courts; and, if it did, it could not be sustained as an exercise of the war power. On this part of the subject it will be sufficient to cite the language of *Chief Justice* Marshall in giving the opinion of the court in the case of *Barron* v. *Baltimore*, 32 U. S. 7 Pet. 247 [8: 674]:

"The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it unless it be shown to come within the provisions of the 25th section of the judiciary act. The plaintiff in error contends that it comes within the clause in the 5th Amendment to the Constitution, which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause. The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the

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United States for themselves, for their own government, and not for the government of the [625] individual states. *Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes. If these propositions be correct, the 5th Amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restriction on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest. . . . We are of opinion that the provision in the 5th Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."

This result has never since been questioned. As, then, the provision of the Constitution of the United States which protects witnesses from self-incrimination cannot be invoked in a state court, so neither can the congressional substitute therefor.

It is urged that, even if the state courts would not be compelled to respect the saving clause of the Federal statute, in respect to crimes against the state, yet that such a jeopardy is too remote to be considered. The force of this contention is not perceived. On the contrary, such is the nature of the commerce which is controlled by the interstate com- [626] merce law, *so intimately involved are the movements of trade and transportation, as well within as between the states, that just such questions as those which are now considered may be naturally expected to frequently arise.

It is said that the constitutional protection is solely against prosecutions of the government that grants it, and that, in this case, the questions asked the witness related exclusively to matters of interstate commerce, in respect of which there can be but one sovereign; that his refusal to answer related to his fear of punishment by *that* sovereign, and to nothing else; and that no answer the witness could make could possibly tend to criminate him under the laws of any other government, be it foreign or state.

But, as we have seen, it is entirely within the range of probable events that the very same act or transaction may constitute a crime or offense against both governments, state and Federal. This was manifested in the case of *Ex parte Fonda*, 117 U. S. 516 [29: 994]. That was an original application to this court for a writ of habeas corpus by one who was a clerk in a national bank, and who alleged in his petition that he had been convicted in one of the courts of Michigan under a statute of that state, and sentenced to imprisonment for having embezzled the funds of that banking institution. The principal ground upon which he asked for a writ of habeas corpus and for his discharge from custody was that the offense for which he was tried was covered by the statutes of the United States, and was therefore exclusively cognizable by the Federal courts. But this court refused the application without, however, deciding whether the same act was or was not an offense against both governments. A similar question was presented in *New York* v. *Eno*, 155 U. S. 98 [39: 83], and these observations were made by *Mr. Justice* Harlan, who delivered the opinion of the court: "Whether the offenses described in the indictment against Eno are offenses against the state of New York and punishable under its laws, or are made by existing statutes offenses also against the United States and are exclusively cognizable by courts of the United States; and whether the same acts, upon the part of the accused, may *be offenses against [627] both the national and state governments and punishable in the judicial tribunals of each government, without infringing upon the constitutional guaranty against being put twice in jeopardy of limb for the same offense, these are questions which the state court of original jurisdiction is competent to decide in the first instance;" and accordingly the writ of habeas corpus was dismissed, and the accused was remanded to the custody of the state authorities. But, as already observed, not only may the same act be a common offense to both governments, but the disclosures compulsively made in one proceeding may give clues and hints which may be subsequently used against the witness in another, to the loss of his liberty and property.

Much stress was laid in the argument on the supposed importance of this provision in enabling the commission and the courts to enforce the salutary provisions of the interstate commerce act. This, at the best, is a dangerous argument, and should not be listened to by a court, to the detriment of the constitutional rights of the citizen. If, indeed, experience has shown, or shall show, that one or more of the provisions of the Constitution has become unsuited to affairs as they now exist, and unduly fetters the courts in the enforcement of useful laws, the remedy must be found in the right of the nation to amend the fundamental law, and not in appeals to the courts to substitute for a constitutional guaranty the doubtful and uncertain provisions of an experimental statute.

It is certainly speaking within bounds to say that the effect of the provision in question, as a protection to the witness, is purely conjectural. No court can foresee all the results and consequences that may follow from enforcing this law in any given case. It is quite *certain* that the witness is *compelled* to

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testify against himself. Can any court be *certain* that a sure and sufficient substitute for the constitutional immunity has been supplied by this act? and if there be room for reasonable doubt, is not the conclusion an obvious and necessary one?

It is worthy of observation that opposite views of the validity of this provision have been ex-[628] pressed in the only two cases *in which the question has arisen in the circuit court—one, in the case of *United States* v. *James*, 60 Fed. Rep. 257, where the act was held void; the other, the present case. In most of the cases cited, wherein state courts have passed upon analogous questions, and have upheld the sufficiency of a statute dispensing with the constitutional immunity, there have been dissenting judges.

A final observation, which ought not to be necessary, but which seems to be called for by the tenor of some of the arguments that have been pressed on the court, is that the constitutional privilege was intended as a shield for the innocent as well as for the guilty. A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.

But surely no apology for the Constitution, as it exists, is called for. The task of the courts is performed if the Constitution is sustained in its entirety, in its letter and spirit.

The judgment of the circuit court should be reversed and the cause remanded, with directions to discharge the accused from custody.

I am authorized to state that *Mr. Justice* **Gray** and *Mr. Justice* **White** concur in this dissent.

Mr. Justice **Field** dissenting:

I am unable to concur with my associates in the affirmance of the judgment of the circuit court of the United States for the western district of Pennsylvania.

The appellant and petitioner had been subpœnaed as a witness before the grand jury called at a term of the district court of the same district, to testify with reference to a charge, under investigation by that body, against certain officers and agents of the Allegheny Valley Railroad Company, of having violated certain provisions of the interstate commerce act. Several interrogatories were addressed by the grand jury to the witness, which he refused to answer on the ground that his answers might tend to criminate him. [629] On a *rule to show cause why he should not be punished for a contempt, and be compelled to answer, he invoked his constitutional privilege of silence.

It is stated in the brief of counsel that no question was raised as to the good faith of the appellant, the petitioner, in invoking this privilege, but the ground was taken and held to be sufficient, that under the statute of Congress of February 11, 1893, he was bound to answer the questions. On his still persisting in his refusal, he was adjudged guilty of contempt and committed. He then sued out a writ of habeas corpus from the circuit court, and on the production of his body before that court and the return of the marshal, the same position was taken and the statute was held valid and sufficient to require him to answer, and he was accordingly remanded. From the order remanding him and thus adjudging the statute to be valid and constitutional in requiring the witness to answer the inquiries propounded to him, notwithstanding his invoking the privilege of exemption from answering when upon his statement his answer would tend to criminate himself, the petitioner appealed to this court.

The 5th Amendment of the Constitution of the United States declares that no person shall be compelled, in any criminal case, to be a witness against himself. The act of Congress of February 11, 1893, entitled "An Act in Relation to Testimony before the Interstate Commerce Commission, and in Cases or Proceedings under or Connected with an Act Entitled 'An Act to Regulate Commerce,' Approved February 4, 1887, and Amendments thereto," provides as follows: "That no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents, before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary *or otherwise, required of him, [630] may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents required, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment."

The 5th Amendment of the Constitution of the United States gives absolute protection to a person called as a witness in a criminal case against the compulsory enforcement of any criminating testimony against himself. He is not only protected from any criminating testimony against himself relating to the offense under investigation, but also relating to any act which may lead to a criminal prosecution therefor.

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No substitute for the protection contemplated by the amendment would be sufficient were its operation less extensive and efficient.

The constitutional amendment contemplates that the witness shall be shielded from prosecution by reason of any expressions forced from him whilst he was a witness in a criminal case. It was intended that against such attempted enforcement he might invoke, if desired, and obtain, the shield of absolute silence. No different protection from that afforded by the amendment can be substituted in place of it. The force and extent of the constitutional guaranty are in no respect to be weakened or **631**]modified, and the like *consideration may be urged with reference to all the clauses and provisions of the Constitution designed for the peace and security of the citizen in the enjoyment of rights or privileges which the Constitution intended to grant and protect. No phrases or words of any provision securing such rights or privileges to the citizen, in the Constitution, are to be qualified, limited, or frittered away. All are to be construed liberally that they may have the widest and most ample effect.

No compromise of phrases can be made by which one of less sweeping character and less protective force in its influences can be substituted for any of them. The citizen cannot be denied the protection of absolute silence which he may invoke, not only with reference to the offense charged, but with respect to any act of criminality which may be suggested.

The constitutional guaranty is not fully secured by simply exempting the witness from prosecution for the designated offense involved in his answer as a witness. It extends to exemption from, not only prosecution for the offense under consideration, but from prosecution for any offense to which the testimony produced may lead.

The witness is entitled to the shield of absolute silence respecting either. It thus exempts him from prosecution beyond the protection conferred by the act of Congress. It exempts him where the statute might subject him to self-incrimination.

The amendment also protects him from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution. It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offense under prosecution. But we do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, "it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that in bestowing upon witnesses in criminal cases **632**]*the privilege of silence when in danger of self-incrimination, they would at the same time save him *in all such cases* from the shame and infamy of confessing disgraceful crimes, and thus preserve to him such measure of self-respect. . . . It is true, as counsel observes, that both the safeguard of the Constitution and the common-law rule spring alike from that sentiment of *personal self respect, liberty, independence, and dignity* which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others. What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was ignorant?"

This court has declared, as stated, that "no attempted *substitute* for the constitutional safeguard is sufficient unless it is a *complete* substitute. Such is not the nature and effect of this statute of Congress under consideration. A witness, as observed by counsel, called upon to testify to something which will incriminate him, claims the benefit of the safeguard; he is told that the statute fully protects him against prosecution for his crime. 'But,' he says, 'it leaves me covered with infamy and unable to associate with my fellows.' He is then told that *under the rule of the common law* he would not have been protected against mere infamy, and that the constitutional provision does not assume to protect against infamy *alone*, and that it should not be supposed that its object was to protect against infamy even when associated with crime. But he answers: 'I am not claiming any common-law privilege, but this particular constitutional safeguard. What its purpose was does not matter. It saves me from infamy, and you furnish me with no *equivalent*, unless by such equivalent I am equally saved from infamy.'" And it is very justly *urged that "a statute is not a full equiva [**633** lent under which a witness may be compelled to cover himself with the infamy of a crime, even though he may be armed with a protection against its merely penal consequences."

In *Respublica* v. *Gibbs*, in the supreme court of Pennsylvania [3 Yeates, 429], an indictment was found against the defendant for violation of the law passed in 1799 to regulate the general elections within the commonwealth. One Benjamin Gibbs, the father of the defendant, a blind and aged man, entitled as an elector, being both a native and an elector above thirty years, who had paid taxes for many years, was led to the election ground by his son and offered his vote. He was told that previous to his vote being received he must answer upon oath or affirmation the following questions, to wit: "Did you at all times during the late revolution continue in allegiance to this state or some one of the United States, or did you join the British forces, or take the oath of allegiance to the King of Great Britain, and, if so, at what period? Have you ever been attainted of high treason against this commonwealth, and if you have, has the attainder been reversed, or have you received a pardon?"

In the litigation which followed these proceedings counsel stated that the Constitution of Pennsylvania, formed on the 28th of September, 1776, directs that "no man can be compelled to give evidence against himself,"

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and that the same words were repeated in the Constitution of 1790. And it was contended that the true meaning of the Constitution and law was that no question should be asked a person, the answer to which may tend to charge him either with a crime or bring him into disgrace or infamy.

The Chief Justice. Shippen, in his charge of the court, among other things, said: "It has been objected that the questions propounded to the electors contravene an established principle of law. The maxim is *Nemo tenetur seipsum accusare (sen prodere)*. It (the maxim) is founded on the best policy, and runs throughout our whole system of jurisprudence. It is the uniform practice of courts of justice as to witnesses and jurors. It is considered cruel **634**] and unjust to *propose questions which may tend to criminate the party. And so jealous have the legislatures of this commonwealth been of this mode of discovery of facts that they have refused their assent to a bill brought in to compel persons to disclose on oath papers as well as facts relating to questions of mere property. And may we not justly suppose that they would not be less jealous of securing our citizens against this mode of self-accusation? The words *accusare* or *prodere* are general terms, and their sense is not confined to cases where the answers to the questions proposed would induce to the punishment of the party; if they would involve him in shame or reproach, he is under no obligation to answer them. The avowed object of putting them is to show that the party is under a legal disability to elect or be elected; and they might create an incapacity to take either by purchase or descent, to be a witness or juror, etc. We are all clear on this point, that the inspectors were not justified in proposing the question objected to, though it is probable they did not wrong intentionally. Nevertheless, if by exacting an illegal oath the election was obstructed or interrupted, it seems most reasonable to attribute it to them."

And in *Galbreath* v. *Eichelberger*, reported in that volume (3 Yeates, 515), it was held by the same court that "no one will be compelled to be sworn as a witness whose testimony tends to accuse himself of an immoral act."

It is conceded as an established doctrine, universally assented to, that a witness claiming his constitutional privilege cannot be questioned concerning the way in which he fears he may incriminate himself, or, at least, only so far as may be needed to satisfy the court that he is making his claim in good faith, and not as a pretext. *Fisher* v. *Ronalds*, 12 C. B. 762; *Adams* v. *Lloyd*, 3 Hurlst. & N. 351; *Reg.* v. *Boyes*, 7 Jur. N. S. 1158; *Ex parte Reynolds*, 22 Am. L. Reg. N. S. 21, *note*, p. 28; *Temple* v. *Com.* (Va.) 2 Crim. L. Mag. 645, *note*, 654.

To establish such good faith on the part of the witness in claiming his constitutional privilege of exemption from self-incrimination where **635**] he is examined as a witness in a *criminal case, he may be questioned as to his apprehension of criminating himself by his answer, but no further.

The position that if witnesses are allowed to assert an exemption from answering questions when in their opinion such answers may tend to incriminate them, the proof of offenses like those proscribed by the interstate commerce act will be difficult and probably impossible, ought not to have a feather's weight against the abuses which would follow necessarily the enforcement of criminating testimony. The abuses and perversions of sound principles which would creep into the law by yielding to arguments like these—to what is supposed to be necessary for the public good—cannot be better stated than it was by the late *Justice* Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635 [29: 746, 752]. Said the learned justice:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. *A close and literal construction deprives them of half their efficacy*, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

As said by counsel for the appellant:

"The freedom of thought, of speech, and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the Constitution, and the contests were fresh in the memories and traditions of the people at that time."

*The act of Congress of February 11, **[636** 1893, very materially qualifies the constitutional privilege of exemption of a witness, in a criminal case, from testifying, and removes the security against unreasonable searches and seizures which is also provided by the Constitution against the exposure of one's private books and papers.

The 4th Amendment of the Constitution, which declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated," is equally encroached upon by the law in question.

The position of the respondent, that the witness can lawfully be compelled to answer, on the ground that the act of Congress in effect abrogates the constitutional privilege in providing that the punishment of the alleged offense, in relation to which the witness was sought to be examined, shall not be imposed in case he answers the interrogatories propounded, is not sound on two grounds: First, because the statute could not abrogate or in any respect diminish the protection conferred by the constitutional amendment; and, secondly, because the statute does not purport to abrogate the offense, but only provides protection against any proceeding to punish it.

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The constitutional safeguards for security and liberty cannot be thus dealt with. They must stand as the Constitution has devised them. They cannot be set aside and replaced by something else on the ground that the substitute will probably answer the same purpose. The citizen, as observed by counsel, is entitled to the very thing which the language of the Constitution assures to him.

Every one is protected by the common law from compulsory incrimination of himself. This protection is a part of that general security which the common law affords against defamation,—that is, against malicious and false imputations upon one's character, as it defends against injurious assaults upon one's person, even though the defamation is created by publication made by himself under compulsion. The defamation arising from self-incrimination may be equally injurious as if originating purely from the maliciousness of **637**]others. *The reprobation of compulsory self-incrimination is an established doctrine of our civilized society. As stated by appellant's counsel, it is the "result of a long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other." As such, it should be condemned with great earnestness.

The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought.

A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement.

The counsel of the appellant justly observes on this subject, as on many of the proceedings taken to escape from the enforcement of the constitutional and legal protection established to guard a citizen from any unnecessary restraints upon his person, action, or speech, that "the proud sense of personal independence, which is the basis of the most valued qualities of a free citizen, is sustained and cultivated by the consciousness that there are limits which even the state cannot pass in tearing open the secrets of his bosom. The limit which the law carefully assigns to the power to make searches and seizures proceeds from the same source."

The doctrine condemning attempts at self-incrimination is declared in numerous cases. Starkie, in his treatise on Evidence, observes that the rule forbidding such incrimination is based upon two grounds, one of policy and one of humanity; "of policy because it would force a witness under a strong temptation to commit perjury, and of humanity because it would be to extort a confession by duress, every species and description of which the law abhors." (Am. ed.) pp. 40, 41.

In *United States* v. *Collins*, 1 Woods, 511, *Mr. Justice* Bradley said: "The immunity is founded on principles of public policy and a regard to the just liberties of every citizen." And we have no sympathy for the efforts of any individual or tribunal to weaken or fritter away any of the provisions of the Constitution, **638**] even the least, intended for *the protection of the private rights of the citizen. Those provisions should receive the construction which would give them the widest and most beneficent effect intended.

But there is another and conclusive reason against the statute of Congress. It undertakes, in effect, to grant a pardon in certain cases to offenders against the law, that is, on condition that they will give full answers to certain interrogatories propounded. It declares that the alleged offender shall not be punished for his offense upon his compliance with a certain condition. The legal exemption of an individual from the punishment which the law prescribes for the crime he has committed is a pardon, by whatever name the act may be termed. And a pardon is an act of grace, which it is, so far as relates to offenders against the United States, the sole prerogative of the President to grant.

In *Ex parte Garland*, 71 U. S. 4 Wall. 380 [18: 371], this court, after stating that the Constitution provides that the President shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment, says: "The power thus conferred is unlimited with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

Congress cannot grant a pardon. That is an act of grace which can only be performed by the President. The constitutional privilege invoked by the appellant should have had full effect, and its influence should not have been weakened in any respect by the statute which attempted to exercise a prerogative solely possessed by the President.

The order remanding the appellant should therefore, in our judgment, be reversed, and an order entered that he be discharged from custody and be set at liberty.

CAROLINE SOUTHWORTH, EXTX. [639 of JOHN P. SOUTHWORTH, Deceased, *Appt.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 639-642.)

Pay of commissioner—when not entitled to pay.

1. A lack of good faith on the part of a commissioner in issuing warrants will bar his claim against the United States for compensation.
2. A commissioner who exercises no discretion in issuing warrants in great numbers, but issues

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NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 567.

When officer liable for error in judgment; for neglect or refusal to perform judicial or ministerial duty; for torts or breach of trust,—see note to Kendall v. Stokes, 11: 506.

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them in all cases in which complaints are made, allowing clerks to affix his signature thereto in pursuance of the general purpose to affect the register of votes for an election, and not to arrest and punish offenders, does not act in a just sense as a judicial officer, so as to be entitled to any compensation from the United States.

[No. 652.]

Argued and Submitted March 3, 1896. Decided March 23, 1896.

APPEAL from a judgment of the Court of Claims for the defendant in a suit brought by John P. Southworth against the United States for services as United States Commissioner for the District of Louisiana. *Affirmed.*

See same case, 151 U. S. 179 [38: 119].

The facts are stated in the opinion.

Messrs. **Lewis Abraham** and **George A. King** for appellant.

Messrs. **J. E. Dodge**, Assistant Attorney General, and *Charles W. Russell* for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

On December 16, 1878, the testator of plaintiff filed his petition in the court of claims, praying judgment against the United States for the sum of $82,830 for services as United [640] *States commissioner for the district of Louisiana. The petition alleged that proceedings were commenced before him as such commissioner in 8,283 cases, and that under U. S. Rev. Stat. § 1986, he was entitled to $10 for each case. A demurrer thereto having been sustained, and a judgment of dismissal rendered, his executrix, the present appellant—he having died pending the suit—appealed to this court, and here the judgment of the court of claims was reversed, and the case remanded for further proceedings. 151 U. S. 179 [38: 119].

In the opinion then filed this court, while disapproving of the contention that the mere multitude of cases was proof of a lack of good faith, at the same time distinctly recognized that no cause of action arose against the government unless the proceedings, judicial in form, were instituted and carried on in good faith and with a view to the arrest and punishment of offenders; and the case was remanded in order that that question of fact might be considered and determined. Thereafter a trial was had in the court of claims, and upon the testimony presented that court found, in its sixth finding, as follows: "From said facts the court finds the ultimate fact to be that the claimant's testator did not perform the services for the United States in good faith for the purpose of enforcing the criminal law." And upon this finding judgment was entered in favor of the defendant. From which judgment the plaintiff has again appealed to this court.

If nothing else were before us than the conclusion of the court of claims, expressed in the sixth finding, there would be little for consideration; because, as was held when the case was here before, a lack of good faith on the part of a commissioner may rightfully be pleaded in bar of any claim against the United States for compensation.

But the contention is that this sixth finding is dependent on facts stated in the prior findings, and that they do not warrant the conclusion. Those findings show that "the prosecutions were the result of a purpose on the part of party managers to purge, as they alleged, the register of illegal voters;" that the commissioner made no "inquiry or examination of witnesses to satisfy himself of probable cause," but *simply "issued warrants on the affi- [641 davits" filed, and that the warrants were not signed by himself but by a number of clerks who used until broken a stamp which made a fac-simile of his signature, and thereafter simply wrote his name; that of the 8,288 persons against whom warrants were issued, about 2,000 were persons of respectability and character, residents of the city of New Orleans, and, these facts being disclosed, the prosecutions were summarily dismissed. It appears further that "in the issuance of warrants the commissioner exercised no discretion, and made no personal examination of the complaints or witnesses, but issued a warrant in all cases in which a complaint was made. . . . That the warrants were issued generally for the purpose of affecting the register of votes to be used in the election, and not to arrest and punish offenders;" that in a large majority of the 1,303 cases in which the defendants were discharged it does not appear that the commissioner "performed any service in investigating the offenses charged, nor in judicially determining the guilt or innocence of the parties." Further findings show that there were 120 persons swearing to the affidavits, each affidavit being sworn to by two persons, there being sixty groups of two persons, and that these affidavits were filed against persons who had registered for the purpose of voting at elections prior to that of 1876, and who, in the meantime, had removed from the ward or voting precinct in which they had theretofore been registered, but had not caused their names to be changed by the supervisors of registration.

Do these facts justify the conclusion stated in the sixth finding? What is a judicial proceeding, and what function does a commissioner perform in instituting a criminal proceeding? Is it partisan in any sense of the term? May a judicial officer exercise the powers conferred upon him to aid any party or faction in respect to a coming election? It seems that the mere statement of the inquiry carries an answer in condemnation. The very thought of a judicial office is that its functions are not partisan or political, and that he who occupies such office stands indifferent to all questions of mere party success. *It car- [642 ries, also, the further thought that in the discharge of his judicial functions the magistrate exercises a personal and judicial consideration of every charge made, and subjects no one to the annoyance and disgrace of arrest until after personal and careful investigation he, as a magistrate, believes him to be guilty of a violation of law. The idea of a perfunctory discharge of these duties, of a transfer of responsibility to mere clerks, of a wholesale proceeding against a multitude of citizens without personal inquiry as to the probability of the charge against each, is something abhorrent to the true and reasonable understanding of the conditions of judicial action. The testimony is not preserved and we must

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rest upon the findings of fact made by the court of claims, and upon them, irrespective of what may be considered in the sixth finding as partially a conclusion of law, it is evident that the action of the commissioner was in no just sense the action of a judicial officer, instituted for the sake of upholding the laws of the United States and the punishment of crime. The facts as stated in the prior findings, we unhesitatingly affirm, justify the conclusions stated in the sixth finding, and therefore hold that the services rendered by the commissioner were partisan rather than judicial, and as such entitled to no compensation from the government.

The judgment is affirmed.

Mr. Justice **White** took no part in the consideration and decision of this case.

BERNARD OWENS, *Plff. in Err.*,
v.
BERNARD McCLOSKEY, Executor of JOHN HENRY, Deceased.

(See S. C. Reporter's ed. 642-646.)

Judgment, when void—revival of judgment.

1. A judgment rendered in an action of debt against a nonresident who has not been served with process or voluntarily appeared has no binding force.
2. A revival of a judgment for purposes of execution, by scire facias without service of the scire facias upon, or appearance by, the defendant, who was outside of the state, cannot operate to remove the statutory bar of the law of another state, in which he resides, and in which the action on the judgment is brought.

[No. 143.]

Argued and Submitted March 13, 1896. Decided March 30, 1896.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment in favor of defendant, and dismissing the suit brought by Bernard Owens against John Henry upon a judgment against the latter. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller**:

June 17, 1861, judgment was entered on a bond and warrant of attorney, dated March 1, 1861, for $10,000, conditioned for the payment of $5,000 on the 2d day of March, 1861, with interest, in favor of Bernard Owens against John Henry and James Feeny in the district court for the county and city of Philadelphia, now the court of common pleas No. 8, for the county of Philadelphia, state of Pennsylvania, and execution was issued thereon that day. February 8, 1866, a scire facias to revive this judgment was issued, returnable the 1st Monday of March, and served upon Feeny, but returned *nihil habet* as to John Henry. And a second writ was issued March 19, 1866, and returned *nihil*. The docket entries show: "Ap'l 21, 1866. Judg't for want of an affidavit of defense," but damages were not assessed until March 17, 1871, when they were entered at $6,525. On that day a sci. fa. to revive this latter judgment was issued returnable the 1st Monday of April, 1871, and returned *nihil*, and April 11 an alias was issued returnable the 1st Monday of May, 1871, with a like return.

May 10, 1871, judgment was rendered "for want of an appearance on two returns of *nihil*," and damages assessed at $8,482.50. The record shows the assessment was made up of the amount of the prior judgment (assessed March 17, 1871, but treated as of the date of the interlocutory judgment), $6,525, interest from April 21, 1866, $1,957.50, "real debt, $8,482.50."

At the time the original judgment was rendered, John *Henry was a citizen of the [644 state of Pennsylvania, but he removed to the state of Louisiana in 1865, and became a citizen of that state, residing there from September 5, 1865, until his death, January 3, 1892.

November 1, 1880, Bernard Owens, who was a citizen of Pennsylvania, filed his petition in the circuit court of the United States for the eastern district of Louisiana against John Henry, as a citizen of Louisiana, setting forth the recovery of judgment against Henry and Feeny June 17, 1861, and the issue of the writs of scire facias, upon which he recovered judgment May 10, 1871, in the sum of $8,482.50, with interest from that date, together with costs, and prayed judgment, with interest and costs. Henry appeared and filed peremptory exceptions to the petition, which exceptions were sustained, and the plaintiff allowed to amend by declaring on which judgment he relied. Thereupon, Owens filed his supplemental petition, in which he elected to stand upon the scire facias judgment of May 10, 1871. Defendant again excepted, and also answered that since September 5, 1865, he had been a citizen and resident of Louisiana, and for and during that time had not been a citizen of Pennsylvania, nor domiciled in said state, nor in any manner represented therein, nor been in any manner, by himself or his property, subject to the laws of the state of Pennsylvania; also pleading *nul tiel record*, and denying that the courts of Pennsylvania ever acquired jurisdiction over him by service or by voluntary appearance.

The case was submitted to the court for trial, a jury being waived, the issues found for defendant, and judgment entered dismissing the suit. While the case was under consideration, Henry died, and it was revived as against his testamentary executor, McCloskey. Thereupon a writ of error was sued out from this court.

Messrs. **George A. King** and **W. S. Benedict** for plaintiff in error.

No counsel for defendant in error.

Mr. Chief Justice* **Fuller delivered [645 the opinion of the court:

Judgments for money, whether rendered

As to jurisdiction of United States circuit court depending on parties and residence,—see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor,—see note to M'Donald v. Smalley, 7: 287.

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within or without the state, are barred by prescription in the state of Louisiana in ten years from the date of the rendition thereof. La. Civ. Code, art. 3547. The original judgment was recovered June 17, 1861, and this action was commenced November 1, 1880. Considered as brought upon that judgment the action was barred, but inasmuch as the original petition set up the judgment on scire facias, rendered May 10, 1871, in respect of which ten years had not run, defendant compelled plaintiff to make his election as to which judgment he relied on, and he elected to stand on the judgment of May 10, 1871. The plea of prescription as to the original judgment therefore became unnecessary.

Ordinarily the writ of scire facias to revive a judgment is a judicial writ to continue the effect of, and have execution of, the former judgment, although in all cases it is in the nature of an action, as defendant may plead any matter in bar of execution, as, for instance, a denial of the existence of the record or a subsequent satisfaction or discharge. Foster, Scire Facias, 13, and cases cited; Tidd, Pr. 1090; 2 Sellon, Pr. 275.

Conformably to the exigency of the writ, the judgment on sci. fa., the proceeding being regarded as a continuation of the original action, usually is that plaintiff have execution of the judgment mentioned in the writ with costs. Lilly's Entries, 398, 638; Chitty's Forms (9th ed.) 635; Black, Judgm. § 498. But in Pennsylvania it is held that a scire facias is in such wise a substitute in that state for an action of debt elsewhere, that the judgment should be *quod recuperet* instead of a bare award of execution; and hence, that a judgment on scire facias cannot be avoided because the original judgment might have been. *Duff* v. *Wynkoop*, 74 Pa. 300; *Buehler* v. *Buffington*, 43 Pa. 278; *Conyngham Twp.* v. *Walter*, 95 Pa. 85. Accordingly the judgment of May 10, 1871, was a judgment for the recovery of the **646**] amount of *the judgment of 1866, with interest added thereon to date, and the judgment of 1866 was a similar judgment on the original judgment of June 17, 1861.

Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of *nihil*, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori*, for the same reason. *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 [21: 897]; *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565]; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 137 U. S. 287 [34: 670]; *Steel* v. *Smith*, 7 Watts & S. 447; *Evans* v. *Reed*, 2 Mich. N. P. 212; *Hepler* v. *Davis*, 32 Neb. 556.

The circuit court was right, and its judgment is affirmed.

THOMAS W. PEARSALL, *Appt.*, *v.* GREAT NORTHERN RAILWAY COMPANY.

(See S. C Reporter's ed. 646-677.)

Construction of charter—consolidation of railroad with parallel line—power of legislature—purchase of parallel line.

1. A grant of power to a corporation is to be strictly construed against it, and nothing will be presumed to pass by the grant unless it be expressed in clear and unambiguous language.
2. Statutes which operate only to regulate the manner in which the franchises of a corporation are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant made by its charter, do not impair the contract contained therein.
3. An arrangement by which a railroad company, in return for a guaranty, turns over to a trustee for the entire body of stockholders of another company owning a parallel road one half of its stock, with an agreement contemplating an interchange of traffic and the use of terminal facilities, and with the almost certainty that the complete control of the former will be obtained by the latter company,—is in violation of a law prohibiting railroad corporations from consolidating with, leasing, or purchasing, or in any other way becoming the owner of or controlling, a parallel or competing line.
4. A bare unexecuted power to consolidate with other corporations, given to a railroad company by its charter, is not, so long as it continues unexecuted, a vested right protected from control or revocation by the legislature,—at least so far as it applies to parallel or competing lines.
5. Where by a railway charter a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, which has remained unexecuted, the legislature may declare by subsequent acts that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines.

[No. 768.]

Submitted December 16, 1895. Decided March 30, 1896.

APPEAL from a decree of the Circuit Court of the United States for the district of Minnesota dismissing a suit in equity brought by Thomas W. Pearsall against the Great Northern Railway Company to enjoin it from entering into and carrying out an agreement between that company and the holders of bonds of the Northern Pacific Railroad Company for the purchase by the former company of the property and franchises of the latter company. *Reversed, and case remanded for further proceedings.*

NOTE.—*As to construction of grants to corporations; corporations having only powers granted, or those necessary to carry into effect powers granted; acting only in the mode prescribed by the law creating.*—see notes to Charles River Bridge Proprs. v. Warren Bridge Proprs. 9: 773; and Beaty v. Knowler, 7: 813.

As to power to alter, amend, or repeal charters, see notes to Dartmouth College v. Woodward, 4: 644, and Greenwood v. Union Freight R. Co. 23: 961.

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Statement by *Mr. Justice* **Brown**:

This was a bill in equity filed by Pearsall, a stockholder in the Great Northern Railway, against the company, which is a corporation created and existing under the laws of the territory and state of Minnesota, and a citizen of that state, to enjoin it from entering into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgage of the Northern Pacific Railroad Company, under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase, or cause to be purchased, the property and franchises of the Northern Pacific Railroad Company.

Plaintiff set up that he was the holder of 500 shares of $100 each of the preferred paid-up stock of the defendant corporation; that such stock is of the value of more than $125 per share, but that the proposed arrangement, if consummated, would decrease the value of his stock and damage him to an amount exceeding $5,000. The suit was brought for the benefit of the plaintiff and all stockholders similarly situated. The facts as they appear in the bill and answer, upon which the case was heard, are substantially as follows:

The defendant, the Great Northern Railway, **649**] is a *corporation organized and existing under an act of the legislature of the territory of Minnesota passed in 1856 to incorporate the Minneapolis & St. Cloud Railroad Company, and a number of amendatory acts not necessary to be noticed in detail. By the original act the territory granted to the railroad company (§ 1) the right to be a corporation, the right to acquire by purchase, gift, grant, devise, or otherwise, and to hold and to convey all such property, real and personal, which should be necessary or convenient to carry into effect the objects and purposes of the corporation; the right (§ 2) to construct and operate a railroad from Minneapolis to St. Cloud (about 75 miles), and also to a point at or near the mouth of the St. Louis river (about 180 miles), with the further power (§ 6) to connect its road by branches with any other road in the territory, or to become part owner or lessee of any railroad in said territory, and also (§ 12) "to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company."

By § 17 "this act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation."

By an amendatory act passed by the legislature of the state February 28, 1865, such corporation (§ 3, amendatory of original § 12) was authorized "to connect with or adopt as its own . . . any other railroad running in the same general direction with either of its main lines or any branch roads, and which said corporation is authorized to construct;" (§ 8) "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of any other road . . . having the same general direction or location, or to become merged therein by way of substitution;" the further right (§ 9) to consolidate any portion of its road and property with the franchise of any other railroad company or any portion thereof; and (§ 12) to consolidate the whole or any *portion of its main line [**650** or branches with the rights, powers, franchises, grants, and effects of any other railroad.

It is alleged in the bill and admitted by the answer that these several acts, with their rights, privileges, and franchises, were duly accepted, and that the same have ever since remained in full force and effect; that prior to 1880, the company constructed and put into operation that portion of its line which extended from St. Cloud eastwardly to the town of Hinckley, in the state of Minnesota, and that in 1889 it changed its name to the Great Northern Railway Company, which name it has ever since borne and now bears; that by various purchases, consolidations, and leases it now operates and controls all the lines of the Great Northern Railway Company extending from St. Paul and Duluth in the state of Minnesota, and from Superior in the state of Wisconsin, across the states of Minnesota, North Dakota, Montana, and Idaho, to the towns of Everett and Seattle in the state of Washington, with many branch and connecting lines, none of which, however, reach Tacoma in the state of Washington, Portland in the state of Oregon, or Winnipeg in the Dominion of Canada. All of these different lines comprise an aggregate mileage of nearly 4,500 miles, and are operated as a combined railway system under the name of the Great Northern Railway.

The Northern Pacific Railroad Company is a corporation organized and existing under certain acts and resolutions of Congress, and owns some, and through its receivers controls and operates all the lines, of the Northern Pacific Railroad system, extending from St. Paul in Minnesota, and from Ashland in Wisconsin, to Tacoma in the state of Washington and Portland in the state of Oregon, with many branches and connecting lines, one of which extends to Winnipeg in Canada; that the aggregate mileage of the Northern Pacific system is nearly 4,500 miles, and some of the lines of each of these systems are parallel to and some competing with the lines of the other system; that the Northern Pacific Railroad Company is insolvent, its road in the hands of receivers appointed by the court at the instance of the *bondholders under [**651** the second, third, and consolidated mortgages. The trustee for these bondholders has commenced suits to foreclose these mortgages, and the receivers are in possession under appointment in these foreclosure suits.

The defendant and the holders of a majority of the outstanding bonds of these mortgages of the Northern Pacific Railroad Company have entered into an arrangement or agreement by which the property shall be sold to a committee of the bondholders, who are to organize a new corporation, subject to the prior mortgages, which shall issue its bonds to the aggregate amount of $100,000,000, or more, payment of which is to be guaranteed by the Great Northern, and capital stock to the further amount of $100,000,000, one half of which is to be transferred to the shareholders of the Great

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Northern, and shall enter into a traffic contract with it, whereby in substance the two companies shall thereafter exchange traffic at all intersecting and connecting points, and divide the common earnings from such exchanged traffic on the basis of miles hauled on the systems respectively. This arrangement is fully set forth in the answer, a copy of which in that particular is printed in the margin.†

652] *Plaintiff claims that this agreement is unlawful and in violation of Minn. Laws 1874, chap. 29, which provides that "no railroad corporation or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad corporations owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as the officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and 653] also because it is a violation *of the act of March 3, 1881 (Minn. Laws 1881, chap. 94, § 8), which enacts that "no railroad corporation shall consolidate with, lease, or purchase, or in any way become owner of, or control, any other railroad corporation or any stock, franchise, rights, or property thereof, which owns or controls a parallel or competing line."

Defendant answered that it had ample power to make and perform its agreement under its charter; that the true construction of the provisions of the acts of 1874 and 1881, just cited, is that they do not amend or affect its charter, and that if the opposite construction be adopted, they are void in so far as they prohibit or affect its rights to make and perform this agreement, because they are in violation of the contract clause of the Constitution.

Upon the other hand, plaintiff insisted that the right to so amend the charter of the defendant as to prohibit the performance of this contract was reserved to the state by § 17 of the act of 1856, providing that the act might be amended by any subsequent legislation in any manner not destroying or impairing the vested rights of said corporation.

The case was first submitted to the court upon motion for injunction, which was denied, and again upon a final hearing upon bill and answer; and the court, for the reasons stated in the opinion upon the motion for injunction, entered a decree dismissing the bill. Whereupon the plaintiff appealed to this court.

Mr. **Henry J. Horn,** for appellant:

The plaintiff as a stockholder was entitled to bring such a suit to enjoin an act of the corporation which was *ultra vires*, or illegal.

Cook, Stock & Stockholders, § 666, and authorities therein cited.

The proposed arrangement in question is within the prohibition of the general laws of Minnesota (Gen. Laws 1874, chap. 29: Gen. Laws 1881, chap. 94), aside from the claim of the defendants of exemption therefrom.

The said statutes (of 1874 and 1881) control the charter of the defendant, or act of 1856, and amendments thereto, and the reservation in § 17 in said act of 1856 removes any impediment to such legislative control.

Dartmouth College v. *Woodward*, 17 U. S. 4 Wheat. 519 (4: 629); *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 454 (21: 204); *Hamilton Gaslight & C. Co.* v. *Hamilton*, 146 U. S. 258 (36: 963); *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13 (26: 961): *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347 (28: 173): *Maine C. R. Co.* v. *Maine*, 96 U. S. 499 (24: 836): *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 470 (26: 1143); *Bangor, O. & M. R. Co.* v. *Smith*, 47 Me. 35; *Roxbury* v. *Boston & P. R. Corp.* 6 Cush. 431; *Prince* v. *St. Paul*, 19 Minn. 267; *State* v. *Klein*, 22 Minn. 329; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *Greenwood* v. *Union Freight Co.* 105 U. S. 13 (26: 961); *Gardner* v. *Hope Ins. Co.* 9 R. I. 104,

†(1) The holders of the said several classes of bonds shall obtain a decree of foreclosure in said actions and for the sale of the railroad properties and franchises of the Northern Pacific Railroad Company, including its franchise to be a corporation, subject to the said divisional and general first mortgages mentioned in paragraph 10 of the bill, and shall cause the same to bid in and be purchased by a committee of bondholders or their agents for the benefit of all the holders of said outstanding bonds secured by the mortgages so foreclosed, and shall cause a reorganization of the said railway franchises and property as a new corporation, either under the said acts and joint resolutions of Congress relating to the Northern Pacific Railroad Company or under some other proper and sufficient legislation of the United States, or of some one or more states.

(2) Upon such foreclosure sale and reorganization the reorganized company may issue its bonds to an amount in the aggregate of $100,000,000 or over, and its full-paid capital stock of $100,000,000, this defendant to guarantee, for the benefit of the holders of such bonds, the payment of the principal thereof, together with interest thereon to an amount in the aggregate of such interest, guarantee not to exceed $6,200,000 per year, which guaranty shall, if required by said reorganization company, be written and executed upon the back of each of said bonds.

(3) Among other good and valuable considerations for such guaranty, and as a compensation for the risk to the stockholders of the defendant company, which may result by reason of said guaranty in the way of a possible diversion of a portion of the earnings of the defendant to make good its guaranty, the said reorganized company shall transfer, or cause or procure to be transferred by its stockholders, to the shareholders of the defendant company, or to some person or corporation as trustee for their use, one-half part of the capital stock of said reorganized company.

(4) The Northern Pacific Company shall join with the defendant in providing reasonable and adequate facilities for an interchange of cars and traffic between their respective lines, and shall interchange traffic with defendant and operate its trains to that end upon reasonable, fair, and lawful terms under joint tariffs or otherwise.

(5) The defendant shall have the right to bill and route its traffic, passengers, and freight from points on its line by way of such connections as now exist or may hereafter be constructed between said line and the Northern Pacific Company to Winnipeg, Tacoma, Portland, and all points in the different states through which the line of the Northern Pacific Railroad extends, and not reached by the line of this defendant.

(6) The defendant shall have the right to make use of the depot and terminal facilities of the Northern Pacific Company at Spokane Falls and other points where such use shall be found to be convenient and economical, jointly with that company, and upon reasonable, fair, and lawful terms, which shall insure to the defendant a large saving on the cost and expense which it must otherwise necessarily incur in constructing and operating depots and terminals of its own.

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11 Am. Rep. 238; Endlich, Interpretation of Statutes, § 231; 2 Morawetz, Priv. Corp. 2d ed. § 1110.

The settled canons of construction of such statutes are clearly against the defendant.

Whitney v. *Whitney*, 14 Mass. 92; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 189 (6: 68).

A saving clause in a statute is to be rejected when it is directly repugnant to the purview or body of the act and could not stand without rendering the act inconsistent and destructive of itself.

1 Bl. Com. 89; 1 Kent, Com. 462, 463; Sutherland, Statutory Construction, §§ 221, 228; *Walsingham's Case*, 2 Plowd. 575; *Alton Wood's Case*, 1 Coke, 40*a*, 47*a*; *Mitford* v. *Elliott*, 8 Taunt. 13, 18.

A grant by the legislature is to be construed in favor of the government upon the ground of public policy.

Atty. Gen. v. *Chicago & N. W. R. Co.* 35 Wis. 559; *Mills* v. *St. Clair County*, 49 U. S. 8 How. 581 (12: 1206); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666 (24: 1038); *Newton* v. *Mahoning County Comrs.* 100 U. S. 561 (25: 712); *Raleigh & G. R. Co.* v. *Reid*, 64 N. C. 163; *Holyoke Water Power Co.* v. *Lyman*, 82 U. S. 15 Wall. 512 (21: 137); *Chesapeake & O. R. Co.* v. *Philadelphia*, 101 U. S. 539 (25: 915); *Missionary Soc. of M. E. Church* v. *Bulles*, 107 U. S. 342 (27: 547); *Slidell* v. *Grandjean*, 111 U. S. 437 (28: 330); *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 49 (35: 65); *State* v. *Vanderbilt*, 37 Ohio St. 641; *New York* v. *Twenty-Third Street R. Co.* 113 N. Y. 317.

The legislature of Minnesota of 1874 and 1881, before referred to, is applicable to and controls the charter of the defendant without the reservation in § 17

The defendant, as a common carrier and railroad corporation, exercises public functions, and to that extent is a public agent.

Long's Appeal, 87 Pa. 114; *Tracey* v. *Elizabethtown, L. & B. S. R. Co.* 85 Ky. 270; *Olcott* v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 678 (21: 382); *Stone* v. *Yazoo & M. V. R. Co.* 62 Miss. 607, 52 Am. Rep. 193.

The right of the legislature to reasonably limit the charges of such companies and also to prevent discrimination is now well settled in practice as well as by the highest authority.

Southern Minnesota R. Co. v. *Coleman*, 94 U. S. 181 (24: 102), *note*; *Ruggles* v. *Illinois*, 108 U. S. 526 (27: 812).

The creation of a corporation is a prerogative of the state or sovereign power; certainly as much as the right of eminent domain. And the power to consolidate is substantially equivalent to the power to form a new corporation.

Atlantic & G. R. Co. v. *Georgia*, 98 U. S. 359 (25: 185); *St. Louis I. M. & S. R. Co.* v. *Berry*, 113 U. S. 465 (28: 1055); *Munn* v. *Illinois*, 94 U. S. 113 (24: 77); *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 382 (12: 482); *Lawton* v. *Steele*, 152 U. S. 136 (38: 388).

Under our system police power is lodged with the legislative branch of the government.

Mugler v. *Kansas*, 123 U. S. 623 (31: 205); *Sandford* v. *Cattawissa, W & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 661; *Hooker* v. *Vandewater*, 4 Denio, 353, 47 Am. Dec. 258.

The legislation of 1874 and 1881 was in accordance with the requirements of the Constitution of the state of Minnesota.

Messrs. **M. D. Grover, C. K. Davis, F. B. Kellogg, and C. A. Severance,** for appellee:

Appellee has express and implied authority under the acts of March 1, 1856, and of February 28, to enter into the proposed traffic agreement and pay for the rights and privileges it acquires by a guaranty of the bonds on the new or reorganized company. And the transaction is therefore not forbidden by any law of the state.

Chenango Bridge Co. v. *Binghamton Bridge Co.* ("*The Binghamton Bridge*") 70 U. S. 3 Wall. 51 (18: 137); *Boston & L. R. Corp.* v. *Salem & L. R. Co.* 2 Gray, 1.

It may consolidate not only its stock, but its road, property, rights, powers, franchises, grants, and effects with the rights, powers, franchises, grants, and effects of any other railroad company within or without the state, and all this may be done upon such terms and conditions as such companies or a majority of the directors thereof may agree upon.

The agreement, so far as it relates to an interchange of traffic, to a joint use of tracks and terminals, and to through billing and routing of traffic from points on the line of appellee to points on the line of the Northern Pacific Railroad Company, not reached by its line, is valid.

Stewart v. *Erie & W. Transp. Co.* 17 Minn. 372; *Oregon S. L. & U. N. R. Co.* v. *Northern P. R. Co.* 61 Fed. Rep. 158, 4 Inters. Com. Rep. 718; *Oregon, S. L. & U. N. R. Co.* v. *Northern P. R. Co.* 51 Fed. Rep. 465, 4 Inters. Com. Rep. 249; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 59 Fed. Rep. 400, 4 Inters. Com. Rep. 537; *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 668 (28: 292); *United States* v. *Trans-Missouri Freight Asso.* 58 Fed. Rep. 58, 4 Inters. Com. Rep. 443, 24 L. R. A. 73.

The proposed guaranty is not an accommodation, promise, or a loan of credit, but is an agreement to meet a legal obligation upon conditions, or to pay a debt, or satisfy a liability.

Zabriskie v. *Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 390 (16: 494); *Green Bay & M. R. Co.* v. *Union Steamboat Co.* 107 U. S. 98 (27: 413); *Pittsburg, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.* 131 U. S. 371 (33: 157); *Fort Worth City Co.* v. *Smith Bridge Co.* 151 U. S. 299 (38: 169); *Harrison* v. *Union P. R. Co.* 13 Fed. Rep. 522; *Tod* v. *Kentucky Union Land Co.* 57 Fed. Rep. 47; *Leavenworth County Comrs.* v. *Chicago, R. I. & P. R. Co.* 134 U. S. 688 (33: 1064); *Kent* v. *Quicksilver Min. Co.* 78 N. Y. 159; *Vandall* v. *South San Francisco Dock Co.* 40 Cal. 83; *Smead* v. *Indianapolis, P. & C. R. Co.* 11 Ind. 104; *Ellerman* v. *Chicago Junction R. & U. S. Y. Co.* 49 N. J. Eq. 217; *Rogers L. & M. Works* v. *Southern R. Asso.* 34 Fed. Rep. 278; *Chicago, R. I. & P. R. Co.* v. *Howard*, 74 U. S. 7 Wall. 392 (19: 117); *Low* v. *Central P. R. Co.* 52 Cal. 58, 28 Am. Rep. 629.

The agreement, so far as it relates to a transfer of one half the full paid stock of the new or reorganized company, by the stockholders

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of such company to the stockholders of appellee, is not forbidden by any law of the state.

Pullman Palace Car Co. v. *Missouri P. R. Co.* 115 U. S. 587 (29: 499).

If the legal effect of the agreement, taken as an entirety, is to give to appellee the control of the new or reorganized company, it is authorized by the acts constituting its charter to execute the agreement and acquire such control.

Marbury v. *Kentucky Union Land Co.* 62 Fed. Rep. 335, 22 U. S. App. 267; *Branch* v. *Jesup*, 106 U. S. 468 (27: 279); *Tod* v. *Kentucky Union Land Co. supra.*

An accepted act of incorporation of a private corporation is a contract between the state and the corporation. A right to become owner of the railroad of another company, or to adopt it, or to become the owner of the stock of another company, or to consolidate with, or acquire the control of such company, is a valuable franchise and property right, which becomes vested immediately upon the acceptance of the acts by which the right was granted.

Dartmouth College v. *Woodward*, 17 U. S. 4 Wheat. 518 (4: 629); *Piqua Branch of State Bank* v. *Knoop*, 57 U. S. 16 How. 380 (14: 981); *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312 (37: 463); *Wilmington & W. R. Co.* v. *Reid*, 80 U. S. 13 Wall. 264 (20:568); *Chenango Bridge Co.* v. *Binghamton Bridge Co.* ("*The Binghamton Bridge*") 70 U. S. 3 Wall. 51 (18: 137); *St. Paul & P. R. Co. First Div.* v. *Parcher*, 14 Minn. 297; *Boston & L. R. Corp.* v. *Salem & L. R. Co.* 2 Gray, 1; *Ames* v. *Lake Superior & M. R. Co.* 21 Minn. 255; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 (29: 525); *St. Tammany Waterworks Co.* v. *New Orleans Waterworks Co.* 120 U. S. 64 (30: 563); *Pablo Sala* v. *New Orleans*, 2 Woods, 188; *Citizens Street R. Co.* v. *Memphis*, 53 Fed. Rep. 715.

The state has the right to adopt such changes or amendments as it deems expedient, and the words "vested rights" do not refer to corporate charter rights and franchises which became vested upon the acceptance of the acts of incorporation. A charter contract not containing a reservation on the part of the state of a right to alter or amend cannot be impaired by subsequent legislation.

Tomlinson v. *Jessup*, 82 U. S. 15 Wall. 454 (21: 204); *Maine C. R. Co.* v. *Maine*, 96 U. S. 510 (24: 841); *Greenwood* v. *Union Freight Co.* 105 U. S. 13 (26: 961), *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 470 (26: 1143); *Vial* v. *Penniman*, 103 U. S. 714 (26: 603); *Ochiltree* v. *Iowa R. Contracting Co.* 88 U. S. 21 Wall. 249 (22: 546); *Smith* v. *Atchison, T. & S. F. R. Co.* 64 Fed. Rep. 272.

Where there is no reserved right, changes like the following cannot be made without the consent of every stockholder:

An exchange of assets on dissolution for stock of another company.

Frothingham v. *Barney*, 6 Hun, 366.

In the case of consolidating the corporation with another to form a new corporation.

Blatchford v. *Ross*, 37 How. Pr. 113; *Ferguson* v. *Meredith* ("*Clearwater* v. *Meredith*") 68 U. S. 1 Wall. 40 (17: 608).

In case of a railroad company departing from the route marked out in its charter.

Buffalo, C. & N. Y. R. Co. v. *Pottle*, 28 Barb. 23.

Or by extending the road and increasing the capital stock.

Macedon & B. Pl. Road R. Co. v. *Lapham*, 18 Barb. 315.

Where, however, the legislature has the power to amend the charter of corporations, an alteration may be accepted by a mere majority of the stockholders and such acceptance is binding on those who do not assent.

White v. *Syracuse & U. R. Co.* 14 Barb. 561; *Joslyn* v. *Pacific Mail S. S. Co.* 12 Abb. N. S. 334; *Shenectady & S. Pl. Road Co.* v. *Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. C. R. Co.* v. *Dudley*, 14 N. Y. 336; *Fry* v. *Lexington & B. S. R. Co.* 2 Met. (Ky.) 314; *Ferguson* v. *Meredith*, ("*Clearwater* v. *Meredith*") 68 U. S. 1 Wall. 25 (17: 604); *Durfree* v. *Old Colony & F. R. R. Co.* 5 Allen, 230.

The right of consolidation of stock and property is clearly granted to appellee by the act of February 28, 1865.

New Jersey v. *Yard*, 95 U. S. 104 (24: 352).

Appellee being authorized under the acts constituting its charter to execute the agreement, such right and franchise cannot be impaired or destroyed by the state under the exercise of police power.

New Orleans Gaslight Co. v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 (29: 517); *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 (29: 525); *Tammany Waterworks Co.* v. *New Orleans Waterworks Co.* 120 U. S. 64 (30: 563); *McRoberts* v. *Washburne*, 10 Minn. 23; *Chenango Bridge Co.* v. *Binghamton Bridge Co.* ("*The Binghamton Bridge*") 70 U. S. 3 Wall. 51 (18: 137); *Boston & L. R. Corp.* v. *Salem & L. R. Co.* 2 Gray, 1; *Citizens' Street R. Co.* v. *Memphis*, 53 Fed. Rep. 715; *People* v. *Jackson, & M. Pl. Road Co.* 9 Mich. 306; *Reagan* v. *Farmers' Loan & T. Co.* (No. 1) 134 U. S. 393 (38: 1021), 4 Inters. Com. Rep. 560.

Mr. **H. W. Childs,** Attorney General of the state of Minnesota, for that state.

Mr. Justice **Brown** delivered the opinion of the court:

This case turns upon the question whether the right given by its charter to the Minneapolis & St. Cloud Railroad Company to connect with any railroad running in the same general direction, and, by a subsequent amendatory act, to consolidate its capital stock or its property, road, or franchise with those of any other railroad, could be taken away by a subsequent act inhibiting the consolidation, lease, or purchase by any railroad of the stock, property, or franchise of any parallel or competing line. A different question would have been presented if any such contract had been made and carried into effect before the act of 1874 was passed, since it might be claimed that the rights of the parties had become vested within the meaning of § 17 of the original charter of the Minnesota & St. Cloud Railroad, and as such could not be destroyed or impaired by subsequent legislation, without infringing upon that *provision of the Constitution inhibiting [660 state legislation impairing the obligation of contracts. The case then involves indirectly the meaning of the words "vested rights," when

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used in the charter of railroads and other similar corporations.

1. The whole doctrine of vested rights as applied to the charters of corporations is based upon *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 [4: 629], in which the broad proposition was laid down that such charters were contracts within the meaning of the Constitution, and hence that an act of the state legislature altering a charter in any material respect was unconstitutional and void. The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence. The precise point decided was this: By the original charter from the Crown, granted in the year 1769, twelve persons therein named were incorporated by the name of "The Trustees of Dartmouth College," and there was granted to them and their successors the usual corporate privileges and powers, among which was authority to govern the college, and fill all vacancies which might be created in their own body. By an act of the legislature of New Hampshire passed in 1816, the charter was amended, the number of trustees increased to twenty-one, the appointment of the additional members vested in the executive of the state, and a board of overseers, consisting of twenty-five persons, created with power to inspect and control the most important acts of the trustees. The president of the Senate, the speaker of the House of Representatives of New Hampshire, and the governor and lieutenant governor of Vermont, for the time being, were to be members *ex officio;* and the board was to be completed by the governor and council of New Hampshire, who were also empowered to fill all vacancies which might occur. A majority of the trustees of the college refused to accept this amended charter, and brought suit for the corporate property, which was in possession of a person holding by authority of the acts of the legislature.

The opinion contained an exhaustive discus-**661**] sion of the whole *subject of corporate rights and their impairment by state legislation, and probably contributed as much as any he ever delivered to the great reputation of *Chief Justice* Marshall. The proposed legislation of the state was fundamental in its character. On the part of the Crown it was expressly stipulated that the corporation thus constituted should continue forever, and that the number of trustees should consist of twelve and no more. By the act of the legislature the trustees were increased to twenty one, the appointment of the additional number given to the executive of the state, and a board of overseers, twenty-one out of twenty-five of whom were also appointed by the executive of the state, was created and invested with power to inspect and control the most important acts of the trustees. Thus, said *Mr. Chief Justice* Marshall, "the whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire." If this legislation was valid, Dartmouth College, as it was originally incorporated, ceased to exist, and a new institution of learning was created, which was put completely at the mercy of the state legislature. It was not the case of an amendment in an unimportant particular—the taking away of a nonessential feature of the charter, but a radical and destructive change of the governing body—a transfer of its power to the executive of the state, and virtually a reincorporation upon a wholly different basis.

Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation. Even before the *Dartmouth College Case* was decided, it was held by this court that grants of land made by the Crown to colonial churches were irrevocable, and that property purchased by or devised to them, prior to the adoption of the Constitution, could not be diverted to other purposes by the states which succeeded to the sovereign power of the colonies. *Terret* v. *Taylor*, 13 U. S. 9 Cranch, 43 [3: 650]; *Pawlet* v. *Clark*, 13 U. S. 9 Cranch, *292 [3: 735]; *Society* [**662** *for Propagation of Gospel* v. *New Haven*, 21 U. S. 8 Wheat. 464 [5: 662].

Indeed, the sanctity of charters vesting in grantees the title to lands or other property has been vindicated in a large number of cases. *Davis* v. *Gray*, 83 U. S. 16 Wall. 203 [21: 447]; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 137 [3: 162, 178]; *Moore* v. *Robbins*, 96 U. S. 530 [24: 848]; *United States* v. *Schurz*, 102 U. S. 378 [26: 167]; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165 [37: 123].

This court has had, perhaps, more frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation than in any other, and in a long series of decisions has held that a clause imposing certain taxes in lieu of all other taxes, or of all taxes to which the company or stockholders therein would be subject, is impaired by legislation raising the rate of taxation, or imposing taxes other than those specified in the charter. Thus, in *Pigua Branch of State Bank* v. *Knoop*, 57 U. S. 16 How. 369 [14: 977], it was held that where, by a general banking law, it was provided that a certain percentage of dividends should be set off for the use of the state, and should be in lieu of all taxes to which the company or stockholders therein would otherwise be subjected, this was a contract fixing permanently the amount of taxation, and that legislation could not thereafter increase it. In this connection it was said by *Mr. Justice* McLean: "Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise and necessary to the business of the bank, cannot without its consent become a subject for legislative action." To the same effect are *New Jersey* v. *Wilson*, 11 U. S. 7 Cranch, 164 [3: 303]; *Gordon* v. *Appeal Tax Court*, 44 U. S. 3 How. 133 [11: 529]; *Dodge* v. *Woolsey*, 59 U. S. 18 How.

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631 [15: 401]; *Jefferson Branch Bank* v. *Skelly*, 36 U. S. 1 Black, 436 [17: 173]; *McGehee* v. *Mathis*, 71 U. S. 4 Wall. 143 [18: 314]; *Home of the Friendless* v. *Rouse*, 75 U. S. 8 Wall. 430 [19: 495]; *Wilmington & W. R. Co.* v. *Reid*, 80 U. S. 13 Wall. 264 [20: 568]; *Humphrey* v. *Pegues*, 83 U. S. 16 Wall. 244 [21: 326]; *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558]; **663**] *New Jersey* v. *Yard*, 95 U. S. 104 [24: 352]; *St. Anna's Asylum* v. *New Orleans*, 105 U. S. 362 [26: 1128]. If, however, the charter contained a reservation of an unlimited power to alter, amend, or repeal, the legislature may take away an immunity from taxation. *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 454 [21: 204].

Within the same principle are grants of an exclusive right to supply gas or water to a municipality or to occupy its streets for railway purposes. *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 [29: 517]; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 [29: 525]; *Louisville Gas Co.* v. *Citizens' Gaslight Co.* 115 U. S. 683 [29: 510]; *St. Tammany Waterworks Co.* v. *New Orleans Waterworks Co.* 120 U. S. 64 [30: 563]; *Boston & L. R. Corp.* v. *Salem & L. R. Co.* 2 Gray, 1.

So, if a company be chartered with power to construct and maintain a turnpike, erect tollgates, and collect tolls, such franchise is protected by the Constitution. *St. Clair County Turnp. Co.* v. *Illinois*, 96 U. S. 63 [24: 651]; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312 [37: 465].

If it be provided in the charter of a bank that the bills and notes of the institution shall be received in payment of taxes or of debts due to the state, such undertaking on the part of the state constitutes a contract between the state and holders of the notes which the state is not at liberty to break, although notes issued after the repeal of the act are not within the contract and may be refused. *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190 [13: 383]; *Paup* v. *Drew*, 51 U. S. 10 How. 218 [13: 394]; *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 [19: 370]; *Keith* v. *Clark*, 97 U. S. 454 [24: 1071]; *Antoni* v. *Greenhow*, 107 U. S. 769 [27: 468]; *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 270 [29: 185]. And in *Planters' Bank* v. *Sharp*, 47 U. S. 6 How. 301 [12: 447], where a bank was chartered with the usual powers to receive money on deposit, discount bills of exchange and notes, and to make loans, and in the course of its business the bank discounted and held promissory notes; and the legislature then passed a law declaring that it should not be lawful for any bank to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt, it was held that the statute conflicted with the Constitution and was void. It was said in this case that "a power to dispose of its **664**] notes, as well as other property, may well be regarded as an incident to its business as a bank to discount notes which are required to be in their terms assignable, as well as an incident to its right of holding them and other property, when no express limitation is imposed upon the power to transfer them."

In each of the above cases, however, the title to property had either become vested in the grantee by operation of law, or the exercise of the power granted was so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscriptions, by the fact that the corporation was endowed with those privileges during the continuance of the charter.

2. Such limitations, however, upon the power of the legislature, must be construed in subservience to the general rule that grants by the state are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language. As was said by *Mr. Justice* Swayne in *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666 [24: 1036, 1038]: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Hence, an exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.* 36 U. S. 11 Pet. 420 [9: 773], and has been steadily adhered to ever since. *Washington & B. Turnp. Co.* v. *Maryland*, 70 U. S. 3 Wall. 210 [18: 180]; *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514 [7: 939]; *Pennsylvania R. Co.* v. *Miller*, 132 U. S. 75 [33: 267]. If, however, there be an exclusive provision, as, for instance, in the charter of a bridge company that it shall [**665** not be lawful for any person to erect another bridge within a certain distance of the bridge authorized, this constitutes an inviolable contract *Chenango Bridge Co.* v. *Binghamton Bridge Co.* ("*The Binghamton Bridge*") 70 U. S. 3 Wall. 51 [18: 137]. But even in such cases, if the second charter be for a similar franchise, but to be exercised in a substantially different manner, the exclusive right conferred by the first charter is held not to be violated; as, for instance, if the first charter be for an ordinary bridge, and the second for a railway viaduct, impossible for man or beast to cross, except in railway cars. *Proprietors of Bridges* v. *Hoboken Land & Imp. Co.* 68 U. S. 1 Wall. 116 [17: 571]. So, if the first franchise be for the sole privilege of supplying a city with water from a designated source, it is not impaired by a grant to another party of the privilege to supply it with water from a different source. *Stein* v. *Bienville Water Supply Co.* 141 U. S. 67 [35: 622].

Upon a similar principle it was held in *Tucker* v. *Ferguson*, 89 U. S. 22 Wall. 527 [22: 805], that a tax upon lands owned by a railway company, and not used nor necessary in working the road and in the exercise of its franchise, was not unlawful, though the charter had pro-

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vided for a certain tax upon the railroad company and had enacted that such tax should be in lieu of all other taxes to be imposed within the state. See also *West Wisconsin R. Co.* v. *Trempealeau County Supers.* 93 U. S. 595 [23: 814].

Nor does it follow, from the fact that the contract evidenced by the charter cannot be impaired, that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant, are not open to the objection of impairing the contract.

A familiar instance of this class of legislation is that enacted under what is known as the police power. In virtue of this the state may prescribe regulations contributing to the comfort, safety, and health of passengers, the protection of the public at highway crossings or elsewhere, the security of owners of adjacent property, by requiring the track to be fenced, and such appliances to be annexed to the engines as shall prevent the communication of [666] fire to *neighboring buildings. Cooley, Const. L. 321. This power, as was said by *Mr. Justice* Miller in *Butchers' Benev. Asso.* v. *Crescent City, L. S. L. & S. H. Co.* ("*Slaughter-House Cases*") 83 U. S. 16 Wall. 36, 62 [21: 394, 404], is and must be, from its very nature, incapable of any very exact definition or limitation. "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." The following cases show to what extent and for what purposes this power may be exercised: *Butchers' Benev. Asso.* v. *Crescent City, L. S. L. & S. H. Co.* ("*Slaughter-House Cases*") 83 U. S. 16 Wall. 62 [21: 404]; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 [24: 1036]; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 [24: 989]; *Patterson* v. *Kentucky*, 97 U. S. 501 [24: 1116]; *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923]; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 [35: 1052]; *Lawton* v. *Steele*, 152 U. S. 133 [38: 385]; *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 446 [38: 779]. And so important is this power, and so necessary to the public safety and health, that it cannot be bargained away by the legislature; and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion. *Stone* v. *Mississippi*, 101 U. S. 814 [25: 1079]; *Phalen* v. *Virginia*, 49 U. S. 8 How. 163, 168 [12: 1030, 1032].

In obedience to the same principle it has always been held that the legislature may repeal laws authorizing municipal subscriptions to railways, though such laws were in existence at the time the railway was chartered, and may be supposed to have influenced the promoters and stockholders of the road in undertaking its construction. And even if there has been a public vote in favor of such subscription, such vote does not itself form a contract with the railway company protected by the Constitution, the court holding that until the subscription is actually made the contract is unexecuted. *Aspinwall* v. *Daviess County Comrs.* 63 U. S. 22 How. 364 [16: 296]; *Wadsworth* v. *Eau Claire County Supers.* 102 U. S. 534 [26: 222]; *Norton* v. *Brownsville Taxing Dist.* 129 U. S. 479 [32: 774]; *Concord* v. *Portsmouth Sav. Bank*, 92 U. S. 625 [23: 628]; *Falconer* v. *Buffalo & J. R. Co.* 69 N. Y. 491; *Covington & L. R. Co.* v. *Kenton County Court*, 12 B. Mon. 144; *Wilson* v. *Polk County*, 112 Mo. 136.

*The contract protected by this clause [667 must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license. Thus, in *Christ Church* v. *Philadelphia County*, 65 U. S. 24 How. 300 [16: 602], the legislature of Pennsylvania enacted that the property of Christ Church Hospital, so long as the same should continue to belong to the same hospital, should be and remain free from taxation. In 1851 they enacted that all property then exempted from taxation, other than that which was in the actual use and occupation of such association, should thereafter be subject to taxation. It was held that the original concession of the legislature exempting the property from taxation was spontaneous, and no service or duty or other remunerative consideration was imposed upon the corporation, and hence that it was in the nature of a privilege or license, which might be revoked at the pleasure of the sovereign.

In *St. Clair County Turnp. Co.* v. *Illinois*, 96 U. S. 63 [24: 651], the original charter of the company gave it the right, in consideration of building a turnpike, to erect toll-gates and exact toll for twenty-five years from the date of the charter. In 1861, when the term of the charter had more than half expired, the state gave the company a new and additional privilege of using a certain bridge and dyke and of erecting a tollgate thereon. The only consideration required was that the company should keep them in repair. No term was expressed for the enjoyment of the privileges, and no conditions were imposed for resuming or revoking it on the part of the state. It was held that it could not be presumed to have been intended as a perpetual grant, since the company itself had but a limited period of existence, and that a law resuming possession of the bridge and dyke by subjecting them to the control and management of the city of East St. Louis was not a law impairing the obligation of the contract.

In *Philadelphia & G. F. Pass. R. Co.'s Appeal*, 102 Pa. 123, it was also held that a supplement to a charter which merely conferred upon the corporation a new right (as an exclusive right to use and occupy certain streets), or enlarged an *old one, without imposing any addition- [668 al burden upon it, was a mere license or promise by the state, and might be revoked at pleasure. "It is without consideration to support it and cannot bind a subsequent legislature."

We have epitomized these cases, not because they have any decisive bearing upon the question at issue, but for the purpose of showing the general trend of opinion in this court upon the subject of corporate charters and vested rights.

3. Conceding that there are no authorities directly in point (and the diligence of counsel

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has failed to cite us to any), let us see how far these principles are applicable to the case under consideration.

The Great Northern Railway was originally chartered in 1856, under the name of the Minneapolis & St. Cloud Railway Company, with authority to build a road from Minneapolis, in a northerly direction, to St. Cloud on the Mississippi river, a distance of about 75 miles, with an additional line to a point at or near the mouth of the St. Louis river (now Duluth) on Lake Superior, about 180 miles, and with a right to connect its road by branches with the road of any railroad company in the territory, to become the part owner or lessee of any such railroad, and to connect its road with the road of such company, and also to connect with any railroad running in the same direction. This power evidently refers to traffic connections at the termini of the road with other roads running in the same direction, in such manner as to make a continuous line, of which the road in question was to become a part. At this time railway construction west of the Mississippi river was in its infancy; no road existed within 200 miles of St. Paul; the state was largely a wilderness, and the object of the charter was evidently to connect two cities upon the Mississippi river, one of which was situated some distance above the head of navigation, and also to connect the Mississippi with a port upon Lake Superior, with the possibility that other roads might be constructed further up the river, or in an easterly or westerly direction into the interior. The road was a local one, and while power was given to make traffic **669**]connections with other roads, none *such was given to consolidate with them—much less with roads having a parallel line. Nor is the act claimed as authorizing the proposed contract.

To save any possible doubt as to the scope of the charter, the act was declared by § 17 "to be a public act, and may be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporation."

Nothing appears to have been done under this charter prior to 1865, when it was amended by re-enacting its 1st section, thereby legalizing and confirming the original organization of the road, and amending § 12 so far as to authorize the corporation "to connect with or adopt as as its own . . . any other railroad running in the same general direction with either of its main lines or any branch roads, which said corporation is authorized to construct." Another section (8) was added, authorizing the company "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of the road or branch road of any other railroad corporation or company having the same general direction or location, or to become merged therein by way of substitution," etc. And further, by § 9, "to consolidate any portion of its road and property, and, each branch being organized as aforesaid, may consolidate any portion of its branch road or property with the franchise of any other railroad company or any portion thereof," as might be agreed. And still further (§ 12), "to consolidate the whole or any portion of its main line or branch railroads, and all the property, rights, powers, franchises, grants, and effects pertaining to such roads, with the rights, powers, franchises, grants, and effects of any other railroad company, either within or without the state," etc., as might be agreed. It will be observed that the words in original § 12, as amended, and in § 8, limiting the power to connect with or consolidate with other roads, to those having "the same general direction or location," are omitted in §§ 9 and 12.

Under these very broad and practically unlimited powers, the company which, in 1889, took the name of the Great *Northern, pro [**670** ceeded, by a series of consolidations, purchases, and leases, to extend its line to the Pacific ocean, and absorb to itself and operate as a combined system an aggregate length of 4,500 miles. It is now proposed, by an arrangement with the bondholders and contemplated purchasers of the Northern Pacific Railway Company, that the Great Northern Railway, the defendant, shall guarantee, for the benefit of the holders of the bonds to be issued by the reorganized company, the payment of the principal and interest upon such bonds, and as a consideration for such guaranty, and as a compensation for the risk to the stockholders, the reorganized company shall transfer to the shareholders of the defendant company, or to a trustee for their use, one half of the capital stock of the reorganized company. By a further provision, the Northern Pacific is to join with the defendant in providing facilities for the interchange of cars and traffic between their respective lines, and shall interchange traffic with the defendant, and operate its trains to that end upon reasonable, fair, and lawful terms under joint tariffs or otherwise, the defendant having the right to bill its traffic, passengers, and freight from points on its own line to points on the Northern Pacific not reached by the Great Northern, with the further right to make use of the terminal facilities of the Northern Pacific at points where such facilities would be found to be convenient and economical, jointly with that company.

As the Northern Pacific road also controls, by its own construction and by the purchase of stock, other roads extending from the Mississippi river to the Pacific ocean, and operates as a single system an aggregate mileage of 4,500 miles, most of which is parallel to the Great Northern system, the effect of this arrangement would be to practically consolidate the two systems, to operate 9,000 miles of railway under a single management, and to destroy any possible advantages the public might have through a competition between the two lines.

It is true that upon its face the agreement contemplates principally an interchange of traffic between the lines under joint tariffs (by which is probably meant similar rates to be agreed upon between the parties) in order that the defendant *may enjoy the right to [**671** ticket its passengers and consign its freight to points upon the line of the Northern Pacific, not reached by the Great Northern, and to that end is also to have the right to make use of the terminal facilities of the Northern Pacific at such points on the line as should be convenient to the defendant. If the sole object of this agreement were to facilitate an interchange of

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traffic, so that each road might enjoy the benefit of billing its passengers and freight to points on the other road not reached by it, it would be difficult to foresee any objection to it. But the fact that one half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control of the Northern Pacific, is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured.

That the transfer of stock is to be made, not directly to the company, but to the shareholders, is immaterial, since it may be assumed that they would cast their votes in the interests of the company. Either the stock so transferred becomes virtually the property of the Great Northern, or there is no consideration for its guaranty of the principal and interest of the consolidated bonds. But as, by the agreement, the guaranty by the defendant of the Northern Pacific bonds is assumed to be in consideration of a transfer to its stockholders of one half the capital stock of the reorganized company, it would inevitably follow that this stock would be held for the benefit of the company. There is, however, in addition to that, an alternative provision that the transfer may be made to a trustee for the use of the stockholders, who would of course act as their agent and represent them as a body, and in fact stand as the company under another name. Doubtless these stockholders could lawfully acquire by individual purchases a majority or even the whole of the stock of the reorganized 672] *company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might, by sales of the stock so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic. Under the proposed arrangement, however, the Northern Pacific as a company, in return for a guaranty which the individual stockholders could not give, turns over to a trustee for the entire body of stockholders of the Great Northern one half of its stock, with the almost certainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies. If such amalgamation were thus effected, it would in all probability be final. We think the proposed arrangement is a plain violation of the acts of the state legislature passed in 1874 and 1881, prohibiting railroad corporations from consolidating with, leasing, or purchasing, or in any other way becoming the owner of or controlling, any other railroad corporation, or the stock, franchises, or rights of property thereof, having a parallel or competing line.

Under the broad powers conferred by the amended act of 1865, it is probable that this arrangement might be lawfully made; and the question is whether an unexecuted power to make such arrangement is a "vested right" within the meaning of § 17 of the original act. It is possible that, if this arrangement had been actually made and carried into effect, before the acts forbidding the consolidation of parallel or competing lines had been passed, the rights of the parties thereto would have become vested, and could not become impaired by any subsequent act of the legislature. But the real question before us is whether a bare unexecuted power to consolidate with other corporations, a power which, if it exists as claimed by the defendant, would authorize it to absorb by successive and gradual accretions the entire railway system of the country, is not, so long as it remains unexecuted, within the control of and subject to revocation by the *legislature, at least so far as it applies [673 to parallel or competing lines.

A vested right is defined by Fearne, in his work upon Contingent Remainders, as "an immediate fixed right of present or future enjoyment;" and by Chancellor Kent as an "immediate right of present enjoyment, or a present fixed right of future enjoyment." 4 Kent, Com. 202. It is said, by *Mr. Justice* Cooley that "rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." Cooley, Const. L. 332.

As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant. If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipments, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. *Sala* v. *New Orleans*, 2 Woods, 188.

But where the charter authorizes the company in sweeping terms to do certain things which are necessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be *revoked [674 if a possible exercise of such power is found to conflict with the interests of the public. As applicable to the case under consideration, we think it was competent for the legislature to declare that the power it had conferred upon

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the Minneapolis & St. Cloud Railway Company to consolidate its interest with those of other similar corporations should not be exercised, so far as applicable to parallel and competing lines, inasmuch as it is for the interest of the public that there should be competition between parallel roads. The legislature has the right to assume in this connection that neither road would reduce its tariff to a destructive or unprofitable figure, or to a point where either road would become valueless to its stockholders, and that the object of the act in question is to prevent such a combination between the two as would constitute a monopoly.

When the act of 1865 was passed it was doubtless contemplated that the Minneapolis & St. Cloud Railway Company would desire to extend its road (although it is hardly possible to suppose that an extension to the Pacific coast was thought of at that time), and to build, purchase, or lease branch roads, which would serve as feeders to its main line, and open up railway communication with territory naturally tributary to St. Paul and other towns on the Mississippi river. Such anticipations were perfectly legitimate, and these broad powers were undoubtedly intended as an encouragement to the construction of railways, to the development of the vast, unoccupied, but fertile, territory stretching in both directions from the course of the Mississippi river, and also to a connection with the fertile wheat-growing section of Manitoba, by a branch road to the Canadian line. Had it occurred to the legislature at that time that these almost unlimited powers would be used to obtain the control of parallel and competing lines, and to stifle legitimate competition, doubtless a proviso would have been inserted to meet this possibility. That the charter of 1865 might be made available to accomplish this purpose became apparent so soon that, within nine years thereafter, and before the construction of the road had been fairly entered upon, the legislature declared, in **675**] its act *of March 9, 1874, that no railroad corporation should consolidate with, lease, purchase, or control any parallel or competing line; and to indicate still more clearly that its object was only to prevent the abuse of these powers by the creation of a monopoly, it passed another act, in 1881, repeating this prohibition, and further declaring that any railroad corporation, whether organized under general law or special charter, might consolidate with, lease, purchase, or in any way become the owner of, or control, or hold the stock of any other railroad corporation, when the respective roads could be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches.

We do not deem it necessary to express an opinion in this case whether the legislature could wholly revoke the power it had given to this company to extend its system by the construction or purchase of branch lines or feeders, since the possibility of an extension of the road, even to the Pacific coast, may have had an influence upon persons contemplating the purchase of its stock or securities, so that a right to do this might be said to have become vested. But we think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong.

Nor do we undertake to say that the legislature may not, in the exercise of a wise foresight, and for the purpose of attracting capital to enterprises of doubtful profit, authorize the granting of monopolies for a limited time, irrevocable by a subsequent legislature. To do so would practically ignore or overrule a series of cases to which we have already adverted, wherein corporations have been induced to furnish municipalities with bridges, gas, water, and other requirements of modern civilization, by the promise of exclusive privileges for a term of years. Perhaps, too, it might not be beyond the competency of the legislature to authorize a railroad, by a clear and explicit act, to consolidate with a parallel or competing line, since cases may be imagined *where [**676** it might be for the public welfare to permit such consolidation. But the act of 1865, upon which the defendant relies, contains no such provision. There is only a general authority to consolidate, which we think the legislature may, by another act, declare shall not apply to cases manifestly not within its original intent. We think the general doctrine requiring grants to corporations to be construed favorably to the public, where there is a reasonable doubt as to the extent of the privilege conferred, may properly be invoked to declare that such privileges shall not be used to the detriment of the public.

Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect,—in short, puts the public at the mercy of the corporation. There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We cannot say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language. While, in particular cases, two railways by consolidating their interests under a single management, may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolies of all traffic along their lines; but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels *against [**677** the attempt of one road to control all traffic between terminal points, also connected by a

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competing line. There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts.

The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the state of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition.

In conclusion, we hold that where, by a railway charter, a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines.

The decree of the court below must therefore be reversed, and the case remanded for further proceedings in conformity with this opinion.

Mr. Justice **Field** and *Mr. Justice* **Brewer** dissented.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plff. in Err.*, *v.* COMMONWEALTH OF KENTUCKY ET AL.

(See S. C. Reporter's ed. 677-704.)

Consolidation of railroads — construction of charter — branch roads — competing lines — contemporaneous construction — estoppel — power to sell—judicial sale—impairing obligation of contract—police power—interstate commerce.

1. The important power to purchase or consolidate a railroad with another line cannot be inferred from such indefinite language as "to unite or connect with such road."
2. The doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation.
3. A right of a railroad company to "purchase and hold any road constructed by another company," given by Ky. act Jan. 17, 1856, § 3, together with the right to extend any "branch road" under the provisions of § 13 of the act, which refers only to branch roads, the cost of which should be charged upon the branch line only, is to be limited to the purchase of branch roads, and not extended to the purchase of parallel roads.
4. Ratification by the state of the acquisition by a railroad company of local lines parallel to certain branch lines of the main road does not indicate an intent to approve the purchase of parallel and competing through lines,—especially where a statute limits the power to consolidate or lease two roads so connected as to form a continuous line.
5. Contemporaneous construction of the charter of a railroad company, which ratified the purchase of a few short local lines, is not sufficient to justify the company in consolidating with a parallel and competing line between its two principal termini, with a view of controlling through traffic and destroying competition.
6. The failure of the state to prevent the acquisition of some parallel lines by a railroad company does not estop it from setting up an opposition to another purchase which in the view of the state is detrimental to public interests.
7. To make a purchase of one railroad by the owner of a parallel line valid, the former must have power to sell as well as the latter power to buy.
8. Where the legislature declares that a railway shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful because the parties choose to let it take the form of a judicial sale.
9. A constitutional prohibition against the consolidation of the stock, franchises, or property, as well as the purchase and lease, of parallel and competing lines of railroad, does not, by repealing an unexecuted charter power of a railroad company to purchase a parallel line, impair the obligation of any contract contained in its charter.
10. Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control, in the exercise of which the legislature is vested with a large discretion beyond the reach of judicial inquiry, if it is exercised bona fide for the protection of the public.
11. The prohibition by a state of the consolidation of parallel and competing lines of railroad is not an interference with the power of Congress over interstate commerce.

[No. 722.]

Argued January 14, 15, 1896. Decided March 30, 1896.

IN ERROR to the Court of Appeals of the State of Kentucky to review the decree of that court affirming a decree of the Jefferson Circuit Court in favor of the Commonwealth of Kentucky, plaintiff, against the Louisville & Nashville Railroad Company enjoining a proposed agreement for consolidation of that railroad with certain other railroads. *Affirmed.*

See same case below, 31 S. W. 476.

Statement by *Mr. Justice* **Brown**:

*This was a bill in equity, styled a petition, originally filed by the Commonwealth of Kentucky against the Louisville & Nashville Railroad Company (hereinafter called the L. & N. Co.) the Chesapeake, Ohio, & Southwestern Railroad Company (hereinafter called the Chesapeake Co.) and several subordinate corporations tributary to the latter, to enjoin the [679

NOTE.—*As to construction of grants to corporations; corporations having only powers granted, or those necessary to carry into effect powers granted; acting only in the mode prescribed by the law creating,*—see notes to Charles River Bridge Proprs. v. Warren Bridge Proprs. 9: 773, and Beaty v. Knowler, 7: 813.

As to power to alter, amend, or repeal charters, see notes to Dartmouth College v. Woodward, 4: 644, and Greenwood v. Union Freight R. Co. 26: 961.

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L. & N. Co. (1) from acquiring the control of or operating the parallel and competing lines of railroad known as the Chesapeake, Ohio, & Southwestern system; (2) from acquiring or operating the Short Route Railway Transfer Co., a belt line in Louisville, and the Union Depot in Louisville, connected therewith; and also (3) to enjoin the Chesapeake, Ohio, & Southwestern system from selling out to or permitting its roads to be operated by its competitor, the L. & N. Co.

It was stated substantially in the commonwealth's petition, as its cause of action, that the L. & N. Co. owned and controlled many railroads in Kentucky, as respects which railroads owned or controlled by the other companies named are parallel and competing; that defendants have made a contract and arrangement whereby the L. & N. Co. is to become the owner and acquire a control of the capital stock, franchises, and property of the other defendant companies, to the great injury of the commonwealth, and in violation of § 201 of the state Constitution of 1891, which reads as follows:

"Sec. 201. No railroad, telegraph, telephone, bridge, or common carrier company shall consolidate its capital stock, franchises, or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge, or common carrier company owning a parallel or competing line or structure; or acquire by purchase, lease, or otherwise any parallel or competing line or structure or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this state or with any common carrier by which combination or contract the earnings of the one doing the carrying are to be shared by the other not doing the carrying."

In an amended petition it was stated in sub-[680]stance that the *L. & N. Co. was endeavoring to acquire the capital stock, interest in real property, and mortgage securities of the other defendant companies in order to obtain control and ultimately purchase at judicial sale and become the owner of their franchises and property.

The answer denied the allegation in the form as made, but contained an affirmative statement that the purchase of the stock and securities referred to had already been consummated, and in effect admitted that the L. & N. Co. intended to purchase the franchises and properties at judicial sale.

The L. & N. Co. was incorporated by an act of the Kentucky legislature approved March 5, 1850, the 14th section of which act provided "that the president and board of directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the city of Louisville to the Tennessee line in the direction of Nashville, the route to be by them selected and determined, not exceeding 66 feet wide, with as many sets of tracks as they may deem necessary; and that they may cause to be made contracts with others for making said railroad or any part of it."

This act was frequently amended in details unnecessary to be noticed here, one of which, adopted March 7, 1854, declared (§ 4) "that it shall be lawful for said Louisville & Nashville Railroad Company to unite their road with any other road connecting therewith upon such terms and conditions as may be agreed upon between the said Louisville & Nashville Railroad Company and such other company as they may desire to unite their said road with."

On December 15, 1855, the legislature of Tennessee passed an act to amend an act entitled "An Act to Charter the Louisville & Nashville Railroad Company, and the Several Acts Amending said Act Passed by the Legislatures of Kentucky and Tennessee" under which it had been authorized to construct its road in Tennessee from the Kentucky line to Nashville, the 13th section of which act provided as follows:

"Sec. 13. *Be it further enacted*, That this act shall take effect from and after its passage: *Provided*, Nothing herein *contained shall [681 be construed to prevent the Louisville & Nashville Railroad Company from admitting branch roads to connect with it at any point or points to be agreed upon between said company and those who have or may subscribe stock for the construction of any branch road. The stock subscribed, and the means created to construct such separate branch, shall be faithfully applied to that purpose; and said company is hereby vested with the power and the right to issue its bonds under the provisions of this act to obtain means to construct and equip any branch road; the bonds to express on their face the purpose for which they were executed; and to secure their payment may execute a deed of trust, or mortgage, for payment of which the rights, credits, profits, property, and franchise, procured for said branch by the use of its means, shall alone be made liable. The credit, rights, or profits of the main stem shall not be used to create means to construct, or be made liable for any debt or liability created to construct, branch roads; nor shall the rights, credit, property, and profits of any branch road be used to create means to construct, or made liable for any debt or liability created to build the main stem; and with a view to such liabilities and profits, said company shall keep separate accounts, exhibiting the stock, property, and debts of the main road, and each separate branch."

On January 17, 1856, the legislature of Kentucky passed an act, the 1st section of which re-enacted the act passed by the legislature of Tennessee in 1855 "in the following sections and words:" (Here follows a literal copy of the Tennessee act.) The 2d section of this act vested the Louisville & Nashville Company with power to make agreements with any Tennessee corporation to construct a railroad in part or in whole of the distance between Louisville and Memphis, and running in the direction of Louisville, whereby to secure mutual and reciprocal rights to the contracting parties, etc. The 3d section was as follows: "That the said company may, under the provisions of the 13th section of this act" (referring evidently to the 13th section of the Tennessee act), "from time to time extend any branch road, *and may purchase and hold any [682 *road constructed by another company*, or may agree on terms to receive the cars of other

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roads on their said road, but shall charge for the same the usual freight."

At the same session, and on February 14, 1856, the legislature of Kentucky passed what is known as the general reservation act, the language of which, so far as it is material here, is as follows:

"Sec. 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed; *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or appeal shall impair other rights previously vested. . . .

"Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

At this time and up to September, 1856, the L. & N. Co. owned only a short piece of road—31 miles in length—extending from Louisville southwardly to Lebanon Junction. Up to September, 1857, it owned only 45 miles; to September, 1858, 72 miles; in 1859, only 110 miles; and not till 1860 did it carry its road to Nashville, 180 miles About the same time was constructed a branch road from a point about 7 miles south of Bowling Green to the state line, which has since been extended and is now owned and operated by it, to Memphis, Tennessee. Subsequently it purchased and now owns a road known as the Evansville, Henderson, & Nashville Railroad, which extends from Edgefield, Tennessee, on its main line 10 miles north of Nashville, by way of Hopkinsville, Kentucky, to Henderson, and thence across the Ohio river to Evansville, Indiana. It also owns and operates various branches in the state of Kentucky that diverge from the main line eastwardly, as well as the Kentucky Central Railroad, extending from Cincinnati southward, and certain branches thereof.

683] *Of the roads constituting the Chesapeake, Ohio, & Southwestern system, the first one extended from Paducah to Elizabethtown, and was subsequently extended from Cecilia Junction, 6 miles from Elizabethtown, to Louisville, whereby a continuous line was formed from Louisville to Paducah, independent of the L. & N. road. But by a subsequent lease, amounting practically to a purchase of a road from Paducah to Memphis, the Chesapeake Company became, about 1881, the owner of a connected, continuous, and independent railroad from Louisville by way of Cecilia Junction and Paducah to Memphis. It also has an interest in and control of several other railroads bearing the name of and nominally held by the companies that built them, one of which is termed the Short Route Railway, extending from Preston street in Louisville through the depot at Seventh and Water streets to Twelfth street, where it connects with the main line.

Upon a hearing of the case upon pleadings and proofs, a decree was entered by the Jefferson circuit court in favor of the commonwealth, enjoining the proposed agreement for consolidation, which decree was subsequently affirmed by the court of appeals of Kentucky. 31 S. W. 476.

Whereupon the L. & N. Co. sued out a writ of error from this court.

Messrs. **Ed. Baxter, James P. Helm,** and **Helm Bruce,** for plaintiff in error:

In determining the meaning of the charter contract we must seek the legislative intent; for that intent, if sufficiently expressed, is the law, and in determining this we have a right to consider the times and circumstances under which this legislative grant was made.

Smith v. *Townsend*, 148 U. S. 490 (37: 533).

The power is given in unqualified terms to "purchase and hold any road constructed by another company," without any attempt to define or limit the kind of road.

Morgan v. *Donovan*, 58 Ala. 263.

As to the power of a railroad company to buy the securities of another company merely to be used in the purchase of the railroad of the second company, where the purchasing company has the express power to buy such railroad, there can be no possible question.

Dewey v. *Toledo, A. A. & N. M. R. Co.* 91 Mich. 351; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 (29: 516); *Louisville Gas Co.* v. *Citizens' Gaslight Co.* 115 U. S. 683 (29: 510); *Chenango Bridge Co.* v. *Binghamton Bridge Co.* ("*The Binghamton Bridge*") 70 U. S. 3 Wall. 51 (18: 137).

There is absolutely nothing in this act to authorize the court to "construe" it as giving the power to buy only nonparallel or noncompetitive roads.

Lake County Comrs. v. *Rollins*, 130 U. S. 670 (32: 1063).

Strict construction, as applied to statutes, does not mean that words shall be so restricted as not to have their full meaning, but everything shall be excluded from the operation of statutes so construed which does not clearly come within the meaning of the language used.

Stein v. *Bienville Water Co.* 141 U. S. 67 (35: 622); *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 562 (36: 542).

In support of the simple reading of the plain letter of this law, we find that such has been the actual, practical, public, oft-repeated, and never-before-questioned construction of this act for nearly half a century. Not only has this court frequently given great weight to the contemporaneous construction of statutes, but the same has been done by the court of appeals of Kentucky, the highest court of the state in which this statute was enacted.

Harrison v. *Com.* 83 Ky. 162; *Barbour* v. *Louisville*, 83 Ky. 102; *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 418 (5: 294); *United States* v. *Moore*, 95 U. S. 763 (24: 589); *United States* v. *Pugh*, 99 U. S. 269 (25: 323); *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 366 (33: 367); *United States* v. *Alabama G. S. R. Co.* 142 U. S. 621 (35: 1136) *United States* v. *Union P. R. Co.* 148 U. S. 562 (37: 560); *United States* v. *Hill*, 120 U. S. 182 (30: 632).

This charter power of the L. & N. R. Co. to buy another road has not been taken away or restricted by the new constitution, and cannot be, because it is a part of a contract that cannot be impaired by the state.

Covington & L. R. Co. v. *Kenton County Ct.* 12 B. Mon. 144; *Dartmouth College* v. *Wood-*

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ward, 17 U. S. 4 Wheat. 627 (4: 656); *Farrington* v. *Tennessee*, 95 U. S. 683 (24: 559); *Northwestern University* v. *People*, 99 U. S. 309 (25: 387); *New Jersey* v. *Yard*, 95 U. S. 104 (24: 352).

The reservation statute of 1856 does not apply

O'Donoghue v. *Akin*, 2 Duv. 479; *Cumberland & O. R. Co.* v. *Washington County Ct.* 10 Bush, 574; *Taylor* v. *Mitchell*, 57 Pa. 209; *Jackman* v. *Garland*, 64 Me. 133; *Charles* v. *Lamberson*, 1 Iowa, 442, 63 Am. Dec. 457; *Rogers* v. *Vass*, 6 Iowa, 408; *Price* v. *Hopkin*, 13 Mich. 318.

Neither a charter passed before the statute nor any amendment thereof, whether passed before or after the statute, is included within the terms of the statute.

New Jersey v. *Yard*, 95 U S. 104 (24: 352).

The state, under what is called its police power, cannot avoid its contracts or annul them, whenever it concludes that they are not advantageous under a new condition of affairs, or according to a new view of public policy.

New Orleans Gaslight Co. v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 660 (29: 520); *Crutcher* v. *Kentucky*, 141 U. S. 59 (35: 652); *Leisy* v. *Hardin*, 135 U. S. 112 (34: 133), 3 Inters. Com. Rep. 36; *Reagan* v. *Farmers' Loan & T. Co.* (No. 1) 154 U. S. 393 (38: 1022), 4 Inters. Com. Rep. 560.

The 201st section of the Constitution of Kentucky, forbidding the purchase of competing railroads, and under which this action is sought to be maintained, is a regulation of interstate commerce, and therefore void, if applied to interstate railroads.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 (6: 678); *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Freight Tax*") 82 U. S. 15 Wall. 232 (21: 146); *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 (29: 785); *Leloup* v. *Port of Mobile*, 127 U. S. 640 (32: 311), 2 Inters. Com. Rep. 134; *Crutcher* v. *Kentucky*, 141 U. S. 47 (35: 649); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S 203 (29: 161), 1 Inters. Com. Rep. 382; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 481 (31: 705), 1 Inters. Com. Rep. 823; *Leisy* v. *Hardin*, 135 U. S. 119 (34: 136), 3 Inters. Com. Rep. 36; *Henderson* v. *Wickham*, 92 U. S. 259 (23: 543); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *Hall* v. *De Cuir*, 95 U. S. 485 (24: 547); *Brennan* v. *Titusville*, 153 U. S. 289 (38: 719), 4 Inters. Com. Rep. 658; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 (30: 244), 1 Inters. Com. Rep. 31; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204 (38: 962), 4 Inters. Com. Rep. 649; *Re Debs*, 158 U. S. 564 (39: 1092).

Messrs. **Alexander P. Humphrey** and **George M. Davie**, for defendant in error:

The privilege of the Louisville & Nashville Railroad Co. to "unite" its said road with a "connecting" road or course related only to the said road from "Louisville to Nashville," and the privilege to "unite" meant simply that two "connecting" railroads could be united physically, so as to make running and trade connections. But such "privilege" to "unite" its road with another "connecting" road does not authorize the one road to purchase or operate the other.

St. Louis, V. & T. H. R. Co. v. *Terre Haute & I. R. Co.* 145 U. S. 404 (36: 753); *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 311 (30: 92); *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 668 (28: 292); *Oregon R. & Nav. Co.* v. *Oregonian R. Co* 130 U. S. 30 (32: 843).

The two systems are "parallel or competing lines" and the court will take judicial knowledge of it.

Gulf, C. & S. F. R. Co. v. *State*, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335.

The following cases define and apply what is meant by "parallel or competing lines" in the constitutional provisons.

Stockton v. *Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 50 N. J. Eq. 489; *Pennsylvania R. Co.* v. *Com.* (Pa.) 29 Am. & Eng. R. Cas. 145, 151; *State* v. *Vanderbilt*, 37 Ohio St. 599; *East Line & R. R. R. Co.* v. *Rushing*, 69 Tex. 313; *State, Leese*, v. *Atchison & N. R. Co.* 24 Neb. 143; *Currier* v. *Concord R. Corp.* 48 N. H. 321; *Central R. Co.* v. *Collins*, 40 Ga. 640; *Langdon* v. *Branch*, 37 Fed. Rep. 449; *Hamilton* v. *Savannah, F. & W. R. Co.* 49 Fed. Rep. 412.

The amendment of 1856 applies only to "branch" lines.

Ryegate v. *Wardsboro*, 30 Vt. 746; *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 49 (35: 64).

Unless confined to "branch" lines, the act would be void; as fundamentally changing the enterprise and the contracts of its subscribers.

Ferguson v. *Meredith* ("*Clearwater* v. *Meredith*") 68 U. S. 1 Wall. 40 (17: 608).

A lateral railroad is nothing more or less than an offshoot from the main line or stem.

Blanton v. *Richmond, F. & P. R. Co.* 86 Va. 618; *McAboy's Appeal*, 107 Pa. 558.

Purchases under the amendment of 1856 should be limited to noncompeting lines.

United States v. *Kirby*, 74 U. S. 7 Wall. 483 (19: 278); *Clarke* v. *Central R. & Bkg. Co.* 50 Fed. Rep. 245; *Morgan* v. *Donovan*, 58 Ala. 263; *Elkins* v. *Camden & A. R. Co.* 36 N. J. Eq. 12; *Brewer* v. *Blougher*, 39 U. S. 14 Pet. 178 (10: 408); *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 30 (32: 843).

The contract right, if any, was only to purchase then existing roads.

East Line & R. R. R. Co. v. *Rushing*, 69 Tex. 306.

The amendment of 1856 was a mere matter of grace, and not a contract.

Tucker v. *Ferguson*, 89 U. S. 22 Wall. 574 (22: 816); *Philadelphia & G. F. P. R. Co.'s Appeal*, 102 Pa. 123; *Johnson* v. *Crow*, 87 Pa. 184.

It was an inchoate privilege or license only, and was revocable, to the extent not acted on.

Covington & L. R. Co. v. *Kenton County Ct.* 12 B. Mon. 144; *Wilson* v. *Polk County*, 112 Mo. 136; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 461 (36: 1045).

The amendment of 1856 did not "take effect" until after the "General Reservation" act of 1856; and was therefore subject to repeal at any time.

Re Howe's Estate, 112 N. Y. 100, 2 L. R. A. 825; *Rice* v. *Ruddiman*, 10 Mich. 135; *Jack-*

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man v. *Garland*, 64 Me. 133; *Davenport* v. *Davenport & St. P. R. Co.* 37 Iowa, 624; *Coe* v. *Commissioners*, 64 Me. 31; *Gorham* v. *Springfield*, 21 Me. 59; *Charles* v. *Lamberson*, 1 Iowa, 436, 63 Am. Dec. 457; *Cargill* v. *Power*, 1 Mich. 369; *Rogers* v. *Vass*, 6 Iowa, 405.

The amendment was "accepted," if at all, subject to repeal.

Memphis & L. R. R. Co. v. *Berry*, 112 U. S. 622 (28: 842); *Cincinnati, H. & I. R. Co.* v. *Clifford*, 113 Ind. 460.

The C. O. & S. W. had no power to sell, or be sold, to a competing line.

St. Louis, V. & T. H. R. Co. v. *Terre Haute & I. R. Co.* 145 U. S. 404 (36: 753); *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 (30: 83); *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 410 (32: 984); *East Line & R. R. R. Co.* v. *State*, 75 Tex. 446.

The other L. & N. amendment (of 1854) did not authorize the purchase or operation of competing lines.

Pennsylvania R. Co. v. *St. Louis, A. & T. H. R. Co. supra; Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 668 (28: 291); *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 24 (35: 55); *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 30 (32: 843).

It was illegal for the L. & N. to purchase the controlling majority of the "stocks and bonds" of the C. O. & S. W.

Central R. Co. v. *Collins*, 40 Ga. 582.

The prohibition against the purchase or operation of competing lines is a valid exercise of the police power.

Olcott v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 694 (21: 388); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 393 (35: 1054); *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 179 (32: 380); *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 367 (37: 771); *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 571 (38: 274); *People* v. *Boston & A. R. Co.* 70 N. Y. 569; *Pennsylvania R. Co.* v. *Miller*, 132 U. S. 75 (33: 267); *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 454 (33: 978), 3 Inters. Com. Rep. 209; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 324 (29: 642); *Crowley* v. *Christensen*, 137 U. S. 90 (34: 623); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 33 (24: 992); *Hancock* v. *Louisville & N. R. Co.* 145 U. S. 412 (36: 756); *Plumley* v. *Massachusetts*, 155 U. S. 471 (39: 226).

To forbid a contract of railroad consolidation is within the power of the legislature.

Oceanyan v. *Winchester Repeating Arms Co.* 103 U. S. 261 (26: 539); *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 455 (38: 781); *Mugler* v. *Kansas*, 123 U. S. 660 (31: 210).

The Kentucky Constitution does not violate the Federal interstate commerce clause.

Plumley v. *Massachusetts*, 155 U. S. 462 (39: 223); *United States* v. *E. C. Knight Co.* 156 U. S. 11 (39: 328); *Leavenworth County Comrs.* v. *Chicago, R. I. & P. R. Co.* 134 U. S. 688 (33: 1064); *Ashley* v. *Ryan*, 153 U. S. 436 (38: 773), 4 Inters. Com. Rep. 664; *New Buffalo Twp.* v. *Cambria Iron Co.* 105 U. S. 73 (26: 1024); *Shields* v. *Ohio*, 95 U. S. 321 (24: 358); *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301 (38: 450); *Livingston County* v. *First Nat. Bank*, 128 U. S. 102 (32: 359); *Wallace* v. *Loomis*, 97 U. S. 154 (24: 898); *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 571 (38: 274).

Mr. Justice **Brown** delivered the opinion of the court:

This case turns to a certain extent upon the principles just announced in Pearsall against the Great Northern Railway Company, although it differs from that case in the fact that the charter of the L. & N. Co. contains no reserved power to alter or amend, as well as in several other minor particulars.

1. The original charter of the L. & N. Co., granted in 1850, *was limited in its char- [684 acter, and authorized the company only to construct a railroad from Louisville to the Tennessee line, in the direction of Nashville, with as many tracks as might be deemed necessary, but with no power to extend its lines or to purchase, lease, or consolidate with other roads.

By the act of March 7, 1854, the company was given power to *unite* their road with any other road connecting therewith upon such conditions as the two companies might agree upon. As we have frequently held that a power to connect or unite with another road refers merely to a physical connection of the tracks and does not authorize the purchase or even the lease of such road, or any union of their franchises, it is evident that this act is no authority for the proposed consolidation. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 667 [28: 291]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 [30: 83]; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1 [32: 837]; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393 [36: 748]; *Tippecanoe County Comrs.* v. *Lafayette, M. & B. R. Co.* 50 Ind. 85, 110. The important power to purchase or consolidate with another line cannot be inferred from any such indefinite language as "to unite or connect with such road." The union referred to in this act is also limited to a union with a road already connected with the L. & N. Co. by running into the same town, and could have no possible relation to the acquirement of a parallel or competing line. We ordinarily speak of two roads as connecting when they have stations in the same city, in which case authority is given by this act to make a mechanical union between the tracks of the two companies.

Appellant relies principally, however, upon the act of January 17, 1856, the 1st section of which re-enacted an act of the legislature of Tennessee, passed the year before, chartering the L. & N. Co., which last-mentioned act contained 16 sections authorizing, among other things, the issue of bonds of the state to aid the company in building a bridge across the Cumberland river, and in purchasing iron, etc. The Kentucky act contained but 5 sections in all, the 3d of which provided "that said company may, under the provisions of the 13th section of this act, from time to time extend any branch road, *and *may purchase and hold* [685 *any road constructed by another company*, or may agree on terms to receive the cars of other roads on their said road, but shall charge for the same the usual freight."

The 13th section of the Tennessee act, incorporated into the 1st section of the Kentucky act, also authorized the company to permit branch roads to connect with it at any points to be agreed upon between the company and

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the stockholders of the branch road. It also authorized the issue of bonds to obtain the means to construct and equip any branch road, and provided that the credits and profits of the main stem should not be used for such purpose, nor the property and profits of any branch road be used to build the main stem. As this section, however, was merely limited to *branch* roads, the L. & N. Co. is forced to rely for its authority to acquire the control of the Chesapeake Co. upon its power "to purchase and hold any road constructed by another company."

The court of appeals of Kentucky held that the whole section, taken together, indicated that the power to purchase and hold any road constructed by another company referred to *branch* roads, which by a previous clause of the same section, the L. & N. Co. was authorized to construct, and that this was also further manifested by the power given to "agree on terms to receive the cars of other roads on their said road."

Upon the other hand, the company insists that the power to purchase and hold other roads is not only unlimited and extends to all other roads built or to be built, although parallel and competing lines, but that it constitutes an irrevocable contract, which a subsequent legislature is powerless to impair.

In construing this section we are bound to bear in mind the general rule, so often affirmed by this court, that all doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation, and that a surrender of the power of the legislature in any matter of public concern must never be presumed from uncertain or equivocal expressions. *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66, 88 [16: 500,509]; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206, 225 [21: 888,894]; **686**] **Bailey* v. *Magwire*, 89 U. S. 22 Wall. 215 [22: 850]; *Slidell* v. *Grandjean*, 111 U. S. 412 [28: 321]; *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.* 138 U. S. 287 [34: 967].

At this time (January, 1856) the only railroads in the state of Kentucky in operation were from Louisville eastwardly to Lexington, and one from Lexington northwardly by way of Paris to Covington. There was no road running into southern or western Kentucky, or southwardly from Louisville, except the L. & N. Co.'s road as far as it had gone. While the General Assembly was not only willing but anxious that this company should have liberal and broad powers to aid it, the question of parallel or competing lines had probably not entered into the minds of the legislators as a contingency to be provided against.

There are two reasons why, in our opinion, the 3d section of the act of 1856 was never intended to confer a general power to purchase roads constructed by other companies, regardless of their relations or connections with the L. & N. road.

(1) The language of the section is that the "company may *under the provisions of the 13th section of this act*" (referring to the 13th section of the Tennessee act, re-enacted), "from time to time extend" by its own construction "any branch road." Now, as before observed, the 13th section of the Tennessee act refers only to *branch* roads, the cost of which was to be a charge or mortgage upon the branch line, and not upon the main stem; and it seems reasonable to infer that the cost of whatever roads were built or purchased under it was intended to be a charge upon the branch only, and not upon the main line. If the limitation "under the 13th section" were held to be applicable only to that part of the 3d section which allows extensions of branch lines, it would result that, if the company constructed a branch road, its cost would be a charge on the branch line, and not upon the main line; but if it should purchase an independent line, the cost could be made a charge upon the main line.

(2) It is hardly possible to suppose that the legislature intended to allow the company to "extend," that is, to construct any extension of a branch road, and at the same time to confer an unlimited power to purchase and hold any road *constructed by another company. The [**687** rule, *noscitur a sociis*, applied to this case would undoubtedly limit the power to *purchase*, under the general clause, to such roads as the company was authorized to *build* under the preceding and more special clause. There is no reason why a power to build should be limited to *branch* roads, while the power to purchase should be so unlimited as to authorize the company to absorb parallel or competing lines, either within or without the state. Additional support for this construction is also found in the concluding words of the section empowering the company "to agree on terms to receive the cars of other roads on their said road." This would indicate an intention to permit the company to receive upon its main line the cars of other roads constructed or purchased as feeders to that line, but would scarcely be applicable to the cars of competing or parallel roads, which would seldom be required to be taken upon their line.

That the general assembly could have intended to grant the broad powers claimed is also highly improbable in view of an act passed a little more than two years thereafter (June 22, 1858) by which all railroad companies were declared to have power and authority to make with each other contracts of the following character: *First*, for the consolidation of either the management, profits, or stock of any two or more companies, the roads of which are or shall be so connected as to form a continuous road. *Second*, for the leasing of the road of one company to another, provided the roads so leased shall be so connected as to form a continuous line. This act is a general one, and the possibility of consolidating parallel or competing lines was evidently considered and reprobated.

As bearing upon the proper construction of this charter, as well as upon the question of actual parallelism, the case of *State* v. *Vanderbilt*, 37 Ohio St. 590, is an instructive one. This was an action in quo warranto to test the legality of a consolidation of the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company and the Cincinnati, Hamilton, & Dayton Railroad Company, the former of which owned and controlled a road running from Cleveland upon *Lake Erie by the [**688** way of Columbus, to Cincinnati, and the latter a road running from Toledo, at the Western

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end of Lake Erie, by the way of Hamilton and Dayton, to Cincinnati. The statute provided that companies might consolidate, where their lines were so constructed as to admit of the passage of burden or passenger cars over any two or more of such roads *continuously* without break or interruption. The court held that, in view of the existence of a large commerce from the southern states by way of Cincinnati to ports upon Lake Erie as well as from such points southerly, by railroad lines converging at Cincinnati, these were substantially parallel and competing roads; that it might be inferred from the record that a leading object in making the consolidation was to destroy that competition; and that upon this state of facts, these roads were not so constructed as to admit the passage of burden or passenger cars over two or more of such roads *continuously*. In delivering the opinion it was observed that "where companies, such as these are, being parallel and competing, claim that authority to consolidate has been granted to them, they must be able to point to words in the statute which admit of no other reasonable construction, for it will not be assumed that the lawmaking power has authorized the creation of a monopoly so detrimental to the public interest."

So in *Elkins* v. *Camden & A. R. Co.* 36 N. J. Eq. 5, a statute authorized railroad companies to lease their roads or any part of them to any other corporation or corporations of that or any other state, or to unite and consolidate, as well as merge their stock, property, franchises, and roads with those of any other company or companies; and that after such lease or consolidation, the company acquiring the other's road might use and operate such road. The court held that this did not authorize a railroad running from Philadelphia to Atlantic City to assume the debts and buy a majority of the stock and bonds and the equipment of a rival railroad running between the same termini, or to become the purchaser of its property at a foreclosure sale, or to control it after such sale in a reorganization of the com-[689]pany. The court *enjoined the purchase, saying that "the purchase of a rival railroad is (not to speak of public policy) foreign to the objects for which the defendant was incorporated. Nor can the purchase be regarded as within the authority given by the defendant's charter to build lateral or branch roads. . . . As a purchase with a view to extinguishing competition, the transaction is clearly *ultra vires*."

Defendant, however, further urges in support of its assumed rights under the 3d section of the charter of 1858, a contemporaneous construction by the parties in interest, under which several lines were purchased which ran parallel to some of its own branches, and one of which, known as the Cecilia branch, about 50 miles in length, running substantially parallel to its main line, which it purchased and held for a short time and then sold to the Chesapeake Company. These, however, were local lines, which either ran parallel to the branches of the L. & N., such as the Owensburg and Nashville, and the Bardstown branch, or an extension of its main line, such as the Louisville, Cincinnati, & Lexington, running from Louisville to Cincinnati, or a short line like the Cecilia branch, running parallel to the main line; yet, as the terminus at one end or the other was in most cases different, it can hardly be said that any of these were competing lines, or that their purchase showed such an acquiescence on the part of the state as to estop it from opposing the purchase of a through line from Louisville to Memphis, by the way of Paducah—a line which connects the principal termini of the L. & N. Co. by a road substantially parallel, and no part of which is more than 50 miles from the corresponding part of the L. & N. Putting the broadest construction upon what was actually done, it amounts to no more than that the company made several purchases of local lines, in which the state acquiesced. That the state may have seen fit in particular cases to ratify the acquisition of local lines parallel to certain branch lines of the main road does not argue that it intended to approve the purchase of parallel and competing through lines, especially in view of the act of June 22, 1858, which limited the power to consolidate or lease to roads so connected as to form a continuous line. *Indeed, these acquisitions appear to have[690 been deemed so little in contravention of the public policy of the state that the general assembly did not hesitate to confirm them by special acts, and to receive taxes upon them as part of the L. & N. system.

While the doctrine of contemporaneous construction is doubtless of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet to justify its application to a particular case, such contemporaneous construction must be shown to have been as broad as the exigencies of the case require. In this view we cannot say that a contemporaneous construction of this charter, which ratified the purchase of a few short local lines, was sufficient to justify the company in consolidating with a parallel and competing line between its two principal termini, with a view of controlling the through traffic from the lower Mississippi to Cincinnati, and destroying the competition which had previously existed between the two lines. It is possible that the commonwealth might, if it had seen fit to do so, have enjoined the acquisition of some of these parallel lines, and the fact that it did not deem such purchases to be in contravention of public policy ought not to estop it from setting up an opposition to another purchase, which, in its view, is detrimental to the public interests. As is said by Mr. Justice Cooley, in his Constitutional Limitations (6th ed.) page 85: "A power is frequently yielded to merely because it is claimed, and it may be exercised for a long time in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against, appearing, or without any one being sufficiently interested in the subject to raise the question. But these circumstances certainly cannot be allowed to sanction a clear infraction of the Constitution." We are therefore of opinion that the court of appeals was substantially correct in saying that "though thirty-eight years since the passage of the act of 1856 and thirty-six since the act of 1858 had elapsed when this action was commenced, the L. & N. Co. never before claimed or attempted to exercise the right to

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purchase and hold parallel and competing lines, 691] except about 1878, when *it purchased the road from Louisville to Cecilia Junction, which was held only a short time and then sold to the Chesapeake, Ohio & Southwestern Company."

That the lines proposed to be consolidated are parallel and competing is evident from an inspection of the map, since both connect the two important cities, Louisville and Memphis, which constitute their termini and are natural competitors for the traffic from the southwestern to the northeastern states by way of Cincinnati, as well as that in the opposite direction. The object of the consolidation is obviously to enable the L. & N. to obtain a complete monopoly of all the traffic through the western half of the state. Conceding that that part of the Chesapeake line which ran from Elizabethtown to Paducah was originally a branch line of the L. & N., and might have been acquired as such under section 8 of the act of 1856, it ceased to be such after the Cecilia branch was acquired, and the line was extended from Paducah to Memphis. It then became a parallel and competing line within the meaning of the Constitution.

In reply to the argument that millions of dollars have been invested in the securities of the company upon the faith of what was supposed to be its admitted powers, and that its capital stock of $1,500,000 in 1856 has expanded to $51,000,000, it is sufficient to say that, in making such investments, capitalists were bound to know the authority of the company under its charter, and to put the proper interpretation upon it; and that we are not at liberty to presume that investments were made upon the faith of powers that do not exist; and, if they were, the commonwealth is not bound to respect investments made under a misapprehension of the law. Indeed, the argument proves too much, and would justify the inference that capitalists put their money into the road upon the assumption that it had been given irrevocable right to absorb to itself every road which might thereafter be constructed within the limits of the commonwealth.

2. Besides this, however, in order to support the proposed consolidation of these two systems, the parties are bound to show, not only that the L. & N. Co. was competent to buy, but 692] *that the Chesapeake Co. was also vested with power to sell. To make a valid contract it is necessary to show that both parties are competent to enter into the proposed stipulations. It is a fundamental principle in the law of contracts that, to make a valid agreement, there must be a meeting of minds, and obviously if there be a disability on the part of either party to enter into the proposed contract there can be no valid agreement. As was said by this court in *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393, 404 [36:748, 753]: "It is unnecessary, however, to express a definite opinion upon the question whether a contract between these parties was beyond the corporate powers of the plaintiff, because, as held by the decisions of this court already cited, a contract beyond the corporate power of either party is as invalid as if beyond the corporate powers of both, and the contract in question was clearly beyond the corporate powers of the defendant." See also *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25:950]; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1 [32:837]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 [30:83]; *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 24 [35:55].

The Chesapeake Co. was incorporated under an act of the general assembly of Kentucky, passed in 1881 (Acts of 1881, p. 258), the 9th section of which declares that the corporation should be "governed by any general law enacted by the legislature of this state in regard to consolidation with parallel or competing lines." So that, although organized prior to the adoption of the Constitution of 1891, it became subject at once, and as soon as said Constitution was adopted, to its provision declaring that no railroad should consolidate its capital stock, franchise, or property with that of any other owning a parallel or competing line or structure.

The only answer attempted to this proposition is that the cases above cited in support of the doctrine that to make a valid sale there must be power both in the seller to sell and in the buyer to buy refers only to private voluntary sales arranged between the companies, and dependent upon their respective corporate powers; and that the doctrine has no*application to judicial or involuntary sales where the property is seized upon to satisfy a debt of the corporation. [693

We do not understand, however, that the fact that a purchase is made at a judicial sale confers upon the purchaser any right he is forbidden to acquire if the purchase had been made at private sale. If, from reasons of public policy, the legislature declares that a railway shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful because the parties choose to let it take the form of a judicial sale. A person who, by reason of any statutory disability, such as infancy, lunacy, marriage, or otherwise, is incompetent to buy at private sale, is not less incompetent from becoming the purchaser at a judicial sale. The prohibition is not upon the power of the court foreclosing the mortgage to order a judicial sale of the property, but upon its power to confirm a sale made to a parallel or competing road. The allegation of the bill in this connection is that suits have been filed upon claims against the several companies interested, with the object of having a judicial sale of their property, so that the L. & N. Co. may purchase the property in its own name, or in the name of some new company or companies organized by it or in which it shall have a controlling interest. It is true, as was observed in *Pearsall* v. *Great Northern R. Co.* 161 U. S. 646 [*ante*, 838], that the stockholders of the L. & N. Co. may individually become the purchasers of the Chesapeake Co. at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the L. & N. Co. The inhibition of the Constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line, but against the acquisition by a railway, in any form, of a parallel or competing line. If this could be evaded by going through the form of a judi-

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cial sale, the constitutional provision would be of no value.

3. But, conceding that the L. & N. Co. was vested by the act of January 17, 1856, with the right to purchase all railroads constructed by other companies, whether parallel or competing or not, and that by virtue of such power it might become the purchaser of the 694] Chesapeake system, it is still *insisted on behalf of the commonwealth that this act was subject to an act approved February 14, 1856, the 1st section of which enacted that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or appeal at the will of the legislature, unless a contrary intent be therein plainly expressed." The 3d section of this act provided that the act should apply only to "charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage." The argument is that, as this act was given immediate effect, while the former act, under a general law of the state, did not take effect until two months from the time it was approved by the governor, the act of February 14 was, in reality, the prior act, and the charter of January 17 was, in fact, granted thereafter, within the meaning of the 3d section of the act of February 14.

The answer of the defendant to this was that the 13th section of the Tennessee act of 1855, which was re-enacted in the 1st section of the Kentucky act of January 17, provided "that this act shall take effect from and after its passage." If the adoption verbatim of this Tennessee act by the Kentucky legislature was sufficient to give the Kentucky act immediate effect, then, undoubtedly, the act of February 14 was a subsequent act and did not apply to the charter of January 17. Upon the other hand, if the re-enactment of the 13th section of the Tennessee act was not intended to give the Kentucky charter immediate effect, then this charter did not become operative until March 17, and thereby became subject to the reservation statute of February 14, which did take immediate effect. This question was elaborately argued at the bar, but, for the reasons hereafter stated, we do not consider it necessary to express a decided opinion upon the point.

4. Whatever be the disposition of this question, and however broad the powers of the L. & N. Co. under its charter of 1856, we are still confronted with the proposition that the proposed consolidation of these two railway systems is a clear violation of § 201 of the Constitu- 695] tion, which forbids the *consolidation of the stock, franchises, or property, as well as the purchase and lease of parallel and competing lines. Unless this section impairs the obligation of the contract contained in the charter, it operates as a repeal of any power that may possibly be deduced from such charter to purchase, lease, or consolidate with any parallel or competing line. In this particular the case differs from that of *Pearsall* v. *Great Northern R. Co.*, just decided [161 U. S. 646, *ante*, 838], only in the fact that the charter of the Great Northern, while conferring a power to consolidate with other roads in much clearer and more explicit language than was used in the L. & N. charter, also contained in § 17 the reservation of a power to amend in any manner not destroying or impairing the vested rights of the corporation. The opinion in that case dealt largely with the question whether a subsequent act of the legislature taking away this power, so long as it was unexecuted, and so far as it applied to parallel or competing lines, impaired a vested right. Our conclusion was that it did not.

We regard the issue presented in this case as involving practically the same question. While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the *Pearsall Case*, that under its police power the people, in their sovereign capacity, or the legislature as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests. In the case of *Munn* v. *Il- [696 linois*, 94 U. S. 113 [24: 77], *Mr. Chief Justice* Waite said: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control."

There was a difference of opinion in the court as to whether this language applied to elevators in such manner as to empower the legislature to fix their charges; but it has been too often held that railways were public highways, and their functions were those of the state, though their ownership was private, and that they were subject to control for the common good, to be now open to question. It was so expressly stated in *Olcott* v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 678, 694 [21: 382, 388]. This power was held to extend in *New York* v. *Miln*, 36 U. S. 11 Pet. 102 [9: 648], to a law requiring the masters of emigrant vessels to report an account of their passengers; in *Stone* v. *Farmers' Loan & T. Co.* ("*Railroad Commission Cases*") 116 U. S. 307 [29: 636], to the right of a state to reasonably limit the amount of charges by a railway company for the transportation of persons and property within its jurisdiction, notwithstanding a statute which granted to it the right "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation;" in *Mugler* v. *Kansas*, 123 U. S. 623 [31: 205], to legislation which prohibited

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the manufacture of intoxicating liquors within the limits of the state, even as to persons who at the time happened to own property whose chief value consists in its fitness for such manufacturing purposes; in *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174 [32: 377], to the prevention of extortion by railways by unreasonble charges, and favoritism by discriminations; in *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 [35: 1051], to a requirement that the salaries and expenses of a state railroad commission be borne by the railroad corporations within the state; in *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556 [38: 269], to a statute 697] *compelling the removal of grade crossings; in *Com.* v. *Alger*, 7 Cush. 53, to the establishment of harbor lines, beyond which landowners shall not extend their wharves; and in *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 446 [38: 779], to a requirement that insurance companies make returns to the proper state officers of their business conditions, etc., notwithstanding the company be organized under a special charter, which did not in terms require it to make such return.

Indeed, it was broadly held in *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 [28: 1084], that the grant of a corporate franchise is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred; and that, when abused or misemployed, they may be withdrawn by proceedings consistent with law. It was said in this case that an insurance corporation was subject to such reasonable regulations as the legislature might from time to time prescribe for the general conduct of its affairs, serving only to secure the ends for which it was created, and not materially interfering with the privileges granted to it. "It would be extraordinary," said the court, p. 580 [1087], "if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide by reasonable regulations against the misuse of special corporate privileges which it has granted, and which could not except by its sanction, express or implied, have been exercised at all." It was further held that the establishment against such a corporation before a judicial tribunal, that it was insolvent; or that its condition was such as to render its continuance in business hazardous to the public; or that it had exceeded its corporate powers; or that it had violated the rules, restrictions, or conditions prescribed by law,—constituted a sufficient reason for the state which created it to reclaim the franchises and privileges granted to it.

We think that the principle of these cases applies to the power of the legislature to forbid 698] the consolidation of *parallel or competing lines, whenever, in its opinion, such consolidation is calculated to affect injuriously the public interests. Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void. Cook, Stock & Stockholders, § 315; *Central R. Co.* v. *Collins*, 40 Ga. 582; *Hazelhurst* v. *Savannah, G. & N. A. R. Co.* 43 Ga. 13; *Elkins* v. *Camden & A. R. Co.* 36 N. J. Eq. 5. The doctrine is peculiarly applicable to this case, in which is shown that the Chesapeake Co. was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining competition with the L. & N. Co.,—a purpose which would, of course, be defeated by a combination with it. This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other states,—a policy which has not only found a place in the statute law of such states as apprehended evil effects from such consolidations, but has been declared by the courts to be necessary to protect the public from the establishment of monopolies. Indeed, the unanimity with which the states have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible. The fact that in certain cases the legislature has seen fit to sanction the consolidation of parallel roads does not militate against the general principle that the consolidation of competing lines is contrary to public policy. Parallel lines are not necessarily competing lines, as they not infrequently connect entirely different termini and command the traffic of distinct territories. For instance, a line from Toledo to Cincinnati is substantially parallel with another from Chicago to Cairo; but they could scarcely be called competing, since one is dependent upon the traffic of the *northwest, while Cincinnati[699 is the southern outlet of the traffic of the northeastern states and the lower lakes. Another familiar instance is that of the three north and south railways through the state of Connecticut, one from Bridgeport to Pittsfield, in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester. These are strictly parallel lines, but in only a limited sense competing, since they are between different termini, and each is required for the trade of its own section of the state. Even in the present case the competition is mostly confined to the through traffic. Considerations of this kind may induce legislatures, in particular instances, to permit the consolidation of parallel roads without intending thereby to relinquish their right to forbid the consolidation of such parallel lines as are in fact competing.

Permission to consolidate such roads is no more to be taken as an approval of a general policy of consolidation than are the laws which have been repeatedly upheld by this court, granting corporations exclusive privileges to supply municipalities with the comforts of life for a certain number of years, of which class of monopolies the one upheld in *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 [29: 516], is a distinguished example. Such cases are, however, exceptional,

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and rest upon the theory of an authority expressly vested in the corporation for a limited time, in consideration of benefits likely to accrue to the public from the establishment of a particular industry. Even in such cases, however, we have held that the monopoly may be modified or abrogated if it proved to be prejudicial to the public health or public morals. *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 [28: 585]. In this case, *Mr. Justice* Miller, in delivering the opinion of the court, observed (p. 750 [587]): "While we are not prepared to say that the legislature can make valid contracts on the subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the *public health* and *public morals*. The preservation of these is so necessary to the **700]** best interests of *social organization that a wise policy forbids the legislative body to devest itself of the power to enact laws for the preservation of health and the repression of crime." To the same effect are *Boyd* v. *Alabama*, 94 U. S. 645 [24: 302]; and *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 [24: 989].

There are doubtless cases where the police power has been invoked to justify acts of the legislature which were dictated to a certain extent by local interests, or with the effect of unduly burdening or interfering with foreign or interstate commerce. Within this category are laws levying taxes upon alien passengers arriving from foreign ports, for the use of hospitals (*Smith* v. *Turner* ("*The Passenger Cases*") 48 U. S. 7 How. 283 [12:702]); requiring a bond to be given for every such passenger to indemnify the state against expense for the relief or support of the person named in the bond (*Henderson* v. *Wickham*, 92 U. S. 259 [23: 543]), even though such bonds be limited to lewd and debauched women (*Chy Lung* v. *Freeman*, 92 U. S. 275 [23:550]); prohibiting the driving or conveying of foreign cattle into the state between certain dates (*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24:527]); taxing persons in other states engaged in selling or soliciting the sale of liquors to be shipped into the state from places without it, without imposing a tax upon similar agents for manufacturers within the state (*Walling* v. *Michigan*, 116 U. S. 446 [29:692]); *Welton* v. *Missouri*, 91 U. S. 275 [23:347]); statutes requiring inspection, before slaughtering, of cattle, sheep, and swine designed for slaughter for human food, so far as they apply to foreign meats (*Minnesota* v. *Barber*, 136 U. S. 313 [34: 455], 3 Inters. Com. Rep. 185); a similar statute prohibiting the sale of meat from animals slaughtered 100 miles or more from the place at which it was offered for sale, unless previously inspected by local inspectors (*Brimmer* v. *Rebman*, 138 U. S. 78 [34:862], 3 Inters. Com. Rep. 485); and finally, to statutes requiring a license, under onerous conditions, from the agents of foreign express companies. *Crutcher* v. *Kentucky*, 141 U. S. 47 [35:650].

These cases, however, do not infringe upon the general principle, so frequently declared, that where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained wherever it can be done without the impairment of vested rights. Notwithstanding these *cases, the general rule holds good that **[701** whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry.

5. But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the states, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less according to the policy of the state within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden. There are certain intimations in some of our opinions, which might perhaps lead to an inference that the police power cannot be exercised over a subject confined exclusively to Congress by the Federal Constitution. But while this is true with respect to the commerce itself, it is not true with respect to the instruments of such commerce.

It was said in *Sherlock* v. *Alling*, 93 U. S. 99 103, 104 [23:819-821], and quoted with approbation in *Plumley* v. *Massachusetts*, 155 U. S. 462, [39: 224], that "in conferring upon Congress the regulation of commerce it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it *without constituting a regulation of it **[702** within the meaning of the Constitution; . . . and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

It has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all

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the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

If it be assumed that the states have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation,—a proposition which only needs to be stated to demonstrate its unsoundness. As we have already said, the power of one railway corporation to purchase the stock and franchises of another must be conferred by express language to that effect in the charter, and hence if the charter of the L. & N. Co. had been silent upon that point, it will be conceded that it would have no power to make the proposed purchase in this case. As the power **703**] *to purchase, then, is derivable from the state, the state may accompany it with such limitations as it may choose to impose. It results, then, from the argument of the appellant, that if there be any interference with interstate commerce it is in imposing limitations upon the exercise of a right which did not previously exist: and hence, if the state permits such purchase or consolidation, it is bound to extend the authority to every possible case, or expose itself to the charge of interfering with commerce. This proposition is obviously untenable.

While the constitutional power of the state in this particular has never been formally passed upon by this court, the power of state legislatures to impose this restriction upon the general authority to consolidate has been recognized in a number of cases. *Baltimore & O. R. Co.* v. *Maryland*, 88 U. S. 21 Wall. 456, 470 [22: 678, 683]; *Shields* v. *Ohio*, 95 U. S. 319 [24: 357]; *Wallace* v. *Loomis*, 97 U. S. 146, 154 [24: 895, 898]; *New Buffalo Twp.* v. *Cambria Iron Co.* 105 U. S. 73 [26: 1024]; *Leavenworth County Comrs.* v. *Chicago, R. I. & P. R. Co.* 134 U. S. 688, 699 [33: 1064, 1071]; *Livingston County* v. *First Nat. Bank*, 128 U. S. 102 [32: 359]; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301 [38: 450]; *Ashley* v. *Ryan*, 153 U. S. 436 [38: 774], 4 Inters. Com. Rep. 664. In the last case it was broadly held that a state, in permitting railway companies to consolidate, might impose such conditions as it deemed proper, and that the acceptance of the franchise implied a submission to the conditions, without which it could not have been obtained.

The power to forbid such purchase or consolidation with competing lines has been directly upheld in a large number of cases in the state courts, in some of which cases a violation of the commerce clause was suggested, and in others it was not. *Hafer* v. *Cincinnati, H. & D. R. Co.* 29 Ohio L. J. 68; *State, Leese,* v. *Atchison & N. R. Co.* 24 Neb. 143; *Gulf, C. & S. F. R. Co.* v. *State*, 72 Tex. 404, 2 Inters. Com. Rep. 335, 1 L. R. A. 849; *East Line & R. R. Co.* v. *Rushing*, 69 Tex. 306; *Pennsylvania R. Co.* v. *Com.* (Pa.) 7 Atl. 368; *Gyger* v. *Philadelphia City Pass. R. Co.* 136 Pa. 96, 9 L. R. A. 369; *Currier* v. *Concord R. Corp.* 48 N. H. 325; *Texas & P. R. Co.* v. *Southern P. R. Co.* 41 La. Ann. 970. See also *Langdon* v. *Branch*, 37 Fed. Rep. 449, 2 L. R. A. 120; *Hamilton* v. *Savannah*, *F. & W. R. Co.* 49 [**704** Fed. Rep. 412; *Clarke* v. *Central R. & Bkg. Co.* 50 Fed. Rep. 238, 15 L. R. A. 683; *Kimball* v. *Atchison, T. & S. F. R. Co.* 46 Fed. Rep. 888.

In conclusion we are of opinion—

1. That a general right to purchase or consolidate with other roads was never conferred upon the L. & N. Co.

2. That the Chesapeake Co. was never vested with the power to consolidate its capital stock, franchises, or property with that of any other road owning a parallel or competing line.

3. That, conceding that the requisite power existed in both the above companies, § 201 of the Constitution of 1891 was a legitimate exercise of the police power of the state, and forbade such consolidation, at least so far as such power remained unexecuted.

The decree of the court of appeals of Kentucky is therefore affirmed.

Mr. Justice **Brewer** and *Mr. Justice* **White** concurred in the result.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1895.

Vol. 162.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1895.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] UNITED STATES, *Plff. in Err.*,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 1-90.)

Boundary between United States and Texas—Melish map—convention—Red river—Greer county—postoffice—location of line—boundaries established.

1. In fixing the boundary between the territory of the United States and Texas, the treaty of 1819 between the United States and Spain controls; and the entire instrument must be examined in order to ascertain the real intention of the contracting parties, and the Melish map referred to therein is to be given the same effect as if it had been expressly made a part of the treaty.
2. The Melish map of 1818, referred to in the treaty of 1819 between the United States and Spain as showing the 100th meridian, with other lines named in describing the boundary fixed by the treaty, was taken as a general basis for fixing the boundary, but was not intended to control the location of that meridian as against its true position astronomically located and differing from that on the map, but the treaty itself provided for fixing the boundary line with more precision by surveying and marking it.
3. The convention or contract between the United States and Texas, as embraced in their respective enactments of 1850, together with the subsequent acts of the two governments, adopts the true or actual 100th meridian, and not its false position on the Melish map, as the true boundary of Texas.
4. The Red river, or Rio Roxo, which by the treaty of 1819 between the United States and Spain was to be followed westward to the 100th meridian of longitude, must be taken to be the south or Prairie Dog Town fork, which most nearly answers to the description of the Red river as shown on the early maps, including that of Melish referred to in the treaty, instead of the north fork, the course of which would make the line run north and northwestwardly.
5. The inclusion of Greer county, Texas, among the counties named in the act of Congress of 1879 as constituting the northern judicial district in Texas, merely placed the territory claimed to constitute that county, but which the United States had claimed as part of the Indian territory, in that district for judicial purposes such as were competent to the United States courts, and was not intended to express the purpose of the United States to surrender its jurisdiction, and does not admit the right of Texas to that territory.
6. The designation for a short time of a postoffice as in Greer county, Texas, on petition of persons describing themselves as residents of such county, before the authorities of the Postoffice Department discovered that it was located in the territory which was in dispute between the United States and Texas,—does not strengthen the claim of Texas to such territory.
7. The location of the line established by the treaty is to be determined by the course of rivers

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NOTE.—*As to judicial settlement of state boundaries*, see note to Nebraska v. Iowa, 36: 798.

As to construction and operation of treaties, see note to United States v. The Amistad, 10: 826.

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and degrees of latitude and longitude, rather than by routes, trails, or roads, the extent and character of which cannot be certainly known at this day, and over which, at the date of the treaty and prior thereto, travel by traders and trappers could have been only occasional and limited.

8. The territory east of the 100th meridian of longitude, west and south of the north fork of Red river, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, along the south bank both of Red river and of the Prairie Dog Town fork or south fork of Red river until such line meets the 100th meridian of longitude, which territory is sometimes called Greer county,—constitutes no part of Texas, but is subject to the exclusive jurisdiction of the United States.

[No. 8, Original.]

Argued October 23-25, 1895. Decided March 16, 1896.

SUIT IN EQUITY by the United States against the State of Texas to determine the boundary between the territory of the United States and Texas and to have it judicially determined whether the tract of land known as Greer County was within the territory of the United States or within the State of Texas. *Adjudged that Greer County is not included within the State of Texas, but is subject to the exclusive jurisdiction of the United States.*

See same case, 143 U. S. 621 [36: 285].

The facts are stated in the opinion.

Messrs. **Judson Harmon,** Attorney General, **Holmes Conrad,** Solicitor General, and **Edgar Allan,** for complainant:

The Rio Roxo of the treaty map coincides more closely with the Kecheahquehono, or main Red river, than with the north fork of that stream.

Contending that the true 100th meridian must be adopted as the boundary, and claiming that as between the north and south forks of Red river the true purpose and intention of the parties to the treaty cannot be determined from any evidence of what was known and understood when the treaty was entered into, then the maxim "that it is not allowable to interpret what has no need of interpretation" (Vattel, Law of Nations, 254) has no application to the case presented here.

The south fork fills the conditions to make it the main stream. It runs further westward, and is the longer of the two forks.

As to the Santa Fé trail, we have no historical reference to rely upon: no legacy from trappers or traders who traversed it; the pioneers of civilization do not seem to have possessed any light in regard to it, and the boundary commission of 1886 had not discovered the mass of modern evidence in that regard which has been introduced in this cause.

A review of the authorities cited by the state of Texas, in the effort to trace the history of Greer, as being claimed as part of Texas before the state was admitted as a state of the United States, will demonstrate how utterly fallacious and misleading is this contention.

Even before the forty families had taken up their residences, the president of the United States issued a proclamation warning all persons against intruding upon said territory, and asserted the right and title of the United States to the same. Nor did the complainant stop her assertion of jurisdiction by the issuance of this proclamation, but in June, 1884, Lieutenant C. J. Crane, 24th U. S. Infantry, proceeded, under instructions, to notify Mr. Sweet and the other settlers that they must remove by October 1, 1884, and if found there after that time force would be used to remove them.

The oral testimony upon the early nomenclature of streams, the physical features of the country, and recognition of boundaries by the respective parties is subject to the criticism that it must, of necessity, have been more or less imperfect.

Indiana v. *Kentucky*, 136 U. S. 517 (34: 335); *Stroud* v. *Springfield*, 28 Tex. 650.

The legal effect of the work of the boundary commission of 1859, so far as the fixedness of the line of the 100th meridian is concerned, amounts to an agreement of both parties to this cause accepting so much of the controversy as settled.

Rhode Island v. *Massachusetts*, 45 U. S. 4 How. 591 (11: 1116); *Cook* v. *United States*, 138 U. S. 156 (34: 906).

If the act of Congress in question has any bearing on the question of title to and sovereignty over the disputed land, then the purpose and scope of that act were far beyond what its title or text indicated.

It was not intended, nor was capable of the construction that it was a cession or conveyance of 1,517,000 acres of land pure and simple, without consideration, or that it was a quitclaim to that which had been the subject of contention for years. It is not allowable to interpret what has no need of interpretation.

Vattel, Law of Nations, § 245.

We are asked to interpret an act which declares one specific object, contemplated by the Constitution and essential to the public welfare, as embracing another and different purpose or effect, which is in direct contravention of the proper exercise of that power. And that, too, in the face of the treaty provision for the continued exercise of jurisdiction over any territory where already exercised, until a final determination of boundaries.

If we admit the possibility that the act in question could have contemplated a surrender without any equivalent, of this vast domain, we may be aided in endeavoring to ascertain that intention by looking to other acts and utterances of the parties.

In the interpretations of treaties, compacts, and promises we ought not to deviate from the common use of the language, unless we have very strong reasons for it. It is then a gross quibble to affix a particular sense to a word in order to elude the true sense of the entire expression. Every interpretation that leads to an absurdity ought to be rejected.

Vattel, Law of Nations, 252.

No presumption arises from the language of the act of 1879 of a purpose to abandon the claim to ownership of the land.

Congress has declared the act to be an inad-

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vertence, and the intent to give this territory to the state of Texas is denied.

The maxim that "it is not allowable to interpret what has no need of interpretation" finds no place in considering the true meaning and effect of the act of Congress to organize a United States court for the northern judicial district of Texas.

The plea in this behalf does not assert or claim that the state of Texas, at the time the act was framed and passed, understood that it was intended to bear upon the question of the conflicting claims to this territory.

Under the practice of the state of Texas this plea would be fatal upon demurrer because it does not set up or allege any consideration for the lease relied upon.

Peters v. *Clements*, 52 Tex. 140.

We are not to presume, without very strong reasons, that one of the contracting parties intended to favor the other to his own prejudice. We must seek for the will of the parties in the sense most favorable to equality and common advantage.

On the day the act of 1879 was passed each party claimed title to the land. Neither may be said to be actually possessed, for as yet no settlers were located there. The complainant was certainly exercising possessory power.

This court has but recently declined to assume that Congress deliberately directed an illegal proceeding, where the act in controversy, taken in connection with its prior act, *in pari materia*, leads to a different conclusion as to its intention.

United States v. *Dulles Military Road Co.* 140 U. S. 631 (35: 571).

Applying the rule that "the intention of the legislature may be found from the act itself, from other acts *in pari materia*, and sometimes from the cause or necessity of the statute, and wherever the intent can be discovered it should be followed with reason and discretion" (Dwarr. Stat. 144), then the act in question cannot be construed as a cession of territory.

Brewer v. *Blougher*, 39 U. S. 14 Pet. 197 (10: 417).

The intention of the legislature is to be resorted to in order to find the meaning of the words. That meaning may be extended beyond the precise words used in the law from the reason or motive upon which the legislature proceeded, from the end in view or the purpose which was designed.

United States v. *Freeman*, 44 U. S. 3 How. 565 (11: 728).

In order to arrive at a true construction it is permissible, and, indeed, sometimes requisite, for the court to "take judicial notice of contemporaneous history or other authentic works and writings."

Endlich, Interpretation of Statutes, 38.

The words of a private grant are taken most strongly against the grantor, but this rule is reversed in cases of public grants. They are construed strictly in favor of the government on grounds of public policy.

Sutherland, Stat. Const. § 478; *Slidell* v. *Grandjean*, 111 U. S. 413 (28: 321).

Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest.

Rice v. *Minnesota & N. W. R. Co.* 66 U. S. 1 Black, 358, 380 (17: 147, 154); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666 (24: 1036, 1038); *Hannibal & St. J. R. Co.* v. *Missouri River Packet Co.* 125 U. S. 260, 271 (31: 731, 735); *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 24, 49 (35: 55, 65); *State* v. *Pacific Guano Co.* 22 S. C. 50, 83, 86; *Stein* v. *Bienville Water Supply Co.* 141 U. S. 67 (35: 622).

Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld, nothing passes by mere implication.

Holyoke Water Power Co. v. *Lyman*, 82 U. S. 15 Wall. 500 (21: 133).

This principle is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies.

Slidell v. *Grandjean*, 111 U. S. 412, 438 (28: 321, 330); *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 562 (36: 542).

In *United States* v. *Fisher*, 6 U. S. 2 Cranch, 358, 386 (2: 304, 313), *Chief Justice* Marshall said: "Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

United States v. *Palmer*, 16 U. S. 3 Wheat. 610 (4: 471).

In *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618, 625 (28: 1109, 1111), speaking of legislative grants, this court has said: "They are to receive such a construction as will carry out the intent of Congress . . . To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

Leavenworth, L. & G. R. Co. v. *United States*, 92 U. S. 733 (23: 634).

And in the recently decided cause of *Barden* v. *Northern P. R. Co.* the court reiterates this doctrine of construction, and says "that it should be forever closed against further question."

154 U. S. 325 (38: 1001); Sutherland, Stat. Const. § 378, and cases cited.

Estoppel cannot be pleaded by reason of an act of the party against whom pleaded, unless the one pleading it has been induced to act upon it.

Grigsby v. *Caruth*, 57 Tex. 269.

The position of the state of Texas lacks the essential ingredient of not having been led to act differently in consequence of the matter set up in estoppel to what she would otherwise have acted. This is a fundamental principle and prerequisite to the operation of the bar.

Bigelow, Estoppel, 5th ed. 638.

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In a case in which two sovereign states are contesting a question of boundary, the most liberal principles of practice and pleading ought to be adopted, in order to enable both parties to present their respective claims in their full strength.

Rhode Island v. *Massachusetts*, 39 U. S. 14 Pet. 210 (10: 423).

The rule which operates ordinarily as a bar in equity does not apply in a case like this.

Rhode Island v. *Massachusetts*, 40 U. S. 15 Pet. 273 (10: 736).

Courts look with disfavor upon applying the doctrine of estoppel against the sovereign.

State, Lott, v. *Brewer*, 64 Ala. 287.

While the state may be estopped by its express grant, no bar can arise from the laches or unauthorized act of its officers.

Pulaski County v. *State*, 42 Ark. 118.

In applying the doctrine of estoppel, when based on a former judgment, the party alleging it must establish that the same fact sought to be litigated in the second suit was in issue in the first suit.

Remington Paper Co. v. *O'Dougherty*, 81 N. Y. 475.

In *Atty. Gen.* v. *Marr*, 55 Mich. 445, it was held that where a board of supervisors, without the legal power so to do, had designated the bonds of a township, long acquiescence did not estop the state from asserting her rights and correcting the wrong.

The absolute absence of any consideration whatever for the surrender of a territory larger than the state of Delaware, taken in connection with the absence of any words of grant or relinquishment, must aid in ascertaining the understanding of the parties and the consequent legal status of this claim.

Upon the facts and law presented the United States and not the state of Texas has a clear and just title to the territory in dispute in this cause.

Messrs. **George Clark, M. M. Crane, A. H. Garland,** *H. J. May, Charles A. Culberson*, and *George R. Freeman*, for defendant:

The treaty of 1819 between Spain and the United States having prescribed in plain and unambiguous terms that the boundary lines between the two nations as therein indicated, should be as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818, which map was appended to the treaty and became a part thereof, it is fruitless now to inquire further as to the location of the true 100th meridian of longitude, or which branch of Red river is the main river. The map of Melish fixes the 100th degree of longitude west from Greenwich approximately, 70 miles below and east of the forks of Red river as now known, and is conclusive upon both parties to the treaty, their privies and successors, regardless of other facts. The boundary established and fixed by compact between nations becomes conclusive upon all subjects and citizens thereof and binds their rights and is to be treated to all intents and purposes as the true real boundary between states.

Rhode Island v. *Massachusetts*, 37 U. S. 12 Pet. 657 (9: 1233).

The purpose of construction is to expound treaties, not to frame them.

Wildman, International Law, § 177.

Surveys, plats, or maps to which reference is made in the deed, contract, act of Congress, or a treaty, have the same effect and operate as if they were inserted at length in the clause referring to them.

Fitzmaurice v. *Bayley*, 9 H. L. Cas. 99; *Elliott* v. *Northeastern R. Co.* 10 H. L. Cas. 333; *McIver* v. *Walker*, 13 U. S. 9 Cranch, 173 (3: 694), 17 U. S. 4 Wheat. 444 (4: 611); *Noonan* v. *Braley*, 67 U. S. 2 Black, 499 (17: 278).

The words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.

Broom, Legal Maxims, 673; *Com.* v. *Pennsylvania Canal Co.* 66 Pa. 42, 5 Am. Rep. 329; *Com.* v. *Hart*, 11 Cush. 137; *Com.* v. *Jennings*, 121 Mass. 50, 23 Am. Rep. 249; 2 Wharf. International Law Dig. 2d ed. 161*a*; *Doe, Clark*, v. *Braden*, 57 U. S. 16 How. 635 (14: 1090); *Randon* v. *Toby*, 52 U. S. 11 How. 518 (13: 795).

And as to touching the consideration of maps thus referred to the rule is as unbending as it is universal.

Tyler, Boundaries, 138, 144, 169, 196, 286, 310–314; 3 Washb. Real Prop. 412, *note 4*; *People* v. *Dana*, 22 Cal. 11; *Glover* v. *Shields*, 32 Barb. 374.

This rule must be received and considered as fixed at the date of the deed referring to the maps, and nothing occurring after that can change the line, and the parties cannot question it.

The acquiescence of the parties to this as distinguished from open acts of estoppel binds them and their privies forever to it, correct or incorrect, right or not.

Jordan v. *Deaton*, 23 Ark. 704.

The rule is the same between nations as to treaties as between individuals as to private conveyances.

Wheat. International Law, 355; Wharf. Am. Crim. Law, § 157; 2 Wharf. International Law Dig. 2d ed. § 133; 1 Kent. Com. 174; *Foster* v. *Neilson*, 27 U. S. 2 Pet. 253 (7: 415); *Marryat* v. *Wilson*, 1 Bos. & P. 436.

This Melish map may have been wrong as to the meridian, but it made fixed the line by marks that cannot be mistaken, and future scientific speculation and conjecture together with all the testimony of the human family cannot overthrow it or set it aside.

Jenkins v. *Trager*, 40 Fed. Rep. 728.

This boundary is recognized by the constitutional congress of the state of Coahuila and Texas, in August, 1824.

1 White, New Recopilacion of Laws of Spain and Mexico, 421 *et seq.*

And also in the colonization project of Col. Stephen Austin, 1821–29.

1 White, New Recopilacion of Laws of Spain and Mexico Supp. 559 *et seq.*

Where the fact is equally unknown to both parties, or when each has equal information or means of knowledge, or where the fact is doubtful from its own nature,—in every such case, if the parties act in good faith, a court of equity will not interfere.

Belt v. *Mehan*, 2 Cal. 159, 56 Am. Dec. 329;

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McCobb v. *Richardson*, 24 Me. 82, 41 Am. Dec. 374; *Hunter* v. *Goudy*, 1 Ohio, 449; *Wilson* v. *Western N. C. Land Co.* 77 N. C. 445; *Hill* v. *Bush*, 19 Ark. 522; *Mason* v. *Crosby*, 1 Woodb. & M. 342; *Warner* v. *Daniels*, 1 Woodb. & M. 90; *Ferson* v. *Sanger*, 1 Woodb. & M. 138; *Daniel* v. *Mitchell*, 1 Story, 172; *Juzan* v. *Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Dambmann* v. *Schulting*, 75 N. Y. 55; *Webster* v. *Stark*, 10 Lea, 406; *May* v. *Le Claire*, 78 U. S. 11 Wall. 217 (20: 50); *Baltzer* v. *Raleigh & A. A. L. R. Co.* 115 U. S. 634 (29: 505); *Farnsworth* v. *Duffner*, 142 U. S. 43 (35: 931).

To entitle a party to a relief either defensive or affirmative, for a mistake of fact, there are two requisites essential to the exercise of equitable jurisdiction.

2 Pom. Eq. Jur. 1st ed. § 856.

The fact concerning which the mistake is made must be material to the transaction. If a mistake is merely incidental and not a part of the very subject-matter or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief, affirmative or defensive.

Stone v. *Godfrey*, 5 De G. M. & G. 76; *Okill* v. *Whittaker*, 1 De G. & S. 83; *Trigge* v. *Lavallee*, 15 Moore P. C. 270; *Carpmael* v. *Powis*, 10 Beav. 36, 39; *Penny* v. *Martin*, 4 Johns. Ch. 566; *Segur* v. *Tingley*, 11 Conn. 134; *Weaver* v. *Carter*, 10 Leigh, 37; *Trigg* v. *Read*, 5 Humph. 529, 42 Am. Dec. 447; *M'Ferran* v. *Taylor*, 7 U. S. 3 Cranch, 270 (2: 436); *Henderson* v. *Dickey*, 35 Mo. 120; *Paulison* v. *Van Iderstine*, 28 N. J. Eq. 306; *Stettheimer* v. *Killip*, 75 N. Y. 282.

The north fork is the main Red river, and a continuation of the main stream above its junction, so known and recognized anterior and subsequent to the treaty, and never questioned until 1852. The south fork is an independent stream with an independent name and designation, known at the time of the treaty and continuously to this day as the "Kecheahquehono" an Indian term signifying "Prairie Dog Town river," and regarded simply as a tributary of Red river until designated differently by Captain R. B. Marcy in 1852.

If either branch of a stream has acquired the name of the main stream, exclusive of the other, then such branch so acquiring said name must be considered as the true river.

Doddridge v. *Thompson*, 22 U. S. 9 Wheat. 469 (6: 137).

The stream now called north fork corresponds, approximately and most nearly, with the Rio Roxo, as delineated by Melish on his map of 1818, with reference to other permanent natural objects delineated upon said map, and as found upon the ground.

The King of Spain asserted his proprietorship of the territory in dispute by repeated acts of governmental ownership for nearly one hundred years before the treaty of 1819; and since her independence, Texas has likewise asserted her ownership of said territory, and has persisted in such assertion down to the present day by acts of government, of legislation, and of occupancy. No governmental act of the state can be tortured or perverted into acquiescence on her part in the claim of the United States. To the contrary, the government of the United States has recognized the right of Texas to the territory in dispute by solemn acts of government, and is now estopped to claim the same or any part thereof. This court takes judicial notice of these facts.

Best, Ev. Chamberlain's ed. 260-263, *notes;* 1 Greenl. Ev. 14th ed. §§ 46a, 479; *Phillips* v. *Detroit*, 111 U. S. 606 (28: 533); *Ah Kow* v. *Nunan*, 5 Sawy. 552.

It is less repugnant to equity to withhold from the owner a possession which he has lost through his own neglect than to strip the just possessor of what lawfully belongs to him.

Vattel, Law of Nations, Chitty's ed. 365, 366.

Texas many years ago, long before the beginning of this generation, had extended her institutions and laws over the territory in dispute.

Comanche County Comrs. v. *Lewis*, 133 U. S. 198 (33: 604); *Phillips* v. *Payne*, 92 U. S. 130 (23: 649).

The sovereign power is a trustee for the people; it acts by its agents; the people should not be bound by any statements of facts made by its agents. For their benefit the truth may be shown, notwithstanding any former statement to the contrary.

Taylor v. *Shuffold*, 4 Hawks, 132, 15 Am. Dec. 512; *Fannin County* v. *Riddle*, 51 Tex. 360; *Candler* v. *Lunsford*, 4 Dev. & B. L. 18; *Ferish* v. *Coon*, 40 Cal. 50; *Johnson* v. *United States*, 5 Mason, 425; *Saunders* v. *Hart*, 57 Tex. 10.

The state cannot be estopped by the acts of any of its officers done in the exercise of a power not conferred upon them.

Day Land & C. Co. v. *State*, 68 Tex. 553; *Carr* v. *United States*, 98 U. S. 433 (25: 209).

An apparent exception to this doctrine, that the state cannot be bound by estoppel, arises in those cases in which the acts sought to be made binding were done in her sovereign capacity by legislative enactment or resolution.

Alexander v. *State*, 56 Ga. 478; *Enfield* v. *Permit*, 5 N. H. 285; *Com.* v. *Andre*, 3 Pick. 224.

We find two real acts of estoppel, substantial, governmental, sovereign; the reimbursement of Texas for the disarmament of Snively's command, and the legislation by Congress of 1879 creating the northern judicial district of Texas.

Texas, and those under whom she claims, have been in possession and enjoyment of this territory for nearly a century, claiming under the treaty of 1819.

Mississippi v. *Johnson*, 71 U. S. 4 Wall. 475 (18: 437); *Virginia* v. *Tennessee*, 148 U. S. 503 (37: 537); *Indiana* v. *Kentucky*, 136 U. S. 479 (34: 529); *Wharton* v. *Wise*, 153 U. S. 155 (38: 669).

Mr. Justice **Harlan** delivered the opinion of the court:

By the act of Congress of May 2, 1890, chap. 182, establishing a temporary government for the territory of Oklahoma, and enlarging the jurisdiction of the United States court in the

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Indian territory, it was declared that that act should not apply to "Greer county" until the title to the same had been adjudicated and determined to be in the United States. And that there might be a speedy judicial determination of that question the Attorney General of the United States was directed to institute in this court a suit in equity against the state of Texas, setting forth the title and claim of the United States "to the tract of land lying between the north and south forks of the Red river where the Indian territory and the state of Texas adjoin, east of the 100th degree of longitude, and claimed by the state of Texas as within its boundary and a part of its land and 21]* designated on its map as Greer county;" the court, on the trial of the case, in its discretion, and so far as the ends of justice would warrant, to consider any evidence taken and received by the joint boundary commission under the act of Congress approved January 31, 1885. 26 Stat. at L. 31, 92, § 25.

In order that the precise locality of this land may be indicated, and for convenience, we insert immediately after this page [see below] an extract from a map of Texas and of the Indian territory, published in 1892. The territory in dispute is marked on that map with the words "Unassigned Land." It contains about 1,511, 576.17 acres, lies east of the 100th meridian of longitude and west and south of the river marked on that map as the north fork of Red river and with the words "Boundary claimed by the state of Texas." It is north of the line marked on that map with the words "Boundary claimed by U. S." The river on the south side is now commonly known as Prairie Dog Town fork of Red river (the Indian name of which is Kecheahquehono), which has its source in the western part of Texas, and is the same river as the south fork of Red river mentioned in the act of 1890.

The present suit was instituted pursuant to that act. The state appeared and demurred

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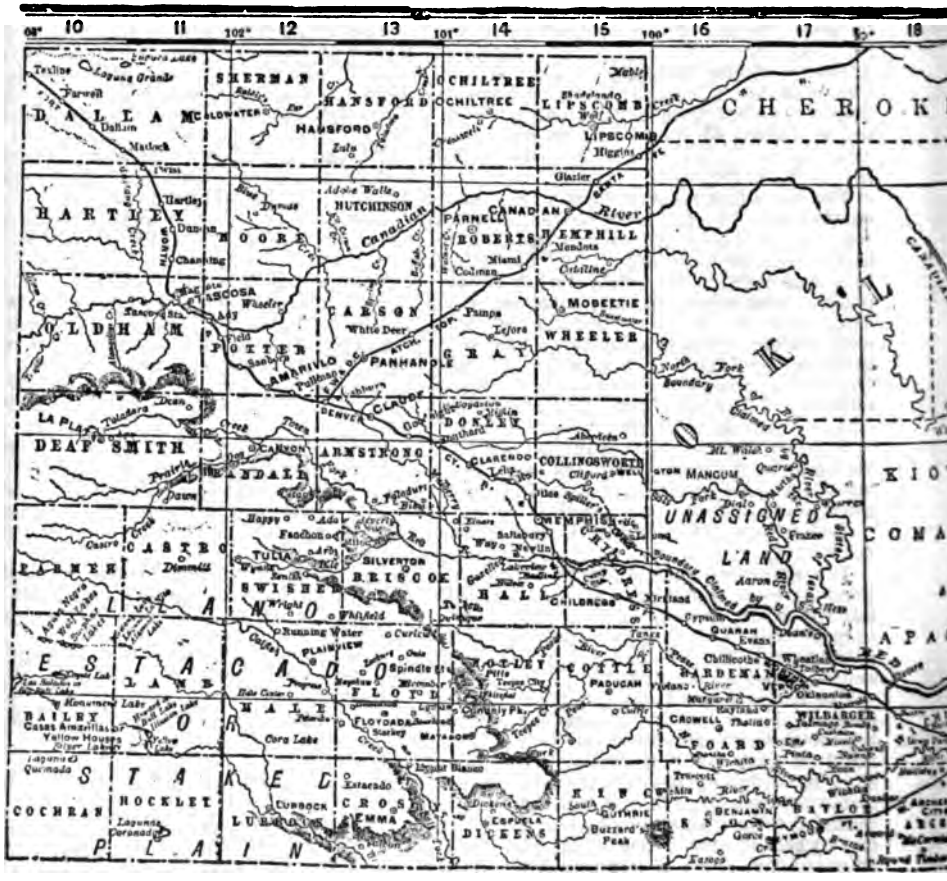
MAP



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to the bill upon the following grounds: 1. The question of boundary raised by the suit was political in its character, and not susceptible of judicial determination by this court in the exercise of any jurisdiction conferred by the Constitution and laws of the United States. 2. Under the Constitution it was not competent for the United States to sue, in its own courts, one of the states composing the Union. 3. This court, sitting as a court of equity, could not hear and determine the present controversy, the right asserted by the United States being in its nature legal, and not equitable.

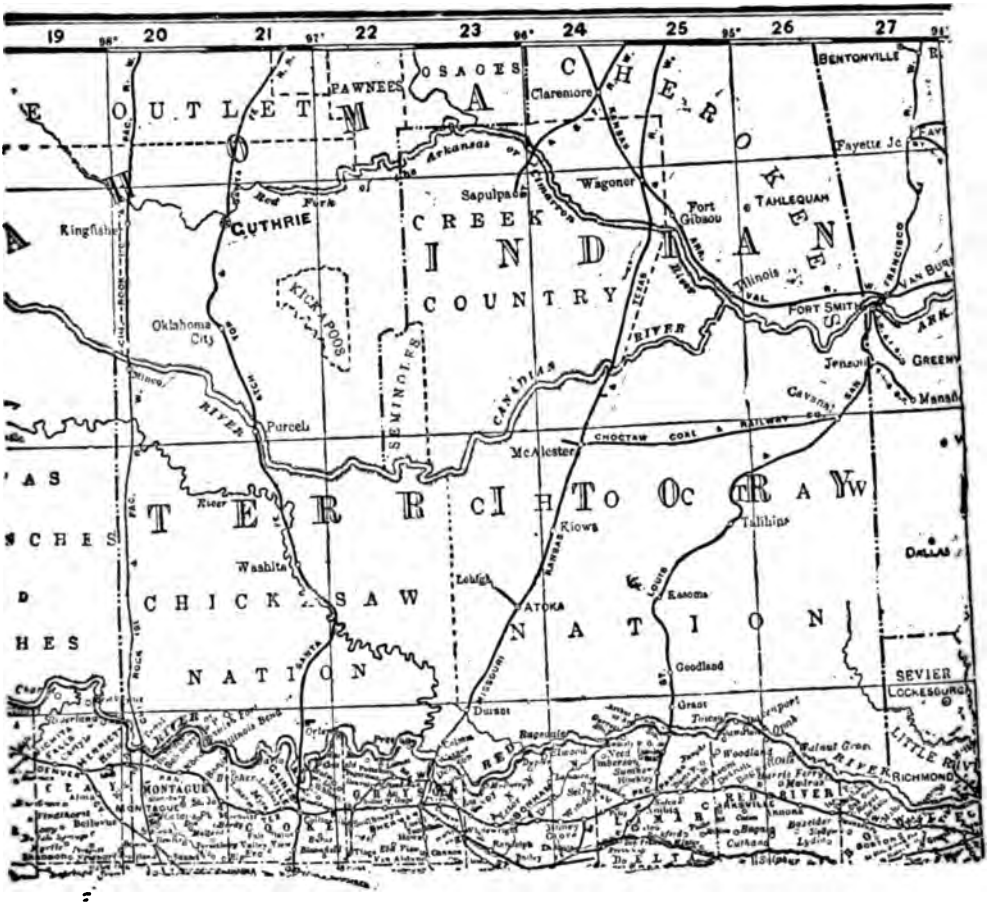
Upon full consideration these several grounds of demurrer were overruled. *United States* v. *Texas*, 143 U. S. 621 [36: 285]. The reasons given for that conclusion need not be here repeated.

The state answered the bill, controverting the claim of the United States and asserting that the lands within the boundary mentioned in the above act constitute a part of its territory. *The United States filed a replication, and proofs having been taken, the case is now before the court upon its merits. [23

Both parties assert title under certain articles of the treaty between the United States and Spain made February 22, 1819, and ratified February 19, 1821. 8 Stat. at L. 252, 254, 256.

Before examining those articles, it will be useful to refer to the diplomatic correspondence that preceded the making of the treaty. That correspondence commenced during the administration of President Madison and was concluded under that of President Monroe. It appears that the negotiations upon the subject of the boundaries between the respective possessions of the two countries were more than once suspended because certain demands on the part of Spain were regarded by the United States as wholly inadmissible. 4 American State Papers, *Foreign Relations*, pp. 425, 430, 438, 439, 452, 464–466, 478. Finally, on the 24th day of October, 1818, the Spanish

● 1892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Oklahoma City
KICKAPOOS
SEMINOLES
RIVER
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Jenson
GREENV
Purcell
CHOCTAW COAL & RAILWAY CO.
McAlester
TERRITORY
Riowa
Tahlihina
Washita
Lehigh
ATOKA
Kasoma
CHICKASAW
NATION
Goodland
SEVIER
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minister, "to avoid all cause of dispute in future," proposed to Mr. Adams, Secretary of State, that the limits of the possessions of the two governments west of the Mississippi should be designated by a line beginning "on the Gulf of Mexico, between the rivers Mermento and Calcasia, following the Arroyo Hondo, between the Adaes and Natchitoches, crossing the Rio or Red river at the 32d degree of latitude, and 93d of longitude from London, according to Melish's map, and thence running directly north, crossing the Arkansas, the White, and the Osage rivers, till it strikes the Missouri, and then following the middle of that river to its source, so that the territory on the right bank of the said river will belong to Spain, and that on the left bank to the United States. The navigation, as well of the Missouri as of the Mississippi and Mermento, shall remain free to the subjects of both parties." He also proposed that, in order "to fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations," each of the contracting parties should appoint a commissioner and surveyor, who should run and mark the line, and make out plans and keep 24] journals of *their proceedings, the result agreed upon by them to be considered part of the treaty, and have the same effect as if inserted in it. Annals of Congress (15th Cong. 2d Sess.) 1819, p. 1900.

To this proposition, Mr. Adams, under date of October 31, 1818, replied: "Instead of it, I am authorized to propose to you the following, and to assure you that it is to be considered as the final offer on the part of the United States: Beginning at the mouth of the river Sabine, on the Gulf of Mexico, following the course of said river to the 32d degree of latitude; the eastern bank and all the islands in the said river to belong to the United States and the western bank to Spain, thence, due north, to the northernmost part of the 33d degree of north latitude, and until it strikes the Rio Roxo, or Red river; thence, following the course of the said river *to its source, touching the chain of the Snow mountains* in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts, as marked on Melish's map; thence to the summit of the said mountains, and following the chain of the same to the 41st parallel of latitude; thence, following the said parallel of latitude 41°, to the South sea. The northern bank of the said Red river, and all the islands therein, to belong to the United States, and the southern bank of the same to Spain." "It is believed," Mr. Adams said, "that this line will render the appointment of commissioners for fixing it more precisely unnecessary, unless it be for the purpose of ascertaining the spot where the river Sabine falls upon latitude 32° north, and the line thence due north to the Red river, and the point of latitude 41° north on the ridge of the Snow mountains." Annals of Congress (15th Cong. 2d Sess.) 1903, 1904.

This proposition was rejected by the Spanish minister, and in his letter of November 16, 1818, he said: "I will undertake to admit the river Sabine instead of the Mermento as the boundary between the two powers, from the Gulf of Mexico, on condition that the same line proposed by you shall run due north from the point where it crosses the river Roxo (Red river) until it strikes the Mississippi, and extend thence along *the middle of the latter to its[25 source, leaving to Spain the territory lying to the right, and to the United States the territory lying to the left of the same." To this Mr. Adams replied under date of November 30, 1818: "As you have now declared that you are not authorized to agree, either to the course of the Red river (Rio Roxo) for the boundary, or to the 41st parallel of latitude, from the Snow mountains to the Pacific ocean, the President deems it useless to pursue any further the attempt at an adjustment of this object by the present negotiation. I am therefore directed to state to you that the offer of a line for the western boundary, made to you in my last letter, is no longer obligatory upon this government. Reserving, then, all the rights of the United States to the ancient western boundary of the colony of Louisiana by the course of the Rio Bravo del Norte, I am," etc. Annals of Congress (15th Cong. 2d Sess.) 1908, 1942.

The negotiations were resumed in the succeeding year, and the Spanish minister wrote to Mr. Adams, under date of February 1, 1819: "Having thus declared to you my readiness to meet the views of the United States in the essential point of their demand, I have to state to you that his Majesty is unable to agree to the admission of the Red river *to its source*, as proposed by you. *This river rises within a few leagues of Santa Fé*, the capital of New Mexico, and as I flatter myself the United States have no hostile intentions towards Spain at the moment we are using all our efforts to strengthen the existing friendship between the two nations, it must be indifferent to them to accept the Arkansas instead of the Red river as the boundary. This opinion is strengthened by the well-known fact that the intermediate space between these two rivers is so much impregnated with nitre as scarcely to be susceptible of improvement. In consideration of these obvious reasons, I propose to you that, drawing the boundary line from the Gulf of Mexico, by the river Sabine, as laid down by you, it shall follow the course of that river to its source; thence, by the 94th degree of longitude, to the Red river of Natchitoches, and along the same to the 95th degree, and, crossing it at that point, to run by a line due north to the *Arkansas, and along it to its source; [26 thence by a line due west till it strikes the source of the river San Clemente, or Multnomah, in latitude 41°, and along that river to the Pacific ocean; the whole agreeably to Melish's map." Annals of Congress (15th Cong. 2d Sess.) 2111, 2112.

The last proposition made by Mr. Adams to the Spanish minister contained the following: "Art. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea; continuing north, along the western bank of that river, to the 32d degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red river; thence, following the course of the Rio Roxo west-

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ward, to the degree of longitude 102 degrees west from London and 25 degrees from Washington; then, crossing the said Red river and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source in latitude 41 degrees north; and thence, by the parallel of latitude, to the South sea; the whole being as laid down in Melish's map of the United States, published in Philadelphia, improved to the 1st of January, 1818. But, if the source of the Arkansas river should be found to fall north or south of latitude 41 degrees, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 41 degrees, and thence along the said parallel to the South sea; the Sabine and the said Red and Arkansas rivers, and all the islands in the same, throughout the course thus described, to belong to the United States, and the western bank of the Sabine, and the southern banks of the said Red and Arkansas rivers throughout the line thus described to belong to Spain. And the United States hereby cede to His Catholic Majesty all their rights, claims, and pretensions to the territories lying west and south of the above-described line; and His Catholic Majesty cedes to the said United States all his rights, claims, and pretensions to any territories east and north of said line, and, for himself, his heirs, and successors, renounces 27]*all claims to said territories forever." The Spanish minister required that "the boundary between the two countries shall be the middle of the rivers, and that the navigation of the said rivers shall be common to both countries." Mr. Adams replied that the United States had always intended that "the property of the river should belong to them," and he insisted on that point "as an essential condition, as the means of avoiding all collision, and as a principle adopted henceforth by the United States in its treaties with its neighbors." He agreed, however, "that the navigation of the said rivers to the sea shall be common to both people." The Spanish minister assented "to the 100th degree of longitude and, to remove all difficulties, to admit the 42d instead of the 43d degree of latitude from the Arkansas to the Pacific ocean." Annals of Congress, Appx. (16th Cong. 2d Sess.) 2120, 2121, 2123.

We have alluded to this diplomatic correspondence to show the circumstances under which the treaty of 1819 was made, and to bring out distinctly two facts that are of some importance in the present discussion: 1. That the negotiators had access to the map of Melish, improved to 1818 and published at Philadelphia. 2. That the river referred to in the correspondence as Red river was believed by the negotiators to have its source near Santa Fé and the Snow mountains.

This brings us to the treaty itself. Its 3d and 4th articles are in these words:

"Art. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of the river to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red river; *then following the course of the Rio Roxo, westward, to the degree of longitude* 100 *west from London and* 23 *from Washington;* then, crossing the said Red river, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas to its source, in latitude 42 north; and thence by that parallel of latitude to the South sea. The whole being as laid down in Melish's *map of the United States, published[28 at Philadelphia, improved to the 1st of January, 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42°, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence along the said parallel to the South sea: All the islands in the Sabine and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters and the navigation of the Sabine to the sea and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions to the territories described by the said line; that is to say: the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims, and pretensions to the territories lying west and south of the above-described line; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims, and pretensions to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever.

"Art. 4. To fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a commissioner and a surveyor, who shall meet before the termination of one year from the date of the ratification of this treaty at Natchitoches, on the Red river, and proceed to run and mark the said line, from the mouth of the Sabine to the Red river, and from the Red river to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42, to the South sea: they shall make out plans, and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree *respecting the necessary articles to be fur-[29 nished to those persons, and also as to their respective escorts, should such be deemed necessary." 8 Stat. at L. 252, 254, 256.

So much of the Melish map of 1818 as is necessary to show its bearing on the present inquiry is reproduced on the next page.

It may be observed here that the 100th meridian of longitude is inaccurately located on this map. That meridian, astronomically located, is more than 100 miles farther west

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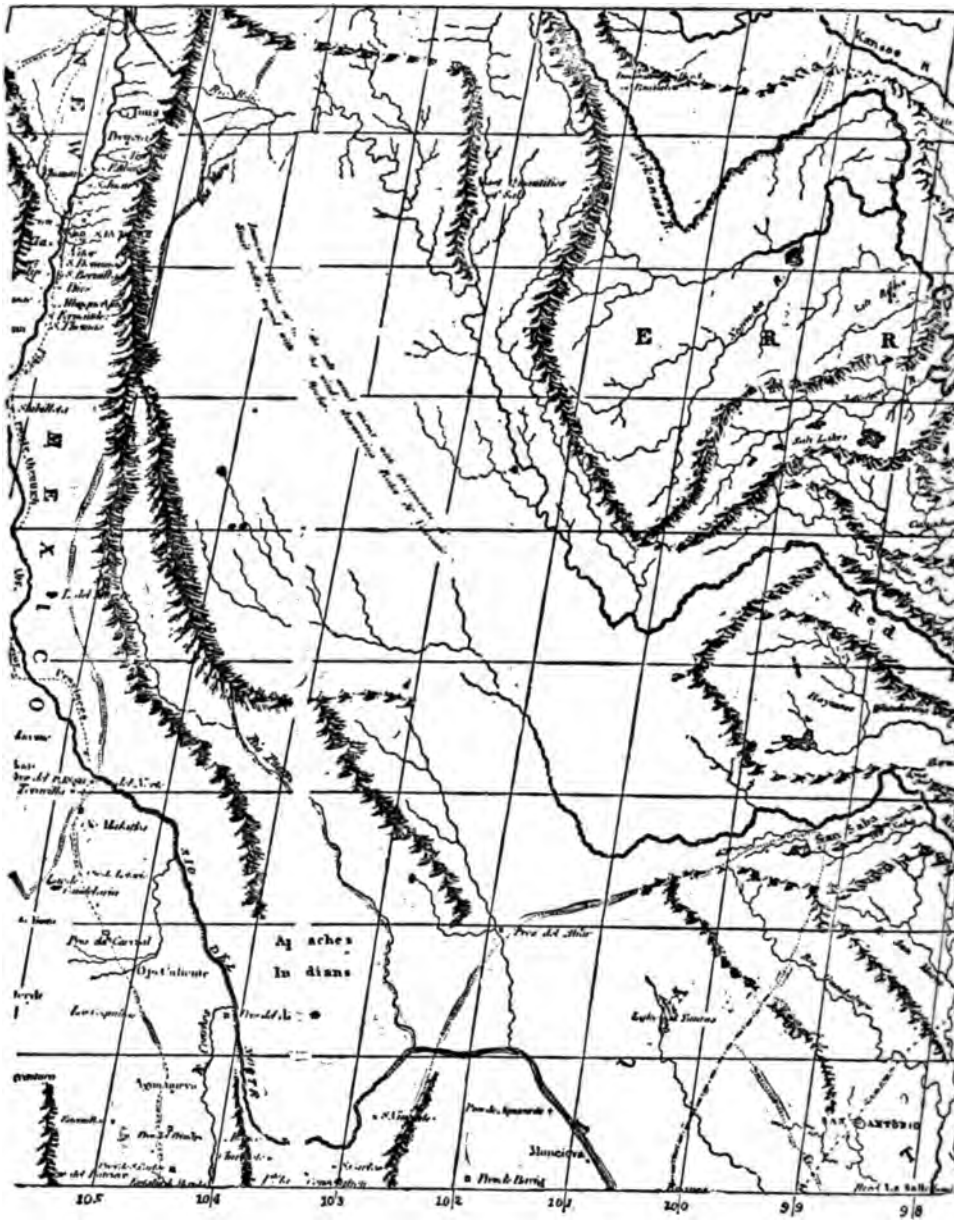

than is indicated by the Melish map. This fact is clearly shown by the record, and is not seriously questioned.

By the treaty of 1828 between the United States of America and the United Mexican States, concluded January 12, 1828, the dividing limits of the respective countries were declared to be the same as those fixed by the treaty of 1819. 8 Stat. at L. 372.

The Republic of Texas, by an act passed December 19, 1836, declared that the civil and political jurisdiction of that Republic extended to the following boundaries, to wit: "Beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico 3 leagues from land to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the 42d degree of north latitude, thence along the boundary line, as defined in the treaty between the United States and Spain, to the beginning; and that the President be and is hereby authorized and required to open a negotiation with the government of the United States of

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MELISH MAP—1818

America, so soon as, in his opinion, the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty." 1 Sayles, Early Laws of Texas, art. 257.

On the 25th of April, 1838, a convention was concluded between the United States and the Republic of Texas for marking the boundary referred to in the above treaty of 1828, as follows:

"Whereas the treaty of limits made and concluded on the 12th day of January, 1828, between the United States of America of the one part and the United Mexican States of *the other part, is binding upon the Repub- [32
lic of Texas, the same having been entered into at a time when Texas formed a part of the United Mexican States; and whereas it is deemed proper, in order to avoid future disputes and collisions between the United States and Texas in regard to the boundary as designated by said treaty, that a portion of the same should be run and marked without unnecessary delay: Art. 1. Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the expiration of twelve months from the exchange of

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the ratification of the convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red river. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. Art. 2. And it is agreed that until this line is marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other, within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised." Treaties and Conventions, 1079. By the act of Congress of January 11, 1839, chap. 2, provision was made for carrying this convention into effect. 5 Stat. at L. 312. It does not appear that anything of importance was accomplished under that act.

33] *By a joint resolution passed March 1, 1845, Congress consented that "the territory properly included within and rightfully belonging to the Republic of Texas" might be erected into a state to be admitted into the Union, one of the conditions of such consent being that the new state be formed subject to the adjustment by the United States of all questions of boundary that might arise with other governments. 5 Stat. at L. 797. The conditions prescribed were accepted by Texas. 1 Sayles, Early Laws of Texas, art. 1531. And by the joint resolution of Congress approved December 29, 1845, Texas was admitted as one of the states of the Union, on an equal footing in all respects with the original states. 9 Stat. at L. 108.

Then came the act of Congress approved September 9, 1850, chap. 49, entitled "An Act Proposing to the State of Texas the Establishment of Her Northern and Western Boundaries, the Relinquishment by the Said State of All Territory Claimed by Her Exterior to Said Boundaries, and of All Her Claims upon the United States, and to Establish a Territorial Government for New Mexico." By that act certain propositions were made to the state of Texas, which, being accepted, were to be binding upon the United States and the state. Among them were the following:

"First. The state of Texas will agree that her boundary *on the north* shall commence at the point *at which the meridian of 100 degrees west from Greenwich* is intersected by the parallel of 36° 30′ north latitude, and shall run from said point due west to the meridian of 103 degrees west from Greenwich; thence her boundary shall run due south to the 32d degree of north latitude; thence on the said parallel of 32 degrees of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico. Second. The state of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she *agrees to establish* by the first article of this agreement. Third. The state of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender *to the United States of her [34 ships, ports, arsenals, custom-house revenues, arms and munitions of war, and public buildings, with their sites, which became the property of the United States at the time of the annexation. Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the state of Texas the sum of $10,000,000 in a stock bearing 5 per cent interest, and redeemable at the end of fourteen years, the interest payable half yearly at the Treasury of the United States," and agreed to "be bound by the terms thereof, according to their import and meaning." 9 Stat. at L. 446, 447.

The state accepted these propositions by an act approved November 25, 1850, and agreed to "be bound by the terms thereof according to their import and meaning." 2 Sayles, Early Laws of Texas, art. 2127.

In the light of these general facts, we recur to the treaty of 1819, from which it will be seen that the line agreed upon—starting from the point where the line due north from the Sabine river, at the 32d degree of latitude, strikes the Rio Roxo of Natchitoches, or Red river—followed "the course of the Rio Roxo *westward* to the degree of longitude 100 west from London and 23 from Washington."

The contention of the United States is that this requirement cannot be met except by going westward along and up the Prairie Dog Town fork of Red river to the point where (as shown on the first of the above maps) that river intersects the 100th meridian—the government claiming that that river, and not the north fork of Red river, is a continuation or the principal fork of the Red river of the treaty.

The state insists that, even if the treaty be interpreted as referring to the true 100th meridian of longitude, and not to that meridian as located on the Melish map of 1818, "the course of the Rio Roxo westward" from the intersection of the line extending north from Sabine river to Red river, takes the line, not westwardly along the Prairie Dog Town fork of Red river, but northwardly and northwestwardly up the north fork of the Red river (from its intersection with *Red river) to [35 the point where the latter fork crosses the true 100th meridian, between the 35th and 36th degrees of latitude.

But at the outset of the discussion the state propounds this proposition: That the treaty of 1819 having declared that the boundary lines between the United States and Spain should be as laid down on Melish's map of 1818, it is immaterial whether the location of the 100th meridian of longitude on that map was astronomically correct or not, or whether the one or the other fork of Red river was or is the continuation of the main river; that the map of Melish, having fixed the 100th degree of longitude west from Greenwich below and

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east of the mouth of the north fork of Red river, as now known, is conclusive upon both governments, their privies and successors. If this position be sound, the case is for the state; for it is conceded that the entire territory in dispute is *west* of the 100th meridian, *as that meridian appears on the Melish map of* 1818, although it is, beyond all question, east of the true 100th meridian astronomically located and as long recognized both by the United States and Texas.

The state's answer thus presents this issue: "That the line of said 100th meridian of longitude west from London, as laid down in said map of Melish, intersects the Rio Roxo, or Red river, a distance of many miles east of what is claimed by the complainant to be the true line of said meridian, and many miles east of the point where the Kecheahquehono [Prairie Dog Town fork of Red river] empties its waters into the Rio Roxo of the treaty; and said meridian so laid down on Melish's map and extended north to the 42d parallel of north latitude includes, *as territory properly belonging to and conceded to Spain* under the terms of the treaty, *and belonging of right to Texas* by virtue of the establishment of her independence, a large part of the lands *now belonging to the Chickasaw and other tribes of Indians, under concessions by treaty, as well as a portion of the present states of Kansas and of Colorado, and a part of the territory of New Mexico.* Defendant shows that long before and after the date of said treaty of 1819 the King [36] of Spain claimed all this territory *lying west of said 100th meridian of longitude and south of said 42d parallel of latitude as laid down upon Melish's map; and in effectuation of such claim exercised repeated acts of ownership and dominion over the same, without question; and after securing her independence and establishment as an independent nation, the United Mexican States likewise asserted their dominion and authority over said territory; and Texas, both as a separate Republic and as a state of the Union, has claimed and exercised complete ownership and dominion over said territory, including the territory now in controversy, by occupation of said territory by her armies, and by extending the operations of her laws over the same, and by various other acts and declarations, until the happening of the matters and things now here to be shown and set forth."

Referring to the pleadings and to the act of Congress of January 31, 1885, in which the terms of the treaty are recited, and which directs the commissioners appointed under it to "mark the point where the 100th meridian of longitude crosses Red river, in accordance with the terms of the treaty," the counsel for the state says: "But if the intersection of the 100th meridian of longitude with the parallel 36° 30′ north latitude, constituting the beginning of the north boundary line of Texas under the act of 1850 [9 Stat. at L. 446, chap. 49], shall be held to mean the actual and not the Melish intersection, it does not follow that the actual and not the Melish 100th meridian constitutes the eastern boundary line of the state. . . . Nor is the situation altered by the fact that this construction will leave *for future determination* the ownership of a portion of the northeastern territory."

If, as asserted by the state, this case should be determined upon the basis that the 100th meridian is where the Melish map located it, and not where it is in fact, this court may well decline to recognize a claim attended with such grave consequences as those suggested by the answer, unless it be clearly established.

Undoubtedly, the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention *of the contracting parties may be ascer- [37 tained. 1 Kent, Com. 174. For that purpose the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty. *McIver* v. *Walker*, 13 U. S. 9 Cranch, 173 [3: 694], 17 U. S. 4 Wheat. 444 [4: 611]; *Noonan* v. *Braley*, 67 U. S. 2 Black, 499 [17: 278]; *Cragin* v. *Powell*, 128 U. S. 691, 696 [32: 566, 567]; *Jefferis* v. *East Omaha Land Co.* 134 U. S. 178, 194 [33: 872, 878]. But are we justified, upon any fair interpretation of the treaty, in assuming that the parties regarded that map as absolutely correct in all respects, and not to be departed from in any particular or under any circumstances? Did the contracting parties intend the words of the treaty should be literally followed, if by so doing the real object they had in mind would be defeated? The boundary line was to begin at the mouth of the river Sabine, and continue north along the western bank of that river to the 32d degree of latitude. Was it intended that the Melish map should control in fixing the point where the Sabine river met that degree of latitude? Was the line due north from Sabine river to Red river to begin at the intersection of Sabine river with the true 32d degree of latitude, or where Melish's map indicated the place of such intersection? The two governments certainly intended that the line should be run from the Gulf along the western bank of the Sabine river, and after it reached Red river that it should follow the course of that river, leaving both rivers within the United States. But it cannot be supposed that they had in view the intersection of Sabine river with any degree of latitude other than the true 32d degree of latitude, nor the crossing of the line extending along the Red river westward with any meridian of longitude other than the true 100th meridian. The 4th article of the treaty shows that the contracting parties contemplated that the line should be fixed with more precision than it was then possible to do; and to that end provision was made for the appointment of commissioners and surveyors, who should run and mark it, and designate exactly the limits of both nations, —the results of such proceedings, it was declared, to be considered part of the treaty, having the same force as if *inserted therein. [38 Melish's map of 1818 was taken as a general basis for the adjustment of boundaries, but the rights of the two nations were made subject to the location of the lines with more precision, at a subsequent time, by commissioners and surveyors appointed by the respective governments. So far as is disclosed by the diplomatic correspondence that preceded the treaty, the negotiators assumed for the purposes of a settlement of their controversy that Melish's map was, in the main, correct. But they did

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not and could not know that it was accurate in all respects. Hence they were willing to take it as the basis of a final settlement, the fixing of the line with more precision, and the designating of the limits of the two nations with more exactness, to be the work of commissioners and surveyors, who were to meet at a named time, and the result of whose work should become a part of the treaty. While the line agreed upon was, speaking generally, to be as laid down on Melish's map, it was to be fixed with more precision, and designated with more exactness, by representatives of the two nations.

But there is another and perhaps stronger view of this question, and which is equally conclusive even if the 100th meridian originally contemplated by the treaty of 1819 were assumed to have been the erroneous meridian line of Melish's map. This view rests upon the official acts of the general government and of Texas, and requires that the present controversy shall be determined upon the basis that the line, which by the treaty was to follow "the course of the Rio Roxo westward," extends to the true 100th meridian, thence by a line due north.

As heretofore stated, the Republic of Texas, by an act passed December 19, 1836, declared that its civil and political jurisdiction extended to the following boundaries: Beginning at the mouth of the Sabine river and running along the Gulf of Mexico 3 leagues from the land, to the mouth of the Rio Grande; thence up the principal stream of the latter river to its source; thence due north to the 42d degree of north latitude; thence "along the boundary line as defined in the treaty between the United **39**]States and Spain, to the *beginning." The President of that Republic was authorized and required by the same act to open a negotiation with the United States to ascertain and define the boundary as agreed upon in that treaty. 1 Sayles, Early Laws of Texas, art. 257. This boundary had not been defined when Texas was admitted as a state into the Union, with the territory "properly included within and rightfully belonging to the Republic of Texas." The settlement of that question, together with certain claims made by Texas against the United States, were among the subjects that engaged the attention of Congress during the consideration of the various measures constituting the compromises of 1850. The result was the passage of the above act of September 9, 1850, chap. 49, the provisions of which were promptly accepted by the state of Texas. This legislation of the two governments constituted a convention or contract in respect of all matters embraced by it. The settlement of 1850 fixed the boundary of Texas "on the north" to commence at the point at which *the 100th meridian* intersects the parallel of 36° 30′ north latitude, and from that point the northern line ran due west to the 103d meridian, thence due south to the 32d degree of north latitude, thence on that parallel to the Rio Bravo del Norte, and thence with the channel of that river to the Gulf of Mexico. Texas, in the same settlement, ceded its claim to territory exterior to the limits and boundaries so established, and relinquished all claims upon the United States for liability for its debts, and for compensation or indemnity for the surrender to the United States of its ships, ports, arsenals, custom-house revenues, arms and munitions of war, and public buildings, with their sites, which became the property of the United States at the time of the admission of the state into the Union. In consideration of that establishment of boundaries, cession of claim to territory, and relinquishment of claims, the United States agreed to pay and has paid to Texas the sum of $10,000,000. 9 Stat. at L. 446.

The words "the meridian of 100 degrees west from Greenwich," in the act of 1850, manifestly refer to the true 100th meridian, and not to the 100th meridian as located *on [**40** the Melish map of 1818. The precise location of that meridian has not been left in doubt by the two governments. The United States has erected a monument at the point where the 100th meridian is intersected by the parallel of 36° 30′ north latitude. This was done many years ago, upon actual survey, and Texas has, by its legislation, often recognized the true 100th meridian to be as located by the United States. Looking at the above map of 1892, it will be seen that the counties of Lipscomb, Hemphill, Wheeler, Collingsworth, and Childress are all immediately west of the 100th meridian. These counties were established in 1876. 3 Sayles, Early Laws of Texas, art. 4285. The boundaries of each, as defined in the legislative enactments of Texas, are given in the margin.† It will be seen that the eastern boundary of each county is the 100th meridian. By the act creating Lipscomb county, its boundary immediately south of the parallel of 36° 30′ north latitude begins "at a monument

†*The county of Lipscomb.*—Beginning at a monument on the intersection of the 100th meridian and the 36½ degree of latitude, 1,629 feet north of the 132d mile post *on the 100th meridian;* thence west 30 miles to the 30th mile post on the 36½ degree of latitude; thence south 30 miles and 1,629 feet; thence east 30 miles to the 102d mile post; thence north 30 miles and 1,629 feet to the beginning.

The county of Hemphill.—Beginning at the northeast corner of Roberts county and the southeast corner of Ochiltree county and southwest corner of Lipscomb county; thence east 30 miles to the southeast corner of Lipscomb county, to the 102d mile post *on the 100th meridian;* thence south 30 miles to the 72d mile post; thence west 30 miles to the southeast corner of Roberts county; thence north 30 miles to the place of beginning.

The county of Wheeler.—Beginning at the 72d mile post, on the 100th meridian, the southeast corner of Hemphill county; thence west 30 miles to the southwest corner of Hemphill county and the southeast corner of Roberts county; thence south 30 miles; thence east 30 miles to the 42d mile post, *on the 100th meridian;* thence north 30 miles to the place of beginning.

The county of Collingsworth.—Beginning at the northeast corner of Donley county and southeast corner of Gray county and southwest corner of Wheeler county; thence east 30 miles to the southeast corner of Wheeler county at the 42d mile post, *on the 100th meridian;* thence south 30 miles; thence west 30 miles to the southeast corner of Donley county; thence north 30 miles to the place of beginning.

The county of Childress.—Beginning at the southeast corner of Collingsworth county at the 12th mile post, *on the 100th meridian;* thence west 23 miles; thence south 30 miles; thence east about 35 miles to the new west line of Hardeman county; thence north to Pairie Dog Town river; thence up said river to the *initial monument on the 100th meridian;* thence north to the 12th mile post at the place of beginning. 3 Sayles, Early Laws of Texas, art. 4285.

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on the intersection of the 100th meridian and the 36½ degrees of latitude." That monument is the one established by the United States after the settlement of 1850. Peculiarly significant is the boundary of Childress county, one of the lines of which runs up Prairie Dog Town river—which river, the United States insists, constitutes the southern boundary of 41] *the territory in dispute—"to the initial monument on the 100th meridian." The "initial monument" here referred to was erected in 1857 under the authority of the United States to mark the place where, as its representatives then and have ever since claimed, the line, "following the course of the Rio Roxo westward," crossed the 100th meridian.

It thus appears that the two governments, with knowledge that the treaty of 1819 referred to Melish's map of 1818, have, by official action, declared that the 100th meridian is located on the line that marks the eastern boundaries of the counties of Lipscomb, Hemphill, Wheeler, and Collingsworth, in the state of Texas. Besides, the proof in the cause leaves no room to doubt that the true 100th meridian is, as shown by the above map of 1892, immediately east of those counties. The acts of the two governments and the evidence therefore concur in showing that the 100th meridian is not correctly delineated on the Melish map of 1818. And in the above settlement of a part of the boundary lines between the United States and Texas, the two governments have accepted the true 100th meridian and discarded the Melish 100th meridian. Giving effect to the compromise act of 1850, the suggestion that the 100th meridian must be taken, in the present controversy, to be as located on the Melish map of 1818, is wholly inadmissible. It cannot be supposed 42] that the United States *would have agreed to pay $10,000,000 to the state of Texas, as provided in the act of 1850, if it had been suggested that any dispute in respect of boundary not covered by that act, and so far as such dispute depended upon degrees of longitude, was to be determined otherwise than by reference to the true 100th meridian. Assuming that the two governments did not intend by the settlement of 1850 to fix the point where the line "following the course of the Rio Roxo westward" crossed the 100th meridian, nevertheless it is inconceivable that the two governments intended that, in establishing the boundary of Texas "on the north," the 100th meridian mentioned in the enactment of 1850 should be the true 100th meridian, but that the state should be at liberty to insist, in respect of its boundary *along Red River*, that the 100th meridian be taken to be as delineated on the Melish map, and thereby obtain all the land, within the limits of Indian territory, between the true 100th meridian and the Melish 100th meridian.

We have said that the treaty itself, upon a reasonable interpretation of its provisions, left it open to the contracting parties, through commissioners and surveyors, to fix the lines with precision, and therefore to show, by competent evidence, where the true 100th meridian was located. But if this were not so, we should feel obliged to hold that the convention or contract between the United States and Texas, as embraced in their respective enactments of 1850, together with the subsequent acts of the two governments, require in the determination of the present controversy that the 100th meridian mentioned in the treaty of 1819 be taken to be the true 100th meridian, and consequently that the line "following the course of the Rio Roxo westward to the degree of longitude 100 west from London" must go, and was intended to go, to the true or actual 100th meridian, and not stop at the Melish 100th meridian.

So that the real question for solution is whether, as contended by the United States, the line "following the course of the Rio Roxo *westward* to the degree of longitude 100 west from London" meets the 100th meridian at the point where *Prairie Dog Town fork of [43 Red river crosses that meridian, or whether, as contended by the state, it goes *northwestwardly* up the north fork of Red river until *that* river crosses the 100th meridian many miles due north of the initial monument established by the United States in 1857.

Upon this point the evidence is very voluminous. Much of it, we feel constrained to say, is of little value, and tends only to confuse the mind in its efforts to ascertain what was within the contemplation of the negotiators of 1819.

It is a matter of regret that the question now presented, involving interests of great magnitude, should not have been determined, in some satisfactory mode, before or shortly after Texas was admitted as one of the states of the Union. It has remained unsettled for so long a time that it is not now so easy of solution as it would have been when the facts were fresh in the minds of living witnesses who had more intimate knowledge of the circumstances than any one can now possibly have upon the most thorough investigation.

Before looking at the Melish map of 1818, it will be proper to inquire as to the general course of Red river, so far as any information had been given to the public prior to the making of that map. Probably the most trustworthy publication on the subject is Pike's "Account of Expeditions to the Sources of the Mississippi and through the Western Parts of Louisiana to the Source of the Arkansaw, Kans, La Platte, and Pierre Juan Rivers, Performed by Order of the Government of the United States, During the Years 1805, 1806, and 1807; and a Tour through the Interior Parts of New Spain, when Conducted through these Provinces by Order of the Captain General in the Year 1807." This work was copyrighted in 1808 and published at Philadelphia in 1810. It was illustrated by numerous charts, copies of which constitute the two [four] pages following this page—one of them being "A Chart of the Internal Part of Louisiana," the other, "A Map of the Internal Provinces of New Spain." Those charts show a large river called Red river, extending from a point near Santa Fé, between latitude 37° and 38°, across what is now the state of Texas, passing Natchitoches, Louisiana. Both show a chain of mountains *running north and [48 south, marked on one chart as "White snow-capped mountains, very high."

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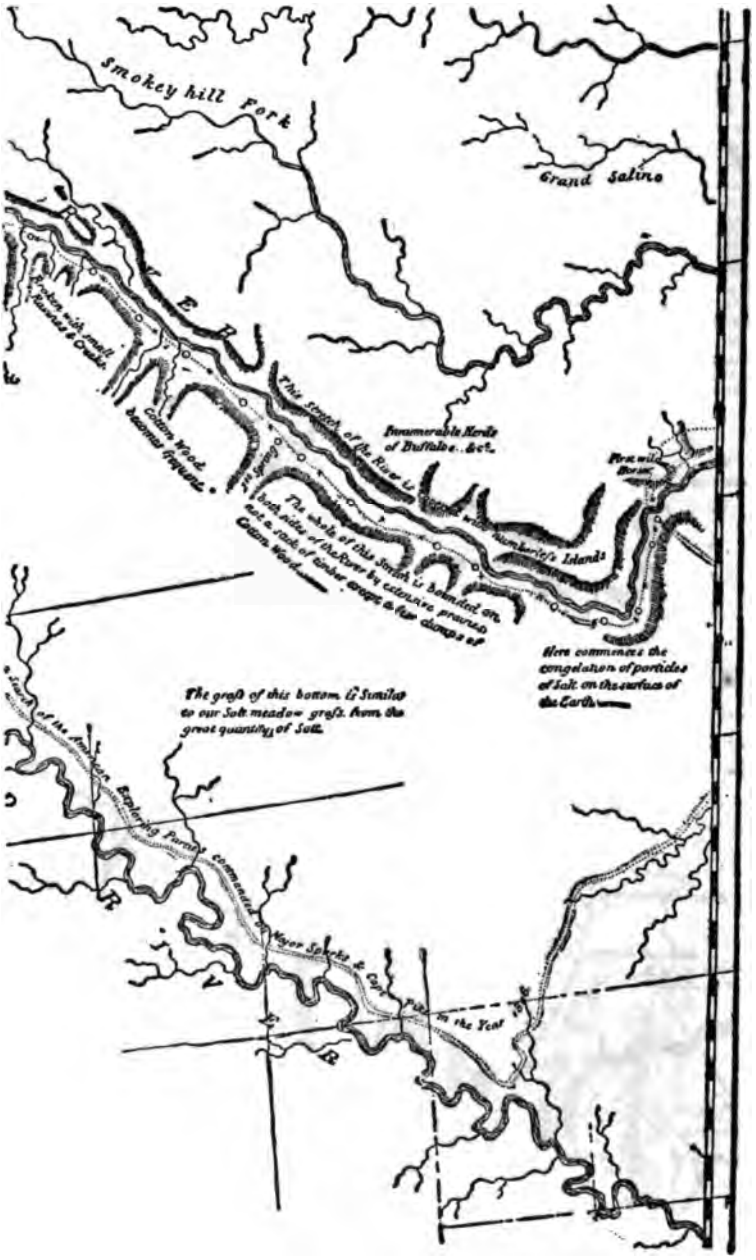
44]*

To go to St Fe it is best to avoid the 3rd Fork to the Mountain thence along the foot of said Mountain to the post at Taos as was the route of the Spanish Cavalry when returning
The Route pursued by the Spanish Cavalry when going
Source of Red River of the Mississippi
Rio Napo
Rio Norte
Rio de la Salado
Rio Grande
Rio Colorado
Rio Gila
Rio Salado
Rio Grande
Rio Colorado
Rio Gila
Rio Salado
Rio Grande
Rio Colorado
Rio Gila
Rio

*[45



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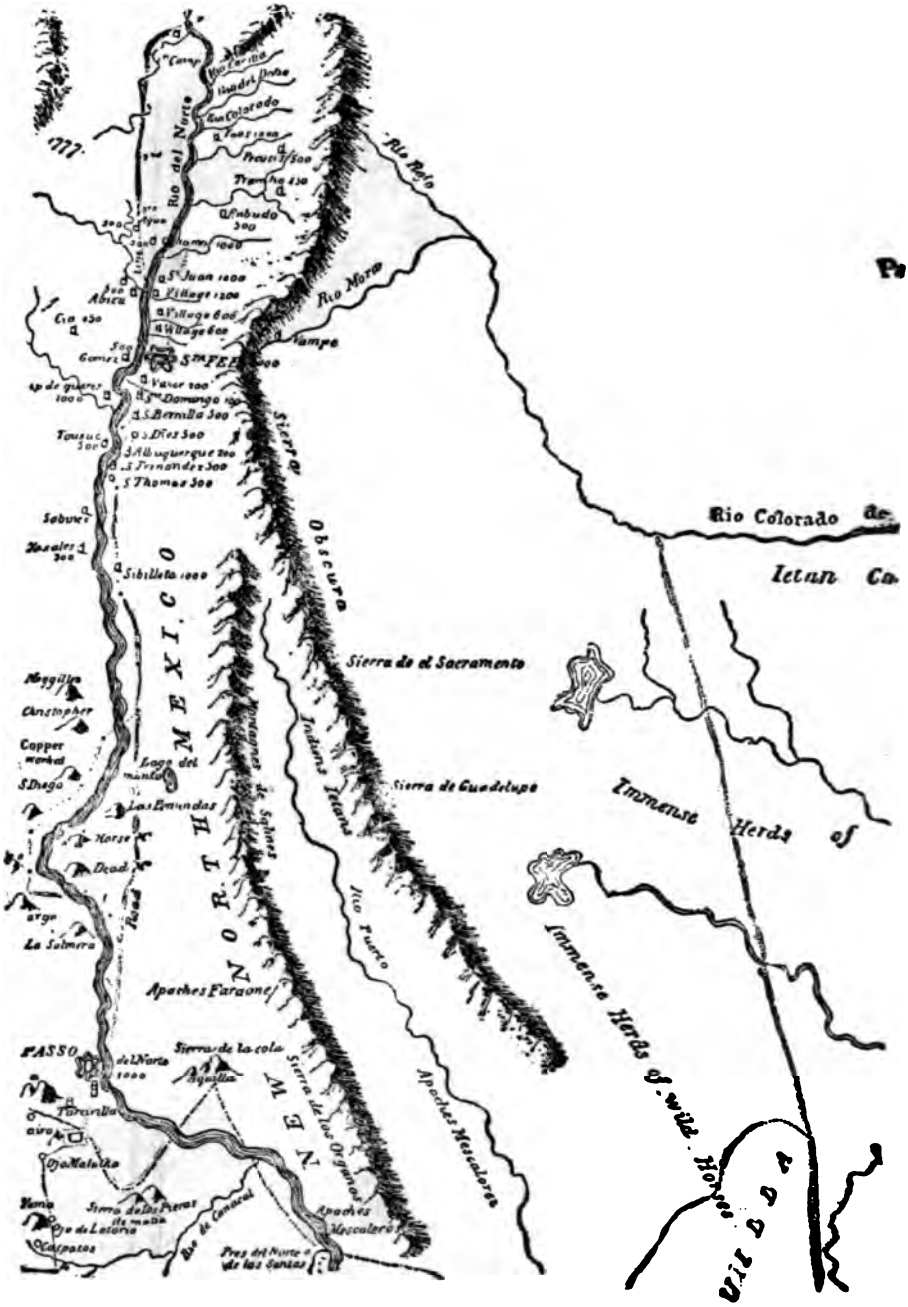

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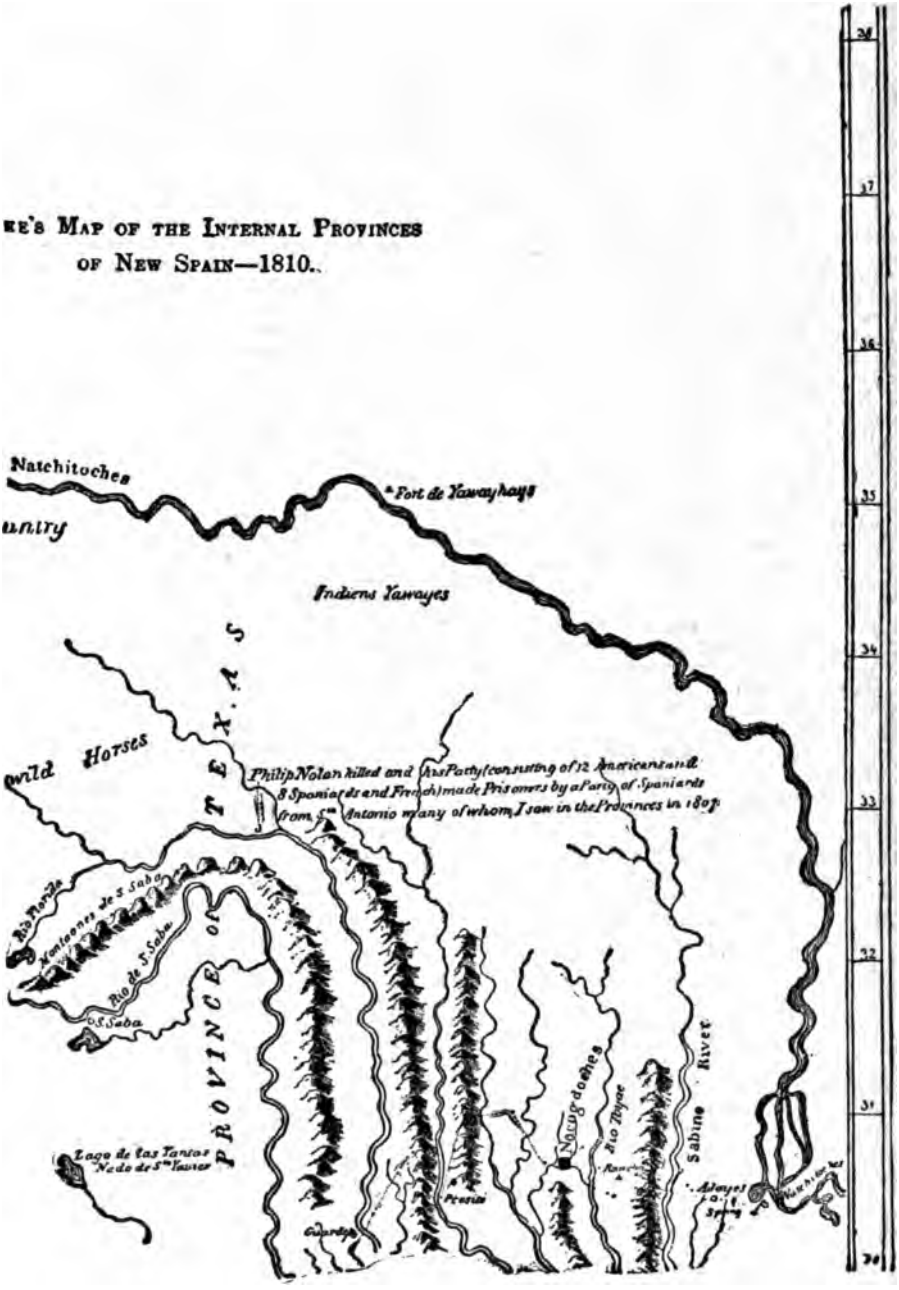

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These are undoubtedly the Snow mountains referred to in the letter of Mr. Adams to the Spanish minister, of October 31, 1818, in which, as we have seen, the former proposed that the line from east to west should follow the course of Red river "to its source, touching the chain of the Snow mountains, in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts." East of the Snow mountains, as delineated on these charts, are two prongs or small streams, "Rio Rojo" and "Rio Moro," the source of the former being northeast, and the latter nearly east, of Santa Fé. The Rio Rojo rises between the 37th and 38th, and the Rio Moro between the 36th and 37th, degrees of latitude, both near the 106th degree of longitude. Between those prongs, on one of the charts, are the words "Source of Red river of the Mississippi." The prongs or streams Rio Rojo and Rio Moro unite at about the 37th degree of latitude, and form one stream, marked on one chart as Red river, and on the other as "Rio Colorado [Red river] of Natchitoches." The stream thus formed runs for a short distance eastwardly, then southeastwardly until it reaches a point a little west of the 100th meridian, then eastwardly, then a little northeastwardly, then southeastwardly, passing Natchitoches, to a junction with the Wichita river, near the Mississippi river. It should also be stated that on these charts is marked a road or line extending from Tous (which is north of Santa Fé) through a gap of the Snow mountains, and thence along the north side of Red river. That line is described as "The route pursued by the Spanish cavalry when going out from Santa Fé in search of the American exploring parties commanded by Major Sparks and Captain Pike in the year 1806." These charts or maps, in connection with the chart of the lower part of Red river, not here reproduced, also show throughout the entire distance from Natchitoches to the source of Red river near the Snow mountains, small streams emptying into the main river from the north and northwest, none of which, however, are marked with names; and that north of Red river, as de-
49] lineated by *Pike, and east of the 100th meridian of longitude, is an unnamed stream, not of great length, but having the same general course as the stream now known as the north fork of Red river.

That prior to Melish's map of 1818 it was believed that the Red river that passed Natchitoches had its source in the mountains near Santa Fé is manifest from Melish's own publications. In 1816 he published at Philadelphia a small book, with the title "A Geographical Description of the United States with the Contiguous British and Spanish Possessions." It accompanied his map of those countries. In that work it appears that he used Humboldt's map of 1804, and Pike's Travels. He said: "The Red river rises in the mountains to the eastward of Santa Fé, between north latitude 37° and 38°, and, pursuing a general southeast course, makes several remarkable bends, as exhibited on the map; but it receives no very considerable streams until it forms a junction with the Wachitta and its great mass of waters, a few miles before it reaches the Mississippi." pp. 13, 39. See also third edition of his work published in 1818, pp. 14, 42.

On Darby's map of the United States, including Louisiana, published in 1818, and prefixed to his "Emigrant's Guide," appears the "Red river of Natchitoches," formed by two prongs, and extending southeastwardly from a point near the intersection of the 107th degree of longitude and the 40th degree of latitude to its junction with waters near the Mississippi. East of the 100th meridian are two unnamed streams coming from the northwest, each much shorter than the main Red river, as delineated on that map. It is stated in this work that the Red river "rises near Santa Fé in N. lat. 37° 30′ and 29° west of Washington, runs nearly parallel to the Arkansas, joins the Mississippi at 31° N. lat. after a comparative course of 1,100 miles." p. 50.

In view of the facts stated, particularly in view of Melish's knowledge of Pike's publication and the statements in his own work, it cannot be doubted that when the Melish map of 1818 was published it was believed that there was a Red river that continued without break from its source near Santa Fé or the *Snow mountains until it joined other **[50** waters east and southeast of Natchitoches, near the Mississippi.

Following the course of Red river as laid down on the Melish map of 1818, it is impossible to doubt that in the mind of Melish the Red river was the stream represented by Pike as having two prongs, Rio Rojo and Rio Moro, near Santa Fé, and as running without break, first easterly, then southeastwardly, then eastwardly for a comparatively short distance, and then southeastwardly to its mouth near the Mississippi river. On the north and east of Red river as thus marked, there was no stream connected with it that was marked by any name. There was an unnamed stream, on the north side of the main river, which emptied into the latter between the 101st and 102d degrees of west longitude *as defined on that map.* If regard be had alone to the map of 1818, it is more than probable that the river marked on it as having near its source two prongs, Rio Rojo and Rio Moro, and which formed one stream that continued without break southeastwardly, and *into which*, between the 101st and 102d degrees of longitude as *marked on that map*, came from the northwest an unnamed stream, was the river designated on Pike's chart as Red river, and was the Red river of the treaty of 1819. The suggestion that the river marked on the Melish map as having two prongs, Rio Rojo and Rio Moro, and running southeastwardly, was the river now known as the north fork of the Red river, is without any substantial foundation upon which to rest. If the latter river is delineated at all on the Melish map, it is the unnamed stream that entered the main river from the northwest, between the 101st and 102d meridians as located on that map.

There is a large amount of evidence of a documentary character showing that this interpretation of the Melish map is correct. We have before us "A map of the United States, with the contiguous British and Spanish possessions, compiled from the latest and best au-

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thorities by John Melish." It was copyrighted June 16, 1820, and published at Philadelphia by Finlayson, the successor of Melish. A part of that map is reproduced on the next page. It is spoken of as Melish's map of 1823, because that is the year to which it was 51] improved. *From that map it appears that a line up the Rio Roxo or Red river, from the northeastern corner of Texas to the 100th meridian, is substantially an east and west line, and that west of the 100th meridian it is westward and northwestwardly *to a point near Santa Fé and the Snow mountains.*

If the case depended upon that map it could not be doubted that the territory in dispute is outside of the limits of Texas. The direction of the treaty is to run *westward*, not northwestwardly, on Red river *to the 100th meridian.* According to the view pressed by the state, the true line extends from the junction of the north fork of Red river with Red river northwardly, then easterly, then northwestwardly *up that fork*, although at such junction there is another wide stream, coming almost directly from the west, and which fully meets the requirement of the treaty to follow the course of the Red river *westwardly* to the 100th meridian. We do not feel authorized to assent to this view. In our judgment the direction in the treaty to follow the course of the Red river *westward* to the 100th meridian takes the line, not up the north fork, but westwardly with the river now known as the Prairie Dog Town fork, or south fork of Red river, until it reaches that meridian, thence due north to the point where Texas agreed that its line "on the north" should commence.

This conclusion is strongly fortified by an inspection of the numerous maps placed before us, and which were made prior to February 8, 1860, on which day the legislature of Texas, with knowledge that the territory in dispute was claimed by the United States, passed an act creating the county of Greer, and thereby assumed that it was part of the territory properly and rightfully belonging to that state at the time its independence was achieved, as well as when it was admitted into the Union. 2 Sayles, Early Laws of Texas, art. 2886. Every map before us, published after the treaty of 1819 and prior to 1860, beginning with the Melish map of 1823, shows that the line going from east to west followed the course of Red river westward until it crossed the true 100th meridian at or near the southwest corner of the territory designated as "Unassigned Land." Upon each and all of 54] these maps appear *streams coming from the northwest, having a northwest and southeast course, that empty into the main river. But none of those streams are marked as a part of the line established by the treaty of 1819.

Among the maps to which we refer are the following: 1. "A Map of Mexico, Louisiana, and the Missouri Territory, including the States of Mississippi, Alabama Territory, East and West Florida, Georgia, South Carolina, and Part of the Island of Cuba," by John H. Robinson, M. D., copyrighted in 1819, and published at Philadelphia. The author is no doubt the gentleman of the same name who accompanied Major Pike in his expeditions, and is spoken of by that officer as a man of enterprise and science. The river marked on that map as Red river east of the 100th meridian has its source in the region of Santa Fé, and corresponds with the Red river, or the Rio Colorado of Natchitoches, as delineated on Pike's map. 2. Morse's map of the United States, published in 1822, and which accompanied an official report made by him in that year to the Secretary of War of the conditions of the various Indian tribes of the country. On this map appears Red river, with its source not far from Santa Fé, and running southeastwardly to a short distance west of the 100th meridian, from which point it extends eastwardly all along the southern line of Indian territory, thence southeastwardly to the Mississippi. 3. Carey and Lea's atlas of 1822. On this map appears Red river having a *westward* course the entire distance from about the 94th to the 102d degree of longitude, between the 33d and 34th degrees of latitude, and constituting the southern line of the Indian territory. Red river on this map has its source near the Snow mountains. 4. The map of Major Long, of the Topographical engineers, inscribed to Mr. Calhoun, Secretary of War, and published in 1822. On this map appears a river with its source near the mountains of Santa Fé, and running southeastwardly, then eastwardly to the 100th meridan, and continuing then eastwardly along the entire line between Indian territory and Texas. As delineated on Long's map, between the 103d and 101st meridians that river is marked "Rio Roxo or Red river," and near the *95th me-[55 ridian it is marked "Red river." 5. Tanner's map of North America 1822. 6. Tanner's map of North America (1823) shows a river on the south border of what is now Indian territory, marked "Red river." On each side of it, after it passes the 100th meridian, there are prongs or streams north and south, and the river, near its end, after it has passed 25° west from Washington, is marked "Red river." Going off from the Red river at about 20° longitude west from Washington is the river marked "False Washitta," which comes from the northwest. Red river as marked on that map extends nearer to Santa Fé than the False Washitta. 7. Finley's American atlas 1826 shows Red river on the south boundary of Arkansas, whose course going from the east is westward until about the 100th meridian is reached, and west of the 100th meridian it is marked "R. Roxo or Red R." At longitude 20° west from Washington a river comes from the northwest marked "False Washitta." The extension marked as above is much longer than any stream emptying into Red river from the north or the northwest. 8. "A Complete Historical, Chronological, and Geographical American Atlas," published by Carey & Lea, at Philadelphia, in 1826, on which will be found marked Red river whose course going from east to west is westwardly past the 100th meridian and then northwestwardly in the direction of Santa Fé. At about the 98th meridian a much shorter stream comes into it from the northwest, and is unmarked. 9. A German atlas of America, published at Leipsic in 1830, contains a map which shows the boundary established in 1819 on the west side of Louisiana, and shows Red river along the whole southern

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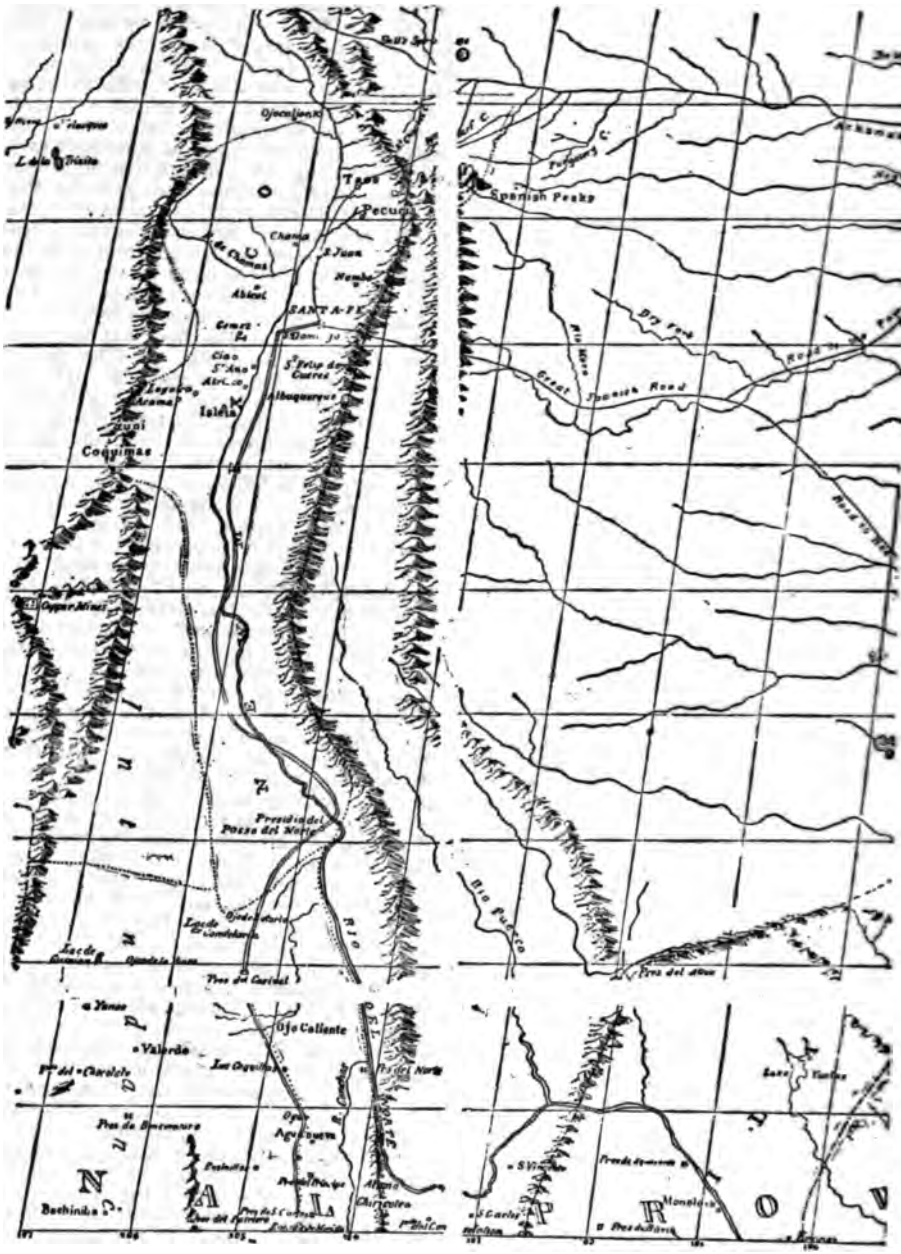
Spanish Peaks
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Rio Pecos
Rio Grande
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Valverde
Bachinita
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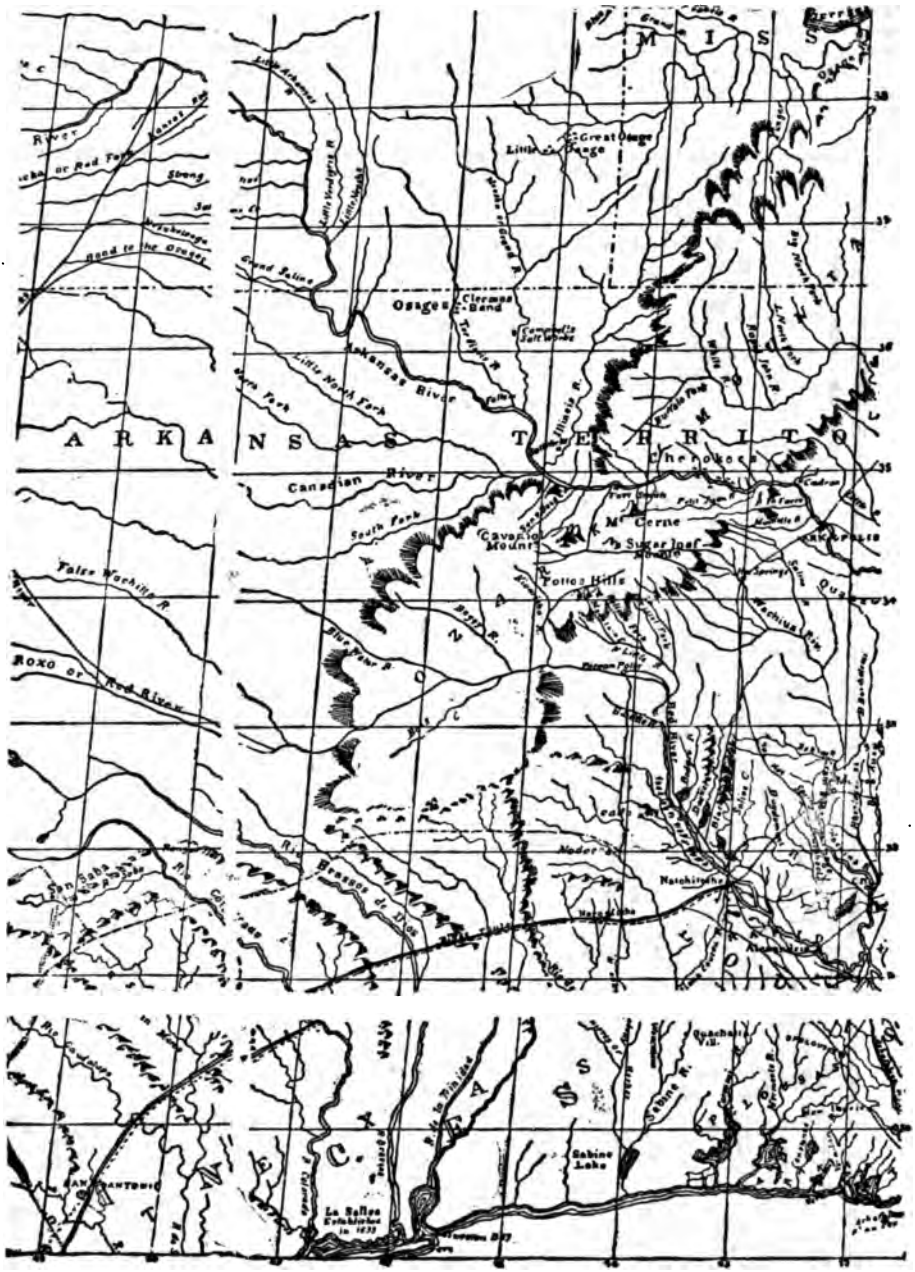

MILLER MAP OF 1823.

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line of the Indian territory. Coming into that river from the northwest, at 99° longitude, is an unmarked stream; and coming from the northwest, and emptying into Red river at about 97° longitude, is another stream marked "Falsche Washitta." 10. Young's New Map of Texas, published at Philadelphia in 1835 by Mitchell, and a copy of part of which is given on the next [this] page. On this map appears Red river with its source a short distance from Santa Fé and marked, east of the 100th meridian, as "Rio Roxo or Red river of *Louisiana," running first southeastwardly, then eastwardly along the southern boundary of Indian territory. 11. Maillard's map of Texas, published in 1841, showing Red river as forming the line between the Indian territory and Texas from about the 94th degree of longitude to the 100th meridan, having a course westward and eastward between those meridians, and marked [58 56]*

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on the map, east of the 100th meridian, as "Rio Roxo or Red river of Louisiana." 12. A map compiled for the Department of State, under the direction of Colonel Abert and Lieutenant Emory, and published by the War Department in 1844. On this map appears Red river, whose course going from east to west from a point near the 94th degree of longitude is substantially westward along the whole line between the Indian territory and Texas. After passing the 100th meridian, its course is westwardly and northwestwardly in the direction of Santa Fé. 13. Tanner's map of the United States and Mexico, published in 1846. That map shows Red river having an eastward and westward course just south of the 34th degree of latitude, and marking the southern line of Indian territory. 14. Colton's map of the United States, published in 1848, shows Red river forking near the 98th meridian, one

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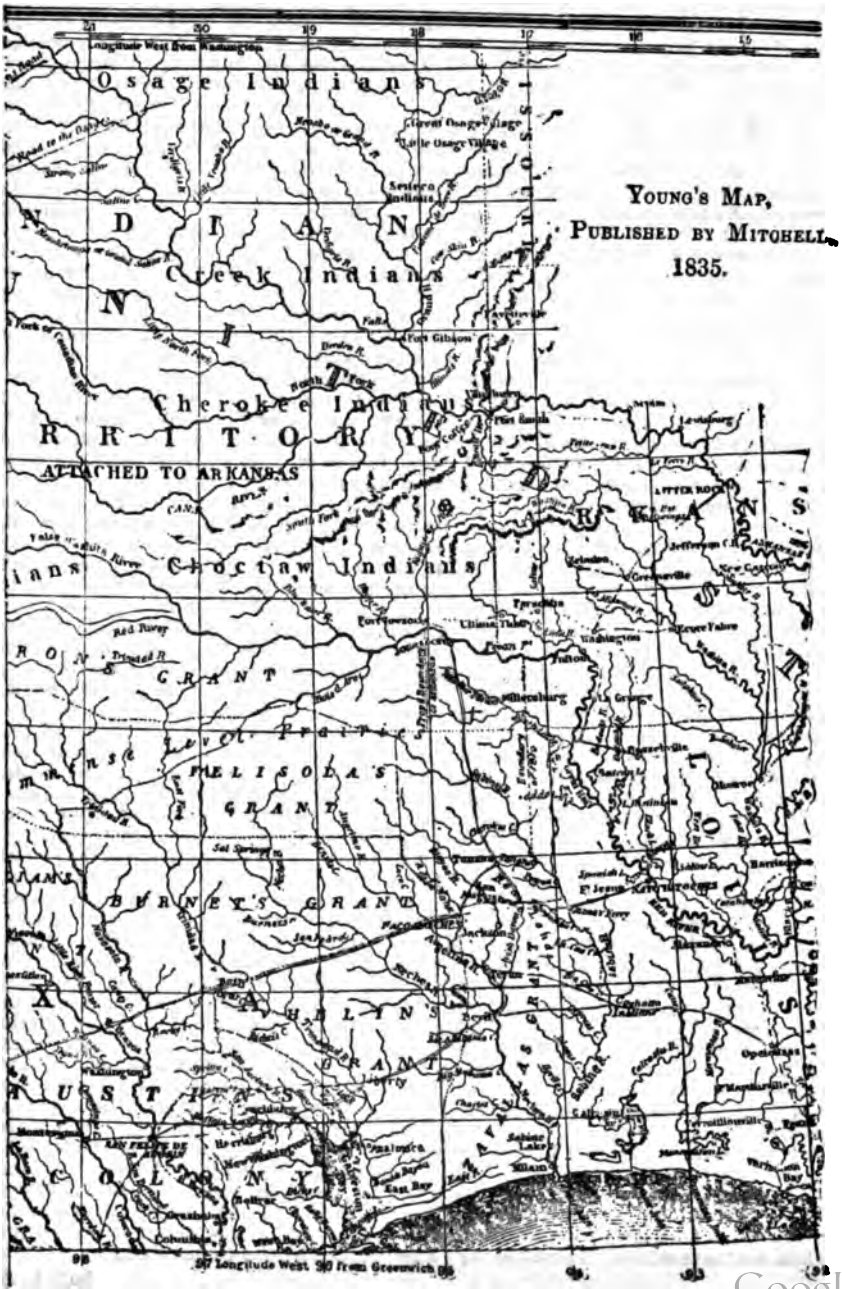

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fork extending westwardly and northwestwardly toward Santa Fé, marked "Rio Roxo or Red river" between 100° and 102°, and "Red river" between 102° and 104°. 15. Cordova's map of the state of Texas, "compiled from the records of the general land office of the state by Robert Creuzbaur," and published in 1849. Creuzbaur entered the land office in Texas before the admission of that state into the Union, and remained there for many years. While there he never heard of any claim by Texas to the territory now called Greer county. Upon the original of this map is a certificate by Thomas W. Ward, commissioner of the land office of Texas from January 5, 1841, to March 20, 1848, and also a certificate by his successor, George W. Smyth. Ward certified that the map had been compiled by Creuzbaur from the records of the general land office of Texas, and that it was the most correct representation of the state he had seen or which had come to his knowledge; "the meanders of the 59] *rivers are all correctly represented, being made from actual survey." Smyth certified that he "has no hesitancy in declaring it as his firm conviction that this map is a very correct representation of the state, representing all returns up to date, having been compiled with great care from the records of the general land office." On this map is also the certificate of the governor and secretary of state as to the official character of Ward and Smyth. It is further attested, under date of August 12, 1848, by Senators Rusk and Houston and by Representatives Kauffman and Pilsbury, as follows: "We, the undersigned Senators and Representatives from the state of Texas, do hereby certify that we have carefully examined J. de Cordova's map of the state of Texas, compiled by R. Creuzbaur from the records of the general land office of Texas, and have no hesitation in saying that no map could surpass this in accuracy and fidelity. It has delineated upon it every county in the state, its towns, rivers, and streams, and we cordially recommend it to every person who desires correct geographical information of our state. To the persons desirous of visiting Texas it would be invaluable." 16. Mitchell's New Atlas of North & South America, published by Thomas Cowperthwaite & Co., Philadelphia, 1851, shows on the map of Texas a river marked "Red river," whose course, after the latitude midway between 33° and 34° is reached, is westward. It continues in a westerly direction with scarcely any change until it reaches the 102d meridian, and then turns northwestwardly in the direction of Santa Fé.

All of these maps place the territory in dispute east of the 100th meridian and *north* of the southern line of the Indian territory *as that line is claimed by the United States*. They are all inaccurate, if any part of that territory is within the limits of Texas. No one of them so locates Red river that its course, going westward (from the point where the line between Texas and Louisiana intersects the Red river) to the 100th meridian would take the line of the treaty of 1819 up the north fork of Red river until it intersected that meridian near the 35th degree of latitude.

The conclusion to be drawn from the maps 60] to which we *have referred is sustained by other maps, namely: 1. A map of the state of Texas purporting to have been compiled by Stephen F. Austin and published at Philadelphia by H. S. Tanner in 1837. The original is in the general land office of Texas, and upon it is the certificate of the commissioner of such land office, dated March 13, 1882, showing that it was temporarily deposited in that office. 2. A map of Texas purporting to have been compiled from surveys on record in the general land office of the Republic of Texas, in the year 1839, by Richard S. Hunt and Jesse F. Randel. Upon this map is a certificate of the secretary of state of Texas, approving the map, and stating that it had been compiled "from the best and most recent authorities." This certificate is followed by one from the commissioner of the general land office of the Republic of Texas, dated April 25, 1839, stating that "the compiler of this map has had access to the records of this office, and that the map was compiled from them." 3. Disturnel's map of the United States of Mexico, published in 1847 and used at the making of the treaty of Gaudalupe Hidalgo. 4. A map prepared for the President of the United States under the direction of the commissioner of the land office in 1849. 5. A travelers' map of the state of Texas, "compiled from the records of the general land office, the maps of the coast survey, the reports of the boundary commission, and various other military surveys and reconnoissances, by Charles W. Pressler." This map was published in 1867. The author held a position in the land office of Texas for more than thirty years.

But it is said that the United States has in many ways, and during a very long period, recognized the claim of Texas to the territory in dispute, and upon principles of justice and equity should not be heard at this late day to question the title of the state.

Is there any basis for the suggestion that the United States has ever acquiesced in the claim of the state that the treaty line *westward* along Red river to the 100th meridian follows the course of the north fork from its mouth northwardly and northwestwardly until that meridian is reached at a point *north of the 35th [61 degree of latitude? This question deserves the most careful examination, for long acquiescence by the general government in the claim of Texas would be entitled to great weight.

In support of the suggestion that the United States has recognized the claim of Texas, reference is made to the fact that in 1843 some Texan troops under the command of Colonel Snively went into the territory here in dispute, and were arrested and disarmed by Captain Cooke of the United States Army, who had been specially assigned to the duty of protecting caravans of Santa Fé traders through the territories of the United States to the Texan frontier. Of his conduct the Republic of Texas complained. Connected with that matter was an alleged forcible entry into the custom-house at Bryarly's Landing on Red river by certain citizens of the United States, and the taking therefrom of goods that had been seized as forfeited under the laws of Texas. The settlement of that dispute between the two governments is now relied on as showing a recognition by the United States of the claim

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of Texas to the territory here in controversy. We have been unable to find anything in the history of those proceedings to justify this contention of the state. From the letter of Mr. Calhoun, Secretary of State, to Mr. Van Zandt, *charge d'affaires* of the Republic of Texas, of date August 14, 1844, it appears that Captain Cooke's conduct in this matter was made the subject of a court of inquiry. Mr. Calhoun said: "The court was ordered, at the request of my immediate predecessor, in conformity to the intimation contained in his communication to Mr. Van Zandt of the 19th of January last, in order to ascertain more fully and in the most authentic form the circumstances and facts connected with the proceedings of Captain Cooke and his command, in the disarming of the Texan force under the command of Colonel Snively. Mr. Van Zandt will find, on recurring to the extract, that the opinion of the court is that the place where the Texan force was disarmed was *within the territory of the United States;* that there was nothing in the conduct of Captain Cooke which was harsh or unbecoming, and that he 62]did not exceed the *authority derived from the orders under which he acted. It is proper to add that the court consisted of three officers of experience and high standing; that the case was fully laid before it, and that its opinion *appears to be fully sustained by the evidence.* There seems to be no doubt that Captain Cooke was sincerely of the opinion that the Texan force was within the territory of the United States, and that the fulfilment of his orders to protect the trade made it his duty, under such circumstances, to disarm them. It is readily conceded that the commander of the Texan forces, with equal sincerity, believed the place he occupied was within the territory of Texas. Which was right or which wrong can be ascertained with certainty only by an actual survey and demarcation of the line dividing the two countries between the Red and Arkansas rivers." After observing that it was neither necessary nor advisable to renew between the two governments the discussion on the question whether the Texan force was or was not within the limits of the United States, Mr. Calhoun proceeded: "In the hope, therefore, of closing the discussion and putting an end to this exciting subject, the undersigned renews the offer of his predecessor contained in the communication above referred to, 'to restore the arms taken from the Texan force, or to make compensation for them,' and his assurance, given at the same time, that 'his government never meditated and will not sanction any indignity towards the government of Texas, nor any wrong towards her people, and will repair any injury of either kind which may be made to appear.'" This offer was accepted by the government of Texas, its *charge d'affaires* saying: "As it is not probable that the arms could be returned in the order in which they were taken, compensation will be received for them." 1 House Ex. Doc. (28th Cong. 2d Sess.) pp. 12, 109, 110. This was followed by an appropriation by Congress by the act of March 30, 1847, chap. 47, of a sum of not exceeding $30,000, "for settling the claims of the late Republic of Texas, according to principles of justice and equity, for disarming a body of Texan troops under the command of Colonel Snively, and for entering the customs house at Bryarly's Landing, and *taking certain goods there [63 from." 9 Stat. at L. 155, 168. It seems to the court too clear to require discussion, that while, during the above controversy, the United States and Texas asserted their authority, respectively, over the place where the Texan troops were disarmed, the determination of the question of territorial boundary was expressly waived, and a settlement was reached, upon the basis indicated in the diplomatic correspondence and in the act of Congress, solely (to use the words of Mr. Calhoun) to allay "irritated feelings between two countries whose interest it is to be on the most friendly terms."

Proceeding with the inquiry whether the United States has recognized the claim of Texas to own the territory in dispute, we find that by the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw Indians, the boundary of the Choctaw and Chickasaw country was thus defined: "Beginning at a point on the Arkansas river, 100 paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red river; thence up Red river to the point *where the meridian of 100 degrees west longitude crosses the same;* thence north along said meridian to the main Canadian river; thence down said river to its junction with the Arkansas river; thence down said river to the place of beginning." 11 Stat. at L. 611, 612. It may be here stated that the Kiowas, Comanches, and Apaches were settled in the Choctaw and Chickasaw country, as originally defined, in virtue of the treaty of 1867. 15 Stat. at L. 581, 582. In execution of the treaty of 1855 the Commissioner of Indian Affairs made a contract with A. H. Jones and H. M. C. Brown for a survey of some of the boundaries of the original Choctaw and Chickasaw country. From the field notes of those surveyors, which were duly reported to the proper office and certified to be correct by the astronomer and examiner of the Indian boundary survey, we make these extracts: "The initial monument for the 100th meridian west longitude boundary line between the state of Texas and the Choctaw and Chickasaw countries is established 30 chs. dist. from the north bank of Red river on an elevation near 50 ft. above the bed of the same. The *situation was select-[64 ed with a view to protect the monument so as never to be destroyed by high water. . . . The river due south from the monument is 76 chs. and 85 lks. wide from high-water mark to high-water mark. Course N. 85° E. It will be sufficient to say to those interested that there can be no doubt as to the fact of its being the main branch of Red river, as was doubted by some persons with whom we had conversed relative to the matter before seeing it, for the reason the channel is larger than all the rest of the tributaries combined, besides affording its equal share of water, though like the other branches in many places the water is swallowed up by its broad and extensive sand beds, but water can at any season of the year be obtained from 1 to 3 feet in main bed of stream."

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We come now to the act of June 5, 1858, chap. 92, by which (in harmony with the act of the legislature of Texas of February 11, 1854, 2 Sayles, Early Laws of Texas, art. 2412) it was provided: "Sec. 1. That the President of the United States be and he hereby is authorized and empowered to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appointed by and on behalf of the state of Texas for the same purpose, shall run and mark the boundary lines between the territories of the United States and the state of Texas: Beginning at the point where the 100th degree of longitude west from Greenwich crosses Red river, and running thence north to the point where said 100th degree of longitude intersects the parallel of 36° 30′ north latitude; and thence west with the said parallel of 36° and 30′ north latitude to the point where it intersects the 103d degree of longitude west from Greenwich; and thence south with the said 103d degree of longitude to the 32d parallel of north latitude; and thence west with the said 32d degree of north latitude to the Rio Grande. Sec. 2. That such landmarks shall be established at the said point of beginning on Red river, and at the other corners, and on the said several lines of said boundary, as may be agreed on by the 65]President of the United States, or *those acting under his authority, and the said state of Texas, or those acting under its authority." 11 Stat. at L. 310.

This act was passed before Jones and Brown had completed and reported the survey made by them. Pursuant to this act of 1858 a commissioner was appointed on behalf of the United States. The Secretary of the Interior in his letter of instructions to that commissioner said, among other things: "After surveying and marking that portion of the boundary defined by the parallel of 36° 30′ north latitude, and which is known to you to present no obstacle to a rapid survey and demarcation, to prevent delay and expense you will take the 100th meridian of west longitude as laid down on the map of the southern boundary of Kansas, or as determined and marked upon the surface of the earth by Messrs. Jones and Brown, surveyors of the Chickasaw and Choctaw boundaries, from observations made by Daniel G. Major, astronomer on the part of the United States, at its intersection with the Northern Creek boundary, about midway between the north fork of the Canadian and the Canadian river, or by independent observations, whichever, in your judgment from comparison, may be found to be the most correct method. Having connected with, or observed for, the 100th meridian at its intersection with the creek boundary, as determined by the parties above mentioned, you will proceed as rapidly as possible over the remaining portion of this meridian to Red river, the termination of your field work, making such observations and measurements as you may deem sufficient to verify it." The governor of Texas having insisted upon the work of the survey being commenced on Red river rather than on the north line, the Secretary of the Interior, after saying that that course would involve a serious delay in fixing the initial point of the 100th meridian, which could only be done after several months of careful astronomical observations and an exchange of observations with some fixed observatory, said: "And besides, by the time the commissioners of the respective governments are prepared to commence their labors at that point, that line will probably have been determined and marked by the United States surveyors, Messrs. Jones and Brown, who *are now engaged upon [66 the surveys of certain boundaries in the Choctaw and Chickasaw country, under the provisions of the treaty of January 22, 1855. . . . The aboved-named surveyors are provided with a competent astronomer and excellent instruments, and their line will probably require but simple verification on the part of the joint commission; and for all purposes appertaining to the interests of the citizens of Texas along and adjacent to the proposed boundary line north of the Red river, Brown and Jones' survey must prove sufficient and satisfactory."

For reasons that need not be here detailed, the commissioners of the two governments separated before their joint work was concluded. The commissioner of the United States in a preliminary report, November 14, 1860, to the Secretary of the Interior, stated that he commenced his survey by tracing the 100th meridian from its intersection with the Canadian river northward to its intersection with the parallel 36° 30′, forming the northeast corner of the boundary. Having traced and marked that parallel to the northwest corner, he returned along the bed of the Canadian river, and came again to the 100th meridian, when he turned southward, and followed that meridian "to its intersection with the south [Prairie Dog Town] or main branch of Red river." In a subsequent report to the commissioner of the land office, under date of September 30, 1861, he said: "That part of the 100th meridian lying between the main branch of Red river"—by which was meant Prairie Dog Town fork or south fork—"and the southern boundary of the *Cherokee* country had been determined, run, and marked by Messrs. Jones and Brown in 1859, under the direction of the Indian Bureau, as constituting the boundary between Texas and a part of the Indian territory. So much of the boundary line as was thus established, Hon. Jacob Thompson, then Secretary of the Interior, directed me to adopt, and in pursuance of this instruction I simply retraced the meridian up to where the work of Messrs. Jones and Brown ended. Thence I prolonged it up to its intersection with the parallel of 36° 30′."

It should be here stated that the governor of Texas, under *date of April 28, 1860, in- [67 structed the commissioner appointed by him to "insist upon the north fork as the main Rio Roxo or Red river, and as the true boundary line, as described in the treaty of 1819." And just before that date, namely, on the 8th day of February, 1860, when there was no reason to suppose that the United States acquiesced in the claim of Texas, the legislature of that state passed the act heretofore referred to, creating the county of Greer with the following boundary: "Beginning at the confluence of Red river and Prairie Dog river, thence running up Red river, passing the mouth of south fork and following main or north Red river to

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its intersection with the 23d degree of west longitude; thence due south across Salt fork and to Prairie Dog river, and thence following that river to the place of beginning." 2 Sayles, Early Laws of Texas, art. 2886. Of course the purpose of that enactment was to assert, in solemn form, the claim of the state to the territory in dispute.

During the civil war, and for many years thereafter, this vexed question did not receive any attention from either government. The reason for this will be understood by every one.

But the fact upon which the state seems to lay most stress is that on the 24th day of February, 1879, Congress passed an act entitled "An Act to Create the Northern Judicial District of the State of Texas, and to Change the Eastern and Western Judicial Districts of said State, and to Fix the Time and Place of Holding Courts in Said Districts." 20 Stat. at L. 318, chap. 97. By the 1st section of that act it was provided "that a judicial district is hereby created in the state of Texas, to be called the northern judicial district of said state, and the territory embraced in the following named counties, as now constituted, shall compose said district, namely." Here follows a list of 110 counties, including all the recognized counties of Texas (except Red river and Bowie) that are immediately south of the line between the Indian territory and Texas as that line is defined on the above map of 1892; and midway in this long list appears the word "Greer."

The learned counsel representing the state in-
68] sist with *confidence that this act of Congress should be regarded as an expression of a purpose by the United States to surrender its claim to the territory in dispute, and as a recognition that that territory was a part of Texas. But we cannot so construe it without doing violence to the strong conviction we have that Congress did not, for a moment, intend by this legislation to part with extensive territorial possessions which the general government had, during a long period, claimed to be under its exclusive jurisdiction and outside of the jurisdiction of any state. We have been unable to find in the history of the act of 1879 any intimation or suggestion that the placing of the territory in dispute in the northern judicial district of Texas was made for the purpose of finally determining the controversy as to boundary that had long existed between the United States and Texas. It was entirely competent for Congress for judicial purposes to have included the whole or any part of the Indian territory within a judicial district established in an adjoining state. If Congress was aware of the state enactment of 1860, the county of Greer might well have been referred to as a county then "constituted" and to be placed for judicial purposes within the northern judicial district of the state of Texas. Thus the act of 1879 may not unreasonably be interpreted; and we think that any other construction of its provisions would impute an intention to Congress to dispose of an important part of the territory of the United States without disclosing such intention, either by the title of the act passed, or by any words in its body indicating a purpose to settle a disputed question of boundary. The respect due to a co-ordinate department of the government forbids this court from taking any view of its action that would imply a willingness to accomplish by indirection, or by the use of vague forms of expression, what, perhaps, could not have been accomplished in an open manner, or by employing such clear, distinct language as the occasion and the interests involved alike demanded.

We are the more inclined to take this view because it is manifest that, prior to the present litigation, the state of Texas never regarded the act of 1879 as recognizing its *jurisdiction[69 over the territory in question, nor supposed that that act placed Greer county, so called, in the northern judicial district of Texas for any except judicial purposes.

In the early part of the year 1882, Senator Maxey, of Texas, at the instance of the governor of that state (and in anticipation of like action by the Texas legislature), introduced into the Senate of the United States a bill providing for the appointment of a commission to consider the unsettled boundary dispute between the United States and Texas. There was no pretense that the matter had been disposed of by the act of 1879. That bill passed the Senate, but did not pass the House of Representatives. In the latter body a bill was introduced by a representative from Texas which defined the boundary between the Indian territory and Texas as follows: "Beginning at the southeast corner of said Indian territory, in the middle of Red river; thence up said river to the junction of the Prairie Dog Town and north forks of said river; thence up the middle of said north fork to the 100th meridian west from London; thence crossing said north fork by a line due north to the northeast corner of said state of Texas, as now established." The judiciary committee reported adversely to this bill, and as a substitute for it reported a joint resolution providing for the appointment of a joint commission to ascertain and mark the point where the 100th meridian crosses Red river, in accordance with the treaty of 1819. House Report No. 1282 (47th Cong.) 1st Sess. The report of that committee will be found in the margin.† It contains a

†*The committee on the judiciary, by Mr. Willits, to whom was referred the bill (H. R. 1715) to define the boundary between the Indian territory and the state of Texas, begs leave to report:*

That said bill seeks by legislative enactment to define said boundary at the point in dispute, as the north fork of the Red river, instead of the south fork, commonly called the Prairie Dog Town fork of the Red river.

The importance of the issue involved may be seen at a glance, when it is observed that the tract in dispute, lying within said two forks of Red river, and bounded on the west by the 100th meridian of longitude west of Greenwich, is about 60 miles long and 40 miles wide, probably over 2,000 square miles, and containing a large amount of valuable land. If this tract is a part of Texas, the lands belong to that state under the act of her admission, while if it is a part of the area of the Indian territory it becomes a portion of the public domain.

The real question in dispute is, Which branch or fork of Red river is its main branch or the continuation of the river? The initial point of investigation is the treaty between the United States and Spain, dated February 22, 1819, in which this part of the boundary is defined as follows: After it strikes the "Rio Roxo of Natchitoches, or Red river" it then follows "the course of the Rio Roxo

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70] *full statement of the views entertained by that committee in opposition to the claim of the state.

In the same year the state of Texas, by an 71] act approved*May 2, 1882, authorized and empowered its governor "to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appoint-72] ed by or in *behalf of the United States for the same purpose, shall run and mark the boundary line between the territories of the United States and the state of Texas, as follows: Beginning at a point where a line drawn north from the intersection of the 32d degree of north latitude with the western bank of the Sabine river crosses Red river, and thence following the course of said river westwardly to the degree of longitude 100 west from London and 23 degrees west from Washington, as said line was laid down in Melish's map of the United States, published at Philadelphia, improved to the first of Janu-73] ary, 1818, and designated *in the treaty between the United States and Spain made February 22, 1819. Sec. 2. Said joint commission will report their survey made in accordance with the foregoing section of this act, together with all necessary notes, maps, and other papers, in order that in fixing that part of the boundary between the territories of the United States and the state of Texas the question may be definitely settled as to the true location of the 100th degree of longitude west from London, and whether the north fork of Red river, or the Prairie Dog fork of said river is the true Red river designated in the treaty between the United States and Spain *made February 22, 1819; and in locating [74 said line said commissioners shall be guided by actual surveys and measurements, together with such well-established marks, natural and artificial, as may be found, and such well, authenticated maps as may throw light upon the subject. Sec. 3. Such commissioner or commissioners, on the part of Texas, shall attempt to have said survey, herein provided for by the joint commission, made and performed between the first day of July and the first day of October of the year in which said survey is made, when the ordinary stage of water in each fork of said Red river may be observed; and when the main or principal Red river is ascertained as agreed upon in said treaty of 1819, and the point is fully designated where the 100th degree of longitude west from London, and 23d degree of longitude west from Washington, crosses said Red river, the same shall be plainly marked and defined as a corner in said boundary; and said commissioners shall establish such other permanent monuments as may be necessary to mark their work." Tex. Gen. Laws 1882, p. 5.

In the year 1884 the attention of the Secretary of the Interior was called to the attempted occupation of a part of the territory in dispute

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westward to the degree of longitude 100 west from London and 23 from Washington; then crossing said Red river and running thence by a line due north to the Arkansas, etc. . . . the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818."

By this it will be seen that the western boundary of that portion of the United States lying on the north of the Red river was said 100th meridian, and that its southwestern corner was where said meridian crosses the river. At the date of that treaty this region had never been accurately explored, and the fact was not known that the Red river divided into two branches before it reached said meridian; in fact, the very map referred to in the treaty makes the river a continuous stream, and does not lay down the north fork at all. Subsequent surveys have discovered the two forks, and have definitely located said 100th meridian about 80 miles west of where the two forks form the river proper. The treaty with Mexico dated January 12, 1828, recognizes the boundary as stipulated in the aforesaid treaty with Spain, as did the joint resolution admitting Texas into the Union. Even at as late a date as her admission into the Union there was no knowledge of uncertainty in this boundary. Lieutenant Emory made a map for the War Department in 1844 (which is now in the Land Office), on which the north fork is not laid down, and on that Red river traces nearly the course of the Prairie Dog Town fork. Disturnell's map of Mexico, dated 1848, follows in this regard Emory's and Melish's maps.

The first accurate knowledge of these streams seems to have been obtained by Captain R. B. Marcy and Captain George B. McClellan, who, under the direction of the War Department, explored the head waters of the Red river in 1852, and made an elaborate report, which was published under the authority of Congress. See Ex. Doc. Senate, No. 54 (32d Cong. 2d Sess.).

Even this report did not develop the data for this dispute, as Captain McClellan, doubtless from the inaccuracy of his instruments, located said 100th meridian below the fork of the river several miles, over one degree of longitude east of its actual location.

The question does not seem to have arisen until after the astronomical survey of said meridian by Messrs. Jones and Brown in 1857 to 1859, in pursuance of a contract between them and the Commissioner of Indian Affairs, who wished to know the boundary line between the Choctaw and Chickasaw country. They located the 100th meridian, as before stated, some 80 miles west of the junction of the two forks, and they designated the Prairie Dog Town branch as the main branch of the Red river.

It appears that this designation was at once questioned by Texas, and, at the instigation of the Senators of that state, Congress passed an act approved June 5, 1858 (11 Stat. at L. 319), authorizing the President, in conjunction with the state of Texas, to run and mark said boundary line. Commissioners were appointed on the part of the United States and of Texas, who proceeded to their work in May and June, 1860.

Governor Sam Houston of Texas instructed the commissioner of that state as follows:

"In the prosecution, then, of the survey, you will be guided by Melish's map, and insist upon the north fork as the main Rio Roxo or Red river, and as the true boundary line, as described in the treaty of 1819."

He refers in his letters of instructions to the Marcy survey, and claims that Marcy was clearly of the opinion that the north fork was the true Rio Roxo, or Red river proper, and further claims that said map of Melish lays down the north fork as the main prong.

The commissioners were unable to agree, the one on the part of the United States claiming that at and across the Red river and to a point about half way from the north fork to the Canadian river the line had been definitely located by Messrs. Jones and Brown the year before, and that nothing now remained but to extend the line north to latitude 36° 3′, its northern extremity. To this the commissioner on the part of Texas objected, and the latter proceeded south to the north fork, and placed a monument thereon on the north bank, 15 feet in diameter and 7 feet high, claiming that as the true southwest corner of Indian territory, and reported his doings to the governor of Texas. The commissioner on the part of the United States seems never to have completed his report.

Texas adopted and acted upon the report of her commissioner as settling the question of boundary, and established the territory in dispute as a county of that state, naming it Greer, and has assumed

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by white settlers, who assumed that it was a part of the state of Texas. That officer called the attention of the Secretary of War to the subject, and suggested that as this territory had been included within the limits of the Indian territory, and treated as a part thereof for many years, the military should protect the interests of the United States. President Arthur issued his proclamation, warning all persons from obtruding upon the lands embraced within the limits of the Indian territory. At the request of the authorities of Texas, action was suspended to await the determination of the disputed question of boundary between that state and the United States.

At the next session of Congress the joint resolutions reported at the previous session were embodied in the act of January 31, 1885, chap. 47. That act provided:

"Whereas the treaty between the United States and Spain, executed February 22, 1819, fixed 75]*the boundary line between the two countries west of the Mississippi river as follows: Beginning on the Gulf of Mexico at the mouth of the Sabine river, in the sea, and continuing north along the western bank of that river to the 32d degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red river; thence following the course of the Rio Roxo westward to the 100th degree of longitude west from London, and the 23d from Washington; thence crossing the said Red river and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source, in latitude 42 degrees north; and thence by that parallel of latitude to the South sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, eighteen hundred and eighteen; and whereas a controversy exists between the United States and Texas as to the point where the 100th degree of longitude crosses the Red river, as described in the treaty; and whereas the point of crossing has never been ascertained and fixed by any authority competent to bind the United States and Texas; and whereas it is desirable that a settlement of this controversy should be had, to the end that the question of boundary now in dispute because of a difference of opinion as to said crossing may also be settled;—therefore—

"*Be it enacted, etc.*, That the president of the United States be and he is hereby authorized to detail one or more officers of the army, who, in conjunction with such person or persons as may be appointed by the state of Texas, shall ascertain and mark the point where the 100th meridian of longitude crosses Red river, in accordance with the terms of the treaty aforesaid, and the person or persons appointed by virtue of this act shall make report of his or their action in the premises to the Secretary of the Interior, who shall transmit the

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jurisdiction over it; and by an inadvertence, not singular in our legislative history, the United States by act of Congress approved February 24, 1879 (20 Stat. at L. 318), included said county of Greer as a part of Texas in the northern judicial district of that state, not annexing it for judicial purposes, but recognizing it apparently as an integral part of Texas.

It is manifest, therefore, that some means should be taken to settle this dispute as soon as possible. Conflicts are arising between the United States authorities and persons claiming to exercise rights on the disputed tract under the jurisdiction of the state of Texas; bloodshed and even death have resulted from this conflict. As long ago as May, 1877, the attention of the Secretary of the Interior was called to the dispute by the War Department, and the Secretary of the Interior replied to the letter of inquiry under date of May 10, 1877, which letter we add as part of this report.

On a careful review of the facts in the case—for the question as to which prong of the river is the true river is really a question of fact—your committee is decidedly of the opinion that the south fork is the true boundary, and that therefore the claim of the state of Texas is unwarranted.

So far from Captain Marcy being clearly of the opinion, as Governor Houston claimed, that the north fork is the main branch, his final opinion was in favor of the south fork. It is true that in his diary, on the day he struck the north fork, he used the language attributed to him, under the date of May 26, to wit:

"We are now in the immediate vicinity of the Wichita mountains [a range of mountains lying east by northeast from the mouth of Otter creek, which empties into the north fork, and where he was encamped]. Red river, which passes directly through the western extremity of the chain, is different in character at the mouth of Otto creek from what it is below the junction of the Ke-che-ah-que-ho-no (The Dog Town fork)."

But he had been for several days traveling along the north bank of the Red river west, and struck the north fork when it, as well as the south fork, was swollen with the rains, and both branches he says "were of apparently about equal magnitude," and he naturally spoke of the north fork as "Red river." But he continued up the north fork to its source, which he located at longitude 101° 55'. Then he took a southwesterly course till he came to the head waters of the Prairie Dog Town (or south fork) which he located at longitude 103° 7' 11", and from that time he repeatedly speaks of that branch as the main branch. (See his report, pp. 55, 58, 84, 86, 87). He also entitles his Plate No. 10, which is a picture of the rock and gorge out of which the headspring of that fork flows, as "Head Ke-che-ah-que-ho-no, or the main branch of the Red river." It is manifest that, whatever may have been his first impressions, he finally came to the conclusion, both from its greater length and size, that the south fork is the main branch.

A reference to the letter of the commissioner of the Land Office, hereto annexed, will show that Messrs. Brown and Jones had no doubt of the south being the main branch. The reasons they give seem to be conclusive. The width of the south fork at the 100th meridian is 76 chains and 85 links; that of the north 23 chains. The field notes of the commissioner on the part of the United States, acting under the act of June 5, 1858, of the date of August 29, 1860, say the channel of the north fork is only 25 chains and 44 feet, and that he found "no water on the surface, *i. e.* the river bed, but it is found by digging 2 feet 3 inches below the surface." While in his field notes of August 30 he says: "Struck main Red river. Main Red river where crossed, 65 chains and 38 feet; channel of running water, 22 feet 6 inches deep. Plenty of long, large lagoons of water in the bed besides the running channel."

If the *data* given in these reports are correct there would seem to be no doubt of the claim of the United States to the tract in dispute, and therefore your committee report adversely to the bill referred to it.

But, inasmuch as the claim is disputed, and that with the earnestness of belief on the part of Texas, and inasmuch as none of the surveys referred to have been made with the privity of the state of Texas, the joint commission appointed having failed to act in concert, your committee are of the opinion that that state should have a hearing in the matter, and should have an opportunity to cooperate with the United States in settling the facts upon which the question in dispute rests. A substitute is reported for the appointment of a joint commission, the passage of which is recommended.

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same to Congress at the next session thereof after such report may be made, for action by Congress." 23 Stat. at L. 296, 297.

76]* Under the act of Texas of 1882 and the act of Congress of 1885, the two governments appointed commissioners, but they were unable to agree upon the vital point as to whether the line which by the treaty was to follow the course of Red river westward to the 100th meridian went up the north fork of Red river until that meridian was reached, or went westward along the Prairie Dog Town fork to the point designated by the survey of Jones and Brown.

On the 30th day of December, 1887, President Cleveland issued a proclamation asserting that title in and jurisdiction over all the territory lying between the north and south forks of the Red river and the 100th meridian, as part of the Indian territory, was vested in the United States. That proclamation recites the fact that the commissioners appointed on the part of the United States, under the act of January 31, 1885, authorizing the appointment of a commission to run and mark the boundary lines between a portion of the Indian territory and the state of Texas, in connection with a similar commission to be appointed by the state of Texas, had by their report determined that the south or Prairie Dog Town fork was the true Red river designated in the treaty, the commissioners appointed on the part of said state refusing to concur in that report. The President admonished and warned all persons, whether claiming to act as officers of the county of Greer, in the state of Texas, or otherwise, against selling or disposing of or attempting to sell or dispose of any of said lands, or from exercising or attempting to exercise any authority over said lands, or purchasing any part of said territory from any person or persons whatsoever.

We have referred, with perhaps more fullness than was necessary, to the action, legislative and otherwise, of the two governments after the passage of the act of 1879, for the purpose of showing that, notwithstanding the passage of that act, the United States continuously asserted its rightful jurisdiction over the territory in dispute as a part of what is commonly called the Indian territory; and that, finally, as the only peaceful method of ending the dispute, Congress passed the act of 1890, under the authority of which the present suit was instituted.

77]* In addition to what has been stated, we may add that the governor of Texas, in his message to the legislature of January 10, 1883, enforced the claim of his state by an exhaustive argument covering the whole field of controversy, but without intimating that the United States, by the act of 1879 creating the northern judicial district of Texas, had admitted that "Greer county" was rightfully a part of Texas and subject to its jurisdiction. No one can read that message without perceiving that the author was familiar with every phase of this question of boundary. It did not occur to him that the question had been concluded by the act of Congress establishing a judicial district in the state of Texas. If he had so interpreted that act, a reference to it would have been made in the course of his presentation of the matter on behalf of his state.

In our judgment the act of Congress of 1879, establishing the northern judicial district in Texas, must be interpreted as meaning that the territory in dispute was placed in that district only for such judicial purposes as were competent to the courts of the United States holden in that district, and that Texas can take nothing in the present controversy by reason of its provisions.

In support of the contention that the United States is estopped by its action to claim the territory in dispute, the answer alleges that "the Executive Department of the government of the United States has established and maintained postoffices and post roads in said county, has advertised publicly for bids for carrying the United States mails over the routes in said county, designating, as defendant is advised, said postoffices and post roads as lying in Greer county, Texas, and not lying in the territory allotted to the Indians." In the amended bill filed by the United States it is alleged that, in 1886, after the passage of the act of 1885 providing for a commissioner to ascertain the line between Texas and the United States as established by the treaty of 1819, and while the commissioners appointed under that act were actually engaged in their duties, certain residents of the disputed territory, describing themselves as residents of Greer county, *Texas, [78 petitioned the Postoffice Department of the United States for the establishment of postoffices respectively at Mangum and Frazier, in Greer county, Texas; that in that year the prayers of the petitions were granted; that acting upon the designation of locality as set forth in such petitions such postoffices were established and designated as in Greer county, Texas; but "during the same year, 1886, and on the 27th day of December in said year, it was discovered by the authorities of the Postoffice Department that said postoffices were located in the territory in dispute; that said territory was claimed by the United States; that it was designated and outlined on the maps of the General Land Office and of the Postoffice Department as not within the limits of the state of Texas, but a part of the Indian territory of the United States; that thereupon, on the last-mentioned day, in order to correct the error, the designations of those postoffices were changed so as to locate them within the Indian territory, and they have been from that date and are still only known, recognized, and described in orders and official acts of the Postoffice Department as located in the Indian territory; and that all other postoffices established within that territory since December, 1886, have been established, recognized, and described, and are still so described and recognized, as within the Indian territory."

It is quite sufficient to say in respect to this point that the evidence fully sustains the allegations of the amended bill, and therefore the designation, for a short time, of the postoffice referred to as being in Greer county, in the state of Texas, cannot, under the circumstances, be deemed of any weight in our determination of the main issue.

There is another view of the case upon which the state relies, to which much of the argument of counsel was directed. It is indicated in the following clauses of the answer filed by the

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state: "That in accordance with their usual custom the Spanish conquerors, upon taking possession of Natchitoches and the territory lying on or adjacent to 'Rio Roxo,' established and laid out a road or route between Santa Fé, in New Mexico, and Natchitoches, now in the 79]state of Louisiana, for *the uses of commerce between said places, which road or route traversed the country west and northwest of Natchitoches, along the south bank of said 'Rio Roxo,' to a point now in ——— county, Texas, then crossed said stream to its north bank, and thence along said north bank to the source of what complainant now styles the 'north fork of Red river,' and thence to Santa Fé. That this road was for many years frequently traveled by merchants, traders, trappers, explorers, and other persons trading or traveling between said points of Santa Fé and Natchitoches, and at the date of said treaty of 1819, 'Rio Roxo of Natchitoches,' from its mouth to its source, was well known to the Spaniards, as well as to the Indians and trappers of that region of country, as the stream now called Red river, having its source near the source of the Canadian river, southeast of and near to Santa Fé, in the now territory of New Mexico; thence running in an eastern or southeastern direction, receiving in its course at intervals the waters of the False Wachita river, the Kecheaqueheno or 'Prairie Dog Town river,' Pease river, Little and Big Wichita rivers, and divers other streams, and emptying its waters into the Mississippi river above New Orleans, in the state of Louisiana. At the date of said treaty of 1819 there was only one 'Rio Roxo of Natchitoches' known to geographers or to the people who inhabited the locality of the territory in controversy, and that was the river above described."

In a former part of this opinion we endeavored to show from early maps and printed publications that, at the date of the treaty of 1819, it was believed that the Rio Roxo of Natchitoches or Red river extended without any break from its source not far distant from Santa Fé, first southeasterly, then eastwardly, and then southeastwardly to a point near the Mississippi river. We have here in the answer filed by the state an admission that such was the fact, its position, as we have seen, being that the river that connected the country near Santa Fé with the country bordering on the Mississippi was what is now called the north fork of Red river. This contention, the state insists, is supported by evidence of the existence of a road or route established in early 80] times between *Natchitoches and Santa Fé, and which passed along that fork.

It is to be observed that this road or trail is not marked upon what is called the treaty map of 1818, nor upon any map that preceded it. Looking at the diplomatic correspondence that resulted in the treaty of 1819, and at the map which was before the negotiators, we find nothing to show that the existence or nonexistence of a road or trail between Natchitoches and Santa Fé was an important factor in determining the boundary between the United States and Spain. So far as the record discloses, the negotiators had no knowledge of such a road or trail; and there is no substantial ground upon which to rest even a conjecture that the line was fixed with any reference to routes or trails traversed by traders and trappers. The negotiators had in mind rivers and degrees of latitude and longitude, and that fact appears on the face of the treaty. It cannot be known that they were controlled in any degree by information as to routes across the country used by traders or explorers.

Looking at maps published after the treaty was made, we find that a "great Spanish road to Red river" is marked on the Carey and Lea atlas of 1822. Leaving Santa Fé it extends in a southeasterly and easterly direction on the north side of the Canadian river to about 101° 30′ of west longitude, then across that river in a southeasterly direction, crossing the False Wachita east of the 100th meridian, then passing southeastwardly and north of a stream which is probably the North fork of Red river, as now known, and then eastwardly and north of Red river until it reaches and crosses Red river just east of the 97th degree of longitude. The same road is delineated on the Melish map of 1823 and the Young-Mitchell map of 1835. According to those maps each of those roads crossed Red river near the mouth of the Wachita, far east of the junction of the north fork with Red river. If this be the trail that extended from Santa Fé to Natchitoches, or if there was a trail which, in early times, passed along the north fork of Red river to or in the direction of Santa Fé (upon which point the evidence *is by no means clear), we should [81 not necessarily conclude that such trail marked the line established by the treaty, nor that its existence proved that the river near or along which it ran was the main branch of Red river. The direction of the treaty was to follow the course of Red river *westward* to the 100th meridian. As we have seen, the treaty did not refer to any road or trail used by traders or trappers, but only to rivers and degrees of longitude. At the point where the north fork empties into Red river there is a river which, to say the least, is as large as the north fork, and which extends *westward*. By following the course of *that stream* to the 100th meridian the terms of the treaty are fully met, while they will not be met by departing from a westward course, before reaching that meridian, and going first in a northerly, then in an easterly, and then in a northwestwardly direction up the north fork. The location of the line established by the treaty should be determined by the course of rivers and degrees of latitude and longitude, rather than by routes, trails, or roads, the extent and character of which cannot be certainly known at this day, and over which, at the date of the treaty and prior thereto, travel by traders and trappers could have been only occasional and limited.

There are other matters to which, in view of the large amount of evidence relating to them, we must advert. Many witnesses were examined upon the question whether the Prairie Dog Town fork or the north fork was the longer river, which the broader and deeper stream, and which drained the most territory. The state insists, in this case, that if regard be had to width and depth of stream and extent of country drained, the north fork must have been deemed, in early times, or when the treaty

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of 1819 was made, the more important of the two forks of Red river, and, therefore, that that fork should be held to be the river whose course, going from the east, was required by the treaty to be followed westward until the 100th meridian was reached.

These questions were considered by the boundary commission appointed after the passage of the act of Congress of January 31, 1885, chap. 47. The commissioners on behalf [82] of the *United States and Texas united in declaring that "in finding the point where the 100th meridian of west longitude crosses Red river, if it should appear that said meridian crosses Red river west of the confluence of what are now known as the north fork and Prairie Dog Town fork, then the true boundary should be taken at that one of those streams which best satisfies the provisions of the treaty of 1819." They concurred in holding that of those two streams the Prairie Dog Town fork was the longer. The commissioners on behalf of the United States voted that the Prairie Dog Town fork was the wider stream. In this view the Texas commissioners concurred, with the qualification that that stream was the "wider between the banks, but not in ordinary flow of water." The United States commissioners held that the Prairie Dog Town fork drained a larger area than the north fork. In this view the Texas commissioners concurred, with the qualification that "there is little or no rainfall on the sources of the stream, and hence is taken out of the usual rule of estimating the size of rivers, while the north fork rises in the mountains, where it rains more, and its sources are living streams." House Ex. Doc. No. 21 (50th Cong. 1st Sess.) pp. 165-168. Touching these matters, the evidence in the present case is very voluminous. Many witnesses, who had apparently equal opportunities of observation, express opinions that are directly conflicting. Governor Roberts, in his message of January 10, 1883, after referring to the disputed question as to which of these two rivers was the main branch of the Red river, said: "I have shown how nearly equal are the claims of each to be called the main branch from facts pertaining to them derived from observation. From this, either one of them, in the absence of the other, would be taken to be the main branch. It may be admitted that the south fork [Prairie Dog Town fork] is the larger and longer, and therefore the main branch in reference to the two nearly equal branches of Red river, and that admission does not settle the fact that the line must run up that branch." The true question, he said, was "Which one of the two nearly equal branches corresponds most nearly with the 'Red river of Natchitoches or Red [83] river,' as it was *known in 1819, when the treaty was made, and as 'laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818?'"

We have found that the 100th meridian mentioned in the treaty must, especially since the compromise act of 1850, be taken to be the 100th meridian astronomically located. And we are now further considering whether the two governments intended the line running from the east to the west should leave Red river at the mouth of what is now known as the north fork, and go northwardly and northwestwardly up that fork, or should go westwardly up what is now known as the Prairie Dog Town or south fork. So far as this question depends upon evidence as to the relative width and length of these two rivers and the extent of country drained by each, we are of opinion that, although a large number of witnesses sustain the position taken by the state, the Prairie Dog Town or south fork, according to the decided weight of evidence, is wider and longer and drains a much greater extent of territory than the north fork. This is the conclusion reached by the court after a careful and patient scrutiny of all the proof. So that the evidence of living witnesses corroborates that furnished by maps, and sustains the position taken by the United States as to the scope and effect of the words in the treaty of 1819, "following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington."

But suppose the evidence left it in doubt as to which was the wider and longer stream and which of the two drains the largest extent of territory; and let it be assumed, as suggested by Governor Roberts, that upon the facts derived from observation the claim of each river to be the main branch of the Red river mentioned in the treaty are nearly equal. What, in such a contingency, is our duty? It is to ascertain which river more nearly meets the requirement that the line from the east to the west must follow "the course of the Rio Roxo *westward* to the degree of longitude 100 west from London." If in following the course of Red river *westward* it be found that that river forks before the 100th meridian of longitude is *reached—one of the forks coming from the [84] north and northwest, and the other from the west—it would seem to be our duty to hold that the river coming from a westward direction was the one whose course the treaty directed to be followed. Those who insist that the course should be *north and northwestwardly* for any material distance from the main river to the 100th meridian are under an obligation to sustain that position by such evidence as would justify the court in departing from the plain direction of the treaty to follow the Red river "westward" to the named meridian. But that has not been done.

Much stress has been laid by the state upon the testimony of the late General Marcy, given before the boundary commission of 1886. In the year 1852 that officer, being then a captain in the United States Army, was directed by General Scott to make an examination of the Red river and the country bordering upon it from the mouth of Cache creek to its source. During his explorations he camped, on the 30th of May, 1852, at a certain point on Red river, and in his daily journal of his movements said: "Red river at this place is a broad, shallow stream, 650 yards wide, running over a bed of sand. Its course is nearly due west to the forks, and thence the course of the south branch is W. N. W. for 8 miles, when it turns to nearly N. W. The two branches are apparently of about equal magnitude, and between them, at the confluence, is a very high bluff, which can be seen for a long distance around." Senate Ex. Doc. No. 54 (32d Cong.

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2d Sess.) p. 20. We take it that, in his reference to the forks of Red river, he had in mind the Prairie Dog Town fork and the north fork.

Thirty-two years later, that is, in 1886, Captain, then General, Marcy, appeared as a witness before the boundary commission. He referred to his report of 1852, and said: "As the time that has elapsed since I made that exploration (thirty-three years) is so great, many of the facts and events connected therewith have passed from my memory; but some matters relative to the objects for which this commission was convened, as I understand, may **85**] not be found in the report. *I have this morning, for the first time, seen a copy of that portion of Melish's map of the United States embracing the part of the Red river country which the commission has under consideration at this time, which is authenticated by the signature of the Secretary of State of the United States. Upon this map only one large fork of Red river is delineated, with one more northerly small affluent, which is not named, but may have been intended for Washita river or Cache creek." House Ex. Doc. No. 21, p. 59.

That the full force of General Marcy's statements may appear, we here give so much of his deposition as is embodied in the brief filed by counsel for the state:

"I regarded the Prairie Dog Town branch as the main Red river, for the reason that its bed was much wider than that of the north fork, although the water only covered a small portion of its bed, and as the sandy earth absorbed a good deal of water after it debouched from the cañon through which it flows, it may not contribute any more water to the lower river than the north fork. The Prairie Dog Town branch and the north fork of Red river, from their confluence to their sources, are of about equal length,—the former being 180 miles and the latter 170 miles in length. For reasons which I will presently state, I have been unable to resist the force of my own convictions that the branch of Red river that I called the north fork of that stream was what is designated upon Melish's map as Rio Roxo. I doubt if the Prairie Dog Town river was ever known to civilized men prior to my exploration in 1852; and, if it was ever mapped before then, I am not aware of it. The character of the country through which this stream flows is such that travelers would have not been likely to pass over it when there was a much more favorable route north of the north fork. The water in the Prairie Dog Town branch, from its confluence with the north fork to within 2 miles of its head spring (about 100 miles), I found so bitter and unpalatable that many of the men became sick from drinking it. But one pool of fresh water was found throughout the entire distance, and the Indians told me they never went up this stream **86**] *with their families if it could be avoided, for the reason that the nauseous water frequently proved fatal to their children. Hence, it is not surprising that but little, if anything, should have been known of this repulsive region before my exploration in 1852. And this probably accounts for the entire absence of most of its southern branches upon Melish's map. It is very certain that the 'Prairie Dog Town river' was never delineated by any Spanish, French, or English name, as were most of the other streams in that country, and it was only known to the Indians, and possibly to some Mexican traders, as 'Kechahquehono,' a Comanche appellation, the signification of which the Delawares informed me was 'Prairie Dog Town river.' . . . As before stated, owing to the absence of good water, the sandy character of the soil along the river, and the formidable obstruction presented by the elevated and staked plain, and the extensive belt of gypsum crossing this route, the Mexicans would never have attempted to traverse it with their carts in their trading expeditions from Santa Fé to Nacogdoches, especially when there was so good a route a little further north, possessing all the requirements for prairie traveling. The Rio Roxo upon Melish's map is almost entirely south and west of the Witchita mountains, but in close proximity to them,—which is in accord with my determination of the position of the north fork,—while there are no mountains upon the Prairie Dog Town branch. The head of the Rio Roxo upon Melish's map is put down as in about latitude 37°, while upon my map the true latitude is 35¼°, while the Prairie Dog Town river rises in about 34¼ degrees; so that, if his Rio Roxo was intended to represent the 'Prairie Dog Town river,' it would be 2¼° of latitude too far north." House Ex. Doc. No. 21, pp. 59, 60.

It thus appears that at the time (1852) General Marcy made his exploration of the Red river country he regarded the Prairie Dog Town river as the main Red river, and his conclusion then formed by actual observation was in harmony with the maps that had been previously given to the public. After many of the facts connected with the subject had, as he *frankly admitted, passed from his **[87** memory, he expressed the opinion that the river that he had called the north fork of Red river was what was designated on Melish's map of 1818 as Rio Roxo. However persuasive his reasons for that conclusion might be regarded, if the facts then stated by him were alone taken into consideration, they do not satisfy us that he was in error when, the facts being fresh in his mind, he expressed the opinion, from personal examination on the ground, that Prairie Dog Town fork was the main Red river. One of the reasons assigned in support of his last view of this question is that Prairie Dog Town river was never delineated upon any map of this country or of Europe prior to his exploration, and that it was only known to the Indians, and possibly to some Mexican traders, as the Kecheahquehono, which means Prairie Dog Town river. Now it is quite true that no map, prior to 1852, *marked* any river *as Prairie Dog Town river*, or as the Kecheahquehono. But it is shown, beyond all question, that on all the maps above referred to which appeared after 1819 and down to the time when General Marcy testified before the boundary commission, a river was marked whose course (going from east to west) is substantially westward from the point where the line from the Sabine river meets the 32d degree of latitude to the 100th meridian, and that the line thus delineated, extending to and

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westwardly beyond the true 100th meridian, is the southern boundary of the Indian territory, *as that boundary is claimed by the United States*. Between the mouth of the north fork and the initial monument established by the government in 1856, there is a river whose course is substantially east and west. *That river* is *marked* on Long's map of 1822 and the Melish map of 1823, west of the 100th meridian, as "Rio Roxo or Red river;" on Finley's map of 1826 as "R. Roxo or Red R;" on the Young-Mitchell map of 1835 and Maillard's map of 1841 as "Rio Roxo or Red river of Louisiana;" and on Mitchell's map of 1851 as "Red river." On all the other maps the same river is plainly delineated. That the name of Prairie Dog Town fork does not appear on maps published prior to 1852, or that that name was not known to civilized people until after 88] the *explorations made by Captain Marcy, is not, therefore, a circumstance of serious moment, certainly not conclusive. The river itself, though unnamed on any map prior to 1852, was in fact delineated on maps for more than a quarter of a century before that officer entered the Red river country with his company.

The character of the country through which the Prairie Dog Town river flowed, and the bad quality of its water for drinking purposes, are also referred to by General Marcy as reasons why the north fork should be regarded as the stream whose course was intended to be followed in establishing the boundary. We do not think that the evidence upon this point is entitled to very great weight. There is no reason to suppose that the negotiators of the treaty had any knowledge or information as to the relative qualities for drinking purposes of the waters of the two streams in question; and if they had, it is difficult to perceive why such facts would control the determination of a disputed question of boundary between two nations. The negotiators knew or believed that there was a Red river, whose source was not far from Santa Fé, and which, in its course, passed Natchitoches. Their purpose was to establish a line which would extend from the point where the line due north from Sabine river met Red river, thence along and up Red river "westward" to the 100th meridian of longitude, then due north to the Arkansas river. The reference in the treaty was to rivers and degrees of longitude and latitude. It was a question of territory without regard to a special trail, the location of which might have been affected by the quality of the waters of any particular stream.

Much significance is attached by the state to the fact that as early as 1860, by legislative enactment, it created the county of Greer with boundaries that include the whole of the territory in dispute, and that it has ever since asserted its jurisdiction over both that territory and the people who inhabit it. However important such facts might under some circumstances be deemed, it must be remembered that during the whole of the period referred to the constituted authorities of Texas have been aware that the United States regarded the territory in dispute as under its exclusive juris-89] diction and as a part of what *is known as the Indian territory. The government has always disputed the claim of Texas. The only qualification of this broad statement is that suggested by the language inadvertently used in the act of Congress creating the northern judicial district of Texas. But that language, we have held, was not intended to express the purpose of the United States to surrender its jurisdiction over the territory in dispute.

It is also said that many titles to land in the disputed territory are held under the state, and that much confusion may follow, and injustice be done to individuals, if the claim of the United States be sustained. On the other hand, it is to be inferred that there are many settlers in the disputed territory who assert title to land under the United States. It appears in evidence that in 1873 and 1874 a part of the territory was sectionized under the authority of the general government. We suppose that Governor Roberts referred to that fact when, in his message of 1883, he said that "the authorities of the United States had established an initial corner on the south fork of Red river, on the line claimed to be the 100th degree of longitude, had sectionized the country east of that line, and protected it from settlement of white people as a part of the Indian territory." He further said: "Application was made to me to know if I would sign the patents, if certificates were located and surveyed in Greer county. Under the then existing circumstances I felt it to be my duty to discourage such locations, as they might be to our prejudice in the settlement of our claim with the United States, when the merits of it could be more fully ascertained." But whatever may be the facts bearing upon this point, our duty is to determine the present issues according to the settled principles of law, without reference to considerations of inconvenience to individuals residing in the disputed territory. We cannot doubt that the Congress of the United States will do all that justice requires to be done in order to avoid any injury to individuals that ought not to be inflicted upon them.

It is further said that the state, since it assumed to create Greer county, has expended a large amount of money in *providing a [90 public school system for the inhabitants of that locality. To what extent moneys have been so expended is not clearly shown. Whatever may be the facts touching this point we do not feel at liberty to give weight to them in this case. The question before us, we repeat, is one of law, and must be determined according to law. What may be fairly and justly demanded by the state on account of moneys expended for the benefit of the inhabitants of the disputed territory is a matter for the consideration of the legislative branch of the national government.

In the argument it was suggested that this court ought not to forget how much was added to the power and wealth of this nation when Texas, with its imperial domain, came into the Union and her people became a part of the political community for whom the Constitution of the United States was ordained and established. This fact cannot, of course, be forgotten by any American who takes pride in the prestige and greatness of the Republic. But the considerations which it sug-

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gests cannot affect the decision of legal questions, and must be addressed to another branch of the government. The supposition is not to be indulged that that department of the government will fail to recognize any duty imposed upon it by the circumstances arising out of this vexed controversy.

For the reasons stated the United States is entitled to the relief asked. And this court now renders the following decree:

This cause having been submitted upon the pleadings, proofs, and exhibits, and the court being fully advised, it is ordered, adjudged, and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the north fork of Red river, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red river and of the river now known as the Prairie Dog Town fork or south fork of Red river until such line meets the 100th meridian of longitude, **91**]—which territory is sometimes*called Greer county,—constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that state into the Union, and is not within the limits nor under the jurisdiction of that state, but is subject to the exclusive jurisdiction of the United States of America.

Mr. Justice **Peckham,** not having been a member of the court when this case was argued, took no part in the decision.

CENTRAL PACIFIC RAILROAD COMPANY, *Plff. in Err.*, *v.* PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C. Reporter's ed. 91-166.)

Taxation of franchise of railroad company—estoppel—sworn statement—Federal question—rejecting evidence—state franchise not merged in Federal franchise.

1. The franchise of a railroad company, included by it in its return of property for taxation and assessed by the public officers is presumed to be a franchise which is not exempt from taxation, and which is within the jurisdiction of the assessing officers, rather than another franchise which was not subje[illegible]reto.
2. A corporation i[illegible] from saying that a description of a franchise in its return of property for taxes is ambiguous, if the property mentioned could be assessed and the assessment follows the return.
3. The fact that a sworn statement of property for taxation, made by a railroad company, was filled out in a printed blank prepared by the tax officers, does not relieve the corporation from the effect of such statement that the property was taxable.
4. Error raising a Federal question cannot be predicated on rulings of a state court excluding evidence on cross-examination as to conversations and statements of the witness.
5. The discretion of the state trial court in rejecting offers of evidence which was not necessarily relevant or material cannot properly be reviewed on writ of error.
6. The state franchise of one of the Pacific railroad companies is not destroyed by or merged in the Federal franchises granted by the acts of Congress, so as to preclude the state from taxing the corporation upon the franchise derived from the state.

NOTE.—*As to di[illegible]* note to Rew, 23: 99.

That taxation [illegible] corpora[illegible] impair obligati[illegible] taxati[illegible] national bank[illegible] Providence [illegible]

[No. 559.]

Argued January 15, 16, 1896. Decided March 16, 1896.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court modifying and affirming the judgment as modified of the Superior Court of the City and County of San Francisco in favor of the plaintiff, the People of the State of California, against the Central Pacific Railroad Company for the amount of certain taxes due from said company to the State and to certain counties thereof. *Affirmed.*

See same case below, 105 Cal. 576.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought in the name of the People of the State of California against the Central Pacific Railroad Company in the superior court of the city and county of San Francisco, under § 3670 of the Political Code of that state, to recover a certain sum of money alleged to be due the state and various other sums of money alleged to be due eighteen counties of the state, for taxes for the fiscal year 1887 upon the assessment of the state board of equalization, judgment being demanded for the several sums of state and county taxes delinquent and unpaid as stated in the complaint, with *5 per cent thereon added for delinquency and nonpayment, and interest from the time of such delinquency; and also for costs of suit and attorneys' fees, as allowed by law. [**93**

The provisions of the state Constitution on the subject of revenue are found in article 13, and §§ 1, 4, and 10 of that article and §§ 3664-3671 of the Political Code of California are given in the margin.*

*Sec. 1. All property in the state, not exempt under the laws of the United States, shall be taxed in [illegible]ion to its value, to be ascertained as pro[illegible]aw. The word "property," as used in this [illegible] section, is hereby declared to include [illegible]redits, bonds, stocks, dues, franchises, [illegible]her matters and things, real, personal, [illegible]d, capable of private ownership: Pro[illegible]at growing crops, property used exclu[illegible]or public schools, and such as may belong [illegible] United States, this state, or to any county or [illegible]cipal corporation within this state, shall be

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94]*The complaint contained nineteen counts on nineteen alleged causes of action, and each count averred that the defendant was, at all times therein mentioned, a corporation organized 95]*and existing under the laws of the state of California, and engaged in operating a railroad in more than one county of that state; and that on August 13, 1887, the state board of equaliza- 96]tion, *for the purposes of state and county taxation for the fiscal year ending June 30, 1888, assessed to defendant, then the owner and operator thereof in more than one county in 97]*said state, the franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad, then situated and being within said state, at the sum of $18,000,000. *The first count [98 then averred that within ten days after the 3d Monday in August, 1887, the state board of equalization apportioned the total assessment of the franchise, *roadway, roadbed, rails, and [99 rolling stock of defendant to the counties in the state in which the railway was located, in proportion to the number of miles of railway laid in such *counties; and the amounts of [100 the total assessments so apportioned by the board to those counties, and the number of miles of defendant's railway laid in said counties, were specifically set forth.

exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state.

Sec. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof. *Provided*, That if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

Sec. 10. All property except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

Provisions of Political Code.

Sec. 3664. The president, secretary, or managing agent, or such other officer as the state board of equalization may designate of any corporation, and each person or association of persons owning or operating any railroad in more than one county in this state, shall, on or before the 1st Monday in April of each year, furnish the said board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the 1st Monday in March in each year—

1. The whole number of miles of railway in the state, and, where the line is partly out of the state, the whole number of miles without the state and the whole number within the state, owned or operated by such corporation, person, or association:
2. The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the state:
3. The width of the right of way:
4. The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway including the part without the state:
5. Number, kind, and value of rolling stock owned and operated in the state:
6. Number, kind, and value of rolling stock used in the state, but owned by the party making the returns:
7. Number, kind, and value of rolling stock owned, but used out of the state either upon divisions of road operated by the party making the returns, or by and upon other railways.

Also showing in detail for the year preceding the 1st of January—

1. The gross earnings of the entire road:
2. The gross earnings of the road in the state and where the railway is let to other operators, how much was derived by the lessor as rental:
3. The cost of operating the entire (road), exclusive of sinking fund, expenses of land department, and money paid to the United States:
4. Net income for such year and amount of dividend declared:
5. Capital stock authorized:
6. Capital stock paid in:
7. Funded debt:
8. Number of shares authorized:
9. Number of shares of stock issued:
10. Any other facts the state board of equalization may require:
11. A description of the road, giving the point of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given no other annual description thereafter is necessary, unless the road shall have been changed. Whenever the road or any portion of the road is advertised to be sold, or is sold for taxes, either state or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, person, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same.

If such statement is not furnished as above provided, the assessment made by the state board of equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final.

Sec. 3665. The state board of equalization must meet at the state capitol on the 1st Monday in August, and continue in open session from day to day, Sundays excepted, until the 3d Monday in August. At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the state, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessors of the county wherein they are situate. Within ten days after the 3d Monday of August, the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The board must also, within said time, transmit by mail to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county or city and county, including the right of way, by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same as fixed by a *pro rata* distribution

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101] *The count then proceeded as follows:

"5. That within ten days after the 3d Monday in August, 1887, said state board of equalization did transmit to each of the county auditors of said counties a statement showing the length of the main track of defendant's railway within the counties of said auditors respectively, with a description of the whole of defendant's railway track within the counties of said auditors respectively, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of defendant's railway in said state, and the amount apportioned to the counties of said auditors respectively.

"6. That thereafter, and prior to the 1st Monday in October, 1887, the county auditor of each of said counties did enter said statement so transmitted to him upon the assessment roll of his county, and did enter upon said assessment roll of his county the said amount of said assessment apportioned by said state board of equalization to his county in the column of the assessment roll of his county which showed the total value of all property of his county for taxation. . . .

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per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the state, and the amount apportioned to the county or city and county. The auditor must enter the statement on the assessment roll or book of the county or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the 1st Monday in October the board of supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the state board of equalization within the county; the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxing district in the county, or city and county, through which such railway runs, as fixed by the state board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council, or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the state board of equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provision of § 3692 of the Political Code, between the 3d Monday in August and the 3d Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the state. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment, of the change made, and the auditor must note such change upon the assessment book or roll of the county as directed by the board. [In effect March 9, 1883.]

Sec. 3606. The state board of equalization must prepare each year a book, to be called "Record of Assessment of Railways," in which must be entered each assessment made by the board, either in writing, or by both writing and printing. Each assessment so entered must be signed by the chairman and clerk. The record of the apportionment of the assessments made by the board to the counties, and cities and counties, must be made in a separate book, to be called "Record of Apportionment of Railway Assessments." In such last-described book must be entered the names of the railways assessed by the board, the names of the corporation to which, or the name of the person or association to whom, each railway was assessed, the whole number of miles of the railway in the state, the number of miles thereof in each county or city and county, the total assessment of the franchise, roadway, roadbed, rails, and rolling stock for purposes of state taxation, and the amount of the apportionment of such total assessment to each county and city and county, for county and city and county taxation. Before the 3d Monday of October of each year the clerk of the state board of equalization must prepare and transmit to the comptroller of the state, duplicates of the "Record of Assessment of Railways," and "Record of Apportionment of Railway Assessments," each certified by the chairman and clerk of the board, and to be known respectively as "Duplicate Record of Assessment of Railways," and "Duplicate Record of Apportionment of Railway Assessments." In the last-named duplicate two columns must be added, in one of which the comptroller must enter the state taxes due the state upon the whole assessment by each corporation, person, or association, and in the other the county or city and county taxes, due upon the assessment apportioned to each county or city and county, by each corporation, person, or association. The two duplicates constitute the warrant for the comptroller to collect the state and county, and city and county, taxes levied upon such property assessed by the board, and the amount of the apportionment of the assessment to each county and city and county, respectively. [In effect March 9, 1883.]

Sec. 3607. When the board of supervisors of each county and city and county, to which the state board of equalization has apportioned the assessment of railways shall have fixed the rate of county or city and county taxation, the clerk of the board of supervisors must forthwith by mail, postage paid, transmit to the comptroller a statement of the rate of taxation levied by the board of supervisors for county or city and county taxation. If the clerk fails to transmit such statement, the comptroller must obtain the information as to such rate of taxation from other sources. On or before the 4th Monday of October the comptroller must compute and enter in separate money columns in the "Duplicate Record of Apportionment of Railway Assessments" the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor as the state tax upon the total amount of the assessment, and the county or city and county tax upon the apportionment of the assessment to each county and city and county, or the property assessed to such corporation, person, or association named in said duplicate record. [In effect March 9, 1883.]

Sec. 3608. Within ten days after the 4th Monday in October the comptroller must publish a notice for two weeks in one daily newspaper of general circulation at the state capital, and in two daily newspapers of general circulation published in the city of San Francisco, specifying:

1. That he has received from the state board of equalization the "Duplicate Record of Assessments of Railways" and the "Duplicate Record of Apportionment of Railway Assessments."

2. That the taxes are now payable and will be delinquent on the last Monday in December next, at 6 o'clock P. M., and that unless paid to the state treasurer at the capitol prior thereto, 5 per cent will be added to the amount thereof. On the last Monday in December of each year, at 6 o'clock P. M. all of unpaid taxes are delinquent, and thereafter there must be collected by the state treasurer or other proper officer an addition of 5 per centum, which sum when collected must be set aside by the treasurer, as a fund with which to pay the contingent expenses of actions against any delinquents, the said expenses to be audited by the board of examiners. When any taxes are paid to the state treasurer by order of the comptroller, upon assessments made and apportioned by the state

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"7. That thereafter, and on the 1st Monday of October, 1887, the board of supervisors of each of said counties did levy the state tax of said state of California according to the rate theretofore fixed for such state tax for the fiscal year ending June 30, 1888, by said state board of equalization, upon the taxable property in its county, including the property of defendant assessed and apportioned to its county as aforesaid, and the taxes so levied in all of said counties for the purposes of state taxation upon said property of defendant assessed and apportioned to said counties as aforesaid was the sum of $109,440.

"8. That upon the 17th day of September, 1887, said state board of equalization did fix the rate of state taxation for the fiscal year ending June 30, 1888, at the rate of $0.608 on each $100.

*"9. That defendant has never at any [102 time paid said state tax, amounting to said sum of $109,440, nor any part thereof. That said state tax became and was delinquent on the last Monday in December, 1887, at 6 o'clock P. M., and upon and at the time of and by reason of such delinquency 5 per cent of said state tax, to wit, the sum of $5,472, was, by the comptroller of said state, added to said

board of equalization, the comptroller must forthwith notify the auditor and treasurer respectively of each county and city and county that such taxes have been paid, and of the amount thereof to which each county and city and county interested is entitled. The state's portion of the taxes must be distributed by the treasurer to each fund entitled thereto, and the portion belonging to the counties and cities and counties must be placed in a fund, to be called "Railway Tax Fund," to the credit of each county and city and county entitled thereto. When any taxes are placed in the "Railway Tax Fund" to the credit of a county or city and county, the comptroller, at the next settlement with the comptroller by the treasurer of such county or city and county, must draw and deliver to such treasurer his warrant upon the state treasurer for the amount in the fund to the credit of such county or city and county. [In effect March 9, 1883.]

Sec. 3669. Each corporation, person, or association assessed by the state board of equalization must pay to the state treasurer, upon the order of the comptroller, as other moneys are required to be paid into the treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association, dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the 5 per cent added, if to be added, on or before the 1st Monday in February, and the filing of notice with the comptroller of an intention to begin an action, may, not later than the 1st Monday of February, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the superior court of the county of Sacramento. The attorney general must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals, are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the comptroller, he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the comptroller may demand and receive from the county or city and county interested the proportion of such costs, or may deduct such proportion from any money then or to become due to said county or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. [In effect March 9, 1883.]

Sec. 3670. After the 1st Monday in February of each year, the comptroller must begin an action in the proper court, in the name of the People of the state of California, to collect the delinquent taxes upon the property assessed by the state board of equalization; such suit must be for the taxes due the state, and all the counties, and cities and counties, upon property assessed by the board of equalization, and appearing delinquent upon the "Duplicate Record of Apportionment of Railway Assessments."

The demands for state and county and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

[Title of Court.]
THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
(Naming the Defendant.)

Plaintiff avers that on the day of , in the year (naming the year) the state board of equalization assessed the franchise, roadway, roadbed, rails, and rolling stock of the defendant at the sum of (naming it) dollars. That the board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on naming each county).

That the defendant is indebted to plaintiff for state and county taxes for the year eighteen , in the following sums: For state taxes, in the sum of (naming it) dollars; for county taxes of the county of (naming it), in the sum of, (naming it) dollars, etc., with 5 per cent added for nonpayment of taxes. Plaintiff demands payment for said several sums and prays that an attachment may issue in form as prescribed in § 540 of the Code of Civil Procedure.

(Signed by the comptroller or his attorney.)

On the filing of such complaint, the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, there shall be included in the judgment as counsel fees, and in case of judgment of taxes after suit brought but before judgment, the defendant must pay as counsel fees, such sum as the court may determine to be reasonable and just. Payment of the taxes or the amount of the judgment in the case must be made to the state treasurer. In such actions the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the comptroller, showing unpaid taxes against any corporation, person, or association for property assessed by the state board of equalization, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the state and counties or cities and counties therein named, and that the corporation, person, or association is indebted to the people of the state of California, in the amount of taxes, state and county and city and county, therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. [In effect March 9, 1883.]

Sec. 3671. The assessment made by the county assessor, and that of the state board of equalization, as apportioned by the board of supervisors to each city, town, township, school, road, or other district in their respective counties, or cities and counties, shall be the only basis of taxation for the county, or any subdivision thereof, except incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect. All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes. [In effect March 9, 1883.]

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state tax, and no part of said $5,472 so added for delinquency has ever been paid by defendant.

"10. That prior to the 3d Monday of October, 1887, the said state board of equalization did prepare and transmit to the comptroller of said state a duplicate record of assessment of railways, and a duplicate record of apportionment of railway assessments for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said state board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the said counties.

"Before the 4th Monday in October, 1887, said comptroller did compute at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums, in dollars and cents, to be paid by the defendant as the state tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county and city and county of the property assessed to defendant named in said duplicate record. That within ten days after the 4th Monday in October, 1887, said comptroller did publish for two weeks in one daily newspaper of general circulation published at the state capital of said state, and in two daily newspapers of general circulation published in the city and county of San Francisco in said state, a notice that he had received from said state board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable and would become delinquent on the last Monday in [103] December, *1887, at 6 o'clock P. M., and that unless paid to the state treasurer at the capitol prior thereto, 5 per cent would be added to the amount thereof.

"That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to 10 per cent of the tax in this cause of action alleged to be delinquent."

Then followed eighteen counts for the county taxes in the several counties, all averring in detail compliance with the law in relation thereto.

Defendant demurred to the complaint, the demurrer was overruled, and defendant answered, setting up various defenses, one of which was that the franchise assessed to defendant by the state board of equalization was derived by defendant from the government of the United States through certain acts of Congress, and that the same were used by defendant as one of the instrumentalities of the Federal government, and, hence, was not taxable by the state; that the assessment of this franchise was so blended with the whole assessment as not to be separable therefrom; and that the whole assessment was therefore void.

The plaintiff put in evidence the "Duplicate Record of Assessments of Railways by the State Board of Equalization for 1887," and the "Duplicate Record of Apportionment of Railway Assessments for 1887," filed in the office of the comptroller of the state of California on the 11th of October, 1887. These were admitted subject to defendant's objection. The duplicate record of the assessments of railways stated that "the state board of equalization being in session on this, the 13th day of August, 1887, all the members being present, and having under consideration the assessment of the franchise, roadway, roadbed, rails, and rolling stock of the Central Pacific Railroad Company, within the state, for the year 1887, and it appearing to this board that said company, on the 1st Monday in March, in the year 1887, at 12 o'clock, meridian, of that day, owned and still owns 719.50 miles of railroad within this state, which at said time and day *in March was [104] and still is operated in more than one county; being the entire railway of said company within this state, and which, with the right of way for the same, is described as follows:" [Here follows description of line of roadway, roadbed, rails, and right of way.] "And it appearing that the actual value of the franchise, roadway, roadbed, rails, and rolling stock of said company, within this state, at the said date and time in March, was and still is the sum of $18,000,000: Therefore it is hereby ordered that the said franchise, roadway, roadbed, rails, and rolling stock, for the year 1887, be and the same are hereby assessed to the said Central Pacific Railroad Company at the sum of $18,000,000.

The duplicate record of apportionment of railway assessments, under date of August 22, 1887, stated: "The state board of equalization met this day. All the members present. The board this day apportioned the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railroad assessed by it on the 13th day of August, 1887, for the year 1887, to the counties and the city and county of San Francisco in proportion to the number of miles of railway laid in each county, and in the city and county of San Francisco, which apportionment is set out in the following table. The apportionment is based upon the proportion the number of miles in each county of a railway bears to the total number of miles of such railway laid in the state."

The annexed table gave the name of the corporation to which each railway was assessed and the name of each railway assessed, in this instance as the "Central Pacific Railroad Company;" the names of the counties and city and county to which the assessment was apportioned; the total number of miles of road in the state; the number of miles in each county and city and county; the value per mile; the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway assessed; the amount apportioned to each county and city and county for purposes of county and city and county taxation; rate of taxation for each county and city and county levied by the board of supervisors; amount of *state taxes at the state rate; and amount [105] due of county and city and county taxes upon the assessment as apportioned.

It was admitted that the apportionment was made as the Political Code required it to be made, and that the mileage for each county was correctly stated.

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Plaintiff then proved, under objection, that the taxes sued for had not been paid, or any portion thereof. Evidence was also introduced in regard to the value of services of counsel.

Defendant called as a witness C. M. Coglan, clerk of the board of equalization, and identified the original minutes of the proceedings of the board relating to the assessment of the property of the Central Pacific Railroad Company for the year 1888, under date of August 17, 1888. It appeared therefrom that the attorney general recommended to the board that the franchises of the Central Pacific and Southern Pacific companies, derived from the state, be assessed, and that the valuation thereof be stated separately in the record of assessments; that the board assess the moles, bridges, and culverts of each road separately, and in respect of certain railroad companies declare that the steamers used in operating those roads were not assessed; whereupon the board proceeded to make such assessment, and ordered that the franchise of the Central Pacific Railroad Company, derived from the state of California, be assessed at $1,250,000, and that the franchise of the Southern Pacific Railroad Company, derived from the state of California, be assessed at $1,000,000; that the moles, culverts, bridges, and wharves upon which the tracks of the Central Pacific are laid be assessed at $1,000,000; that the moles, culverts, bridges, and wharves upon which the tracks of the Southern Pacific are laid be assessed at $400,000. The original record of the assessment of the Central Pacific Railroad Company made by the board for the year 1888 was offered in evidence, and was to the effect that the board assessed the franchise derived from the state of California, the roadway, roadbed, and rolling stock of said company within said state, at the total sum of $15,000,000.

On the cross-examination of Mr. Coglan, plaintiff offered, and the court admitted in evi-[106] dence, under defendant's *objection, the verified statements furnished by defendant to the state board of equalization during the year 1887 and 1888, which were marked plaintiff's Exhibits 4 and 6. Exhibit 4 was the return made by the Central Pacific Railroad Company for 1888, which read thus:

The Central Pacific Railroad Company answers the questions propounded by the board as follows and makes the following statement in relation to its property subject to taxation in the state of California, owned by it for the year ending on the 1st Monday in March, 1888, and of all property used in operating its railway during such year:

The length of railway owned and operated as a system in and out of the state is 1,344.14 miles.

Length of track, sidings, and double track reduced to single track is. ——; out of the state, 597 miles; in the state, 747.14 miles.

The value of the franchise derived from the state within this state	$25 00
The value of the entire roadway, roadbed, rolling stock, and rails within this state is	9,376,607 00
	$9,376,632 00

This was followed by a list of the mileage of the road in California in each of the counties through which it ran, and schedules of the rolling stock; the earnings and expenses of the road as a system in and out of the state; of the operating expenses; and of the earnings and expenses within the state. The return was duly sworn to.

Exhibit 6 was the return of the company for the year 1887. This opened with the same statement as the other, and after giving the length of the railway owned and operated as a system and the length of track, single and double, out of and in the state, continued: "The value of the franchise and entire roadway, roadbed, and rails within this state is $12,273,785.00." The usual lists and schedules were attached.

Defendant then called as a witness one Morehouse, a member of the state board of equalization, whose evidence ten led *to show that [107] the assessment for 1887 was intended by him to and did include defendant's Federal franchise, but that he could not say that the value of the Federal franchise operated on the minds of the other members of the board in making up the items of the valuation. Defendant offered to prove by Morehouse that at every session from 1883 and prior to 1888, the board, in making its assessment of the valuation of the property of the Central Pacific Railroad Company, included in its total estimate the value of the Federal franchise held by that company, by virtue of the acts of Congress referred to, and that the valuation of the Federal franchise was blended into the general assessment of that company in such a manner as to be indistinguishable from it, and not capable of separation. This was objected to as incompetent, irrelevant, and immaterial, the objection sustained by the court, and exception saved.

E. W. Maslin, secretary of the state board of equalization from April, 1880, to March, 1891, who was present at the board meetings and kept the record of its proceedings, was called as a witness by defendant, and testified that from his acquaintance with the history of the assessment of the road since 1880, his relation to it with respect of the franchise and personal property, his conversation with many members through those years, the knowledge he had of how two members arrived at their conclusions, and the knowledge that he thought he had as to how three members arrived at their conclusions, he thought he could state what elements of value were considered by the board in making their estimate for the total values for 1887. Thereupon defendant asked witness the following questions:

Q. From the various sources of knowledge which you have enumerated, please state to the court what elements were taken into consideration by the state board of equalization in making the assessment of this company for the year 1887.

Q. Did you hear any conversation between the members of the state board of equalization during the meeting when the assessment of this company was made for the year 1887, with reference to the elements that they proposed to and did include in the assessment?

*Q. At the time that the assessment of [108] 1887 was made by the state board of equalization upon the property of the Central Pacific Rail-

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road Company, what was said and done at the meeting of the state board of equalization on that day in your presence?

To each of these questions plaintiff interposed objections which were sustained by the court, and defendant excepted.

Defendant then made the following offer:

"Now, in view of the ruling of the court on this subject, we now offer to prove by this witness that from the time of the organization of the state board of equalization in 1880 down to and including the year 1887 that board had every year considered the value of the Federal franchise—that is the franchise derived from the United States by the acts of Congress of the government of the United States, belonging to and owned by the Central Pacific Railroad Company, as an element of value in assessing the total value of the property of that railroad company; and that in 1888, in consequence of the decision of the Supreme Court of the United States upon the subject, the state board of equalization for the first time ceased to consider this Federal franchise as an element of value, and hence reduced their valuation by the sum of $3,000,000 on the Central Pacific Railroad Company's property."

This offer was disallowed by the court and defendant excepted.

Plaintiff in rebuttal called C. E. Wilcoxen and J. P. Dunn, who were members of the board and participated in making the assessment of 1887, and they testified that the Federal franchise was not included in the assessment for that year. On the cross-examination of Mr. Wilcoxen an effort was made to introduce testimony that he had given before a committee of the general assembly of California in 1889, which the court excluded, except so far as it related to the year 1887.

The statement on motion for new trial then continued:

"In its written opinion, upon which the findings were based, the court, after determining as a fact from a preponderance of the evidence before it, that the Federal franchise of defendant was not assessed or included in the assess-[109] ment of *the property of defendant by the state board of equalization for the year 1887, uses the following language:

"'But if the parol evidence offered did not weigh in plaintiff's favor, and if by a preponderance of such evidence defendant could have shown that the state intended to and did include a Federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done.

"'The best and only evidence of the acts and intentions of deliberative bodies must be drawn from the record of its intentions. . . . From both standpoints of fact and of law, the findings must be that a Federal franchise was not included in these assessments.'"

On February 3 the superior court made and filed its written findings of fact and conclusions of law. The findings of fact included the following:

"30. That on the 13th day of August, 1887, the state board of equalization of the state of California did, for the purposes of taxation for the fiscal year 1887, assess as a unit, and not separately, the franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad, then being and situate within the state, at the sum and value mentioned in the amended complaint, and did then and there enter said assessment upon its minutes, and in its record of assessments. That such assessment is the one upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the one aforesaid was ever made by said board of equalization or other assessor of said property of the defendant for said fiscal year. That said state board of equalization did at the time and in the manner alleged in the amended complaint apportion said assessment and transmit such assessment and the apportionment to the county and city and county auditors, and said assessment and the apportionment thereof were entered upon the assessment rolls of said counties and said cities and counties as alleged in said amended complaint, as hereinbefore found.

"31. That the said board of equalization, in making *said assessment, did assess the [110] franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad, at their full cash value, without deducting therefrom the value of the mortgage, or any part thereof, or the value of said bonds issued under said acts of Congress, given and existing thereon, as aforesaid, to secure the indebtedness of said company to the holders of said bonds, and, in making said assessment, said board did not deem nor treat said mortgage or bonds as an interest in said property, but it assessed the whole value of said property as assessed to defendant in the same manner it would have done had there been no mortgage thereon. At the time said assessment and apportionment were made as aforesaid by said state board of equalization the assessment books or rolls for the said fiscal year had been completed and were in existence, and the assessment and valuation of defendant's property for the purposes of taxation for said fiscal year had been ascertained and fixed as provided by law, and said board, in making said valuation and apportionment, did exercise all necessary powers relative to the equalization of values for the purposes of taxation."

"33. Said state board of equalization, in making said assessment of defendant's roadway, did not include in the valuation of said roadway the value of any fences erected upon the land of coterminous proprietors, and did not value said roadway at a greater value than the value of other property similarly situated and greater than its actual cash value, and did not blend in said assessment the value of any fences. That said board, in making its said assessment and valuation therefor, did not adopt a system of valuation which operated unequally, or which was intended to or which did in any manner violate the rule prescribed in § 10 of article 13 of the state Constitution, and said board, in making its said assessment and valuation therefor, did not value the rolling stock of defendant at 60 or any other per cent above its actual value, and did not value nor assess defendant's franchise in excess of its actual value.

"34. That in making said assessment and valuation therefor said state board of equal-

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111] ization did not include the *value of or assess any steamboats or boats, nor blend the value or assessment of any steamboats or boats, with the value of or assessment of defendant's roadway, rails, roadbed, and rolling stock.

"35. That in making its assessment and valuation therefor of defendant's franchise said state board of equalization did not include, assess, or value any franchise or corporate power held or exercised by defendant under the acts of Congress hereinbefore mentioned, or under any act of Congress whatever. And said board, in making said assessment and valuation therefor, upon defendant's franchise, roadbed, roadway, rails, and rolling stock, for purposes of taxation for the fiscal year 1887, did not include in its said assessment and valuation therefor any Federal franchise then possessed by defendant, nor any franchise or thing whatsoever, which said board could not legally include in such assessment or valuation. That the franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad were valued and assessed by said state board of equalization for purposes of taxation for the fiscal year 1887, at their actual value, and in proportion to their values respectively."

The conclusions of law were that plaintiff was entitled to recover the sums claimed, with 5 per cent penalty, interest, and counsel fees, the amounts being stated, and costs.

Judgment was rendered in plaintiff's favor accordingly.

On the 19th of June following the statement on motion for new trial was approved and filed as part of the record, including an assignment and specification of errors. The defendant's motion for a new trial was overruled, and defendant appealed to the supreme court of the state from the judgment and from the order denying the motion for new trial. January 6, 1895, the supreme court rendered judgment, directing the court below to modify its judgment by striking therefrom the amount allowed for interest prior to the entry thereof, and also certain counsel fees, and that, as so modified, the judgment and order denying a new trial should stand affirmed. The opinion is reported in 105 Cal. 576.

Messrs. **J. Hubley Ashton** and *Charles H. Tweed* for plaintiff in error.

Messrs. **J. P. Langhorne, Jno. H. Miller,** and *W. F. Fitzgerald*, Attorney General of California, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The assessment of the state board of equalization is not attacked on the ground of fraud, but it is contended that the value of the Federal franchise or franchises possessed by plaintiff in error was included therein, and that as the assessment embraced all the property assessed as a unit it was thereby wholly invalidated. *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394 [30: 118]; *California* v. *Central P. R. Co.* 127 U. S. 1 [32: 150], 2 Inters. Com. Rep. 153.

By Cal. Const. art. 13, § 1, it is provided that "all property of the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, or mixed, and capable of private ownership;" and by § 10 that "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization, at their actual value;" and the Political Code provided that this must be, and the mode in which it should be, done.

Railway corporations were required to furnish the board of equalization, before it acted, and as of the 1st Monday of March in each year, a statement signed and sworn to by one of their officers, showing in detail the whole number of miles of railway in the state, and when the line was partly out of the state the whole number of miles within and without, owned or operated by each corporation, and the value thereof; the value of the roadway, roadbed, and rails of the whole, and *the [113 value of the same within the state; the width of the right of way; the rolling stock and value; the gross earnings of the entire road and of the road within the state; the net income; the capital stock authorized and paid in; the number of shares authorized and issued, etc.

This verified statement for 1887 was made by plaintiff in error in due time, and purported to be a "statement in relation to its property subject to taxation in the state of California owned by it for the year ending on the 1st Monday in March, 1887, and of all property used in operating its railway during such year." And it was therein set forth, among other things: "The value of the franchise and entire roadway, roadbed, and rails within this state, is $12,273,785." The board of equalization determined "that the actual value of the franchise, roadway, roadbed, rails, and rolling stock of said company, within this state, at the said date and time in March, was and still is the sum of $18,000,000, and thereupon assessed "the said franchise, roadway, roadbed, rails, and rolling stock for the year 1887" at that sum.

By § 3670 of the Political Code the duplicate record of assessments of railways, and the duplicate record of apportionment of railway assessments, or copies thereof, were made prima facie evidence of the assessment, and that the forms of law in relation to the assessment and levy of such taxes had been complied with, and these were put in evidence.

Under this state of facts, the presumption was that the franchise thus included by plaintiff in error in its return and by the board in its assessment was a franchise which was not exempt under the laws of the United States, and that the board had acted upon property within its jurisdiction rather than upon property which it had no power to include in the assessment. Indeed, as the supreme court points out, when plaintiff in error included the franchise in its statement, if there were two franchises, one of which could be assessed and the other could not, plaintiff in error ought not to be permitted to say that the one which was not capable of assessment was intended by it to be or was included therein. *People* v. *Central P. R. Co.* 105 Cal. 592. And the court

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114]*cited *San Francisco* v. *Flood*, 64 Cal. 504; *Lake County* v. *Sulphur Bank Quicksilver Min. Co.* 68 Cal. 14, and *Dear* v. *Varnum*, 80 Cal. 86, which rule that a party who furnishes a list of property for taxation is estopped from questioning the sufficiency of the description so furnished in an action to collect the taxes. Undoubtedly if the board of equalization had included what it had no authority to assess, the company might seek the remedies given under the law to correct the assessment so far as such property was concerned, or recover back the tax thereon, or, if those remedies were not held exclusive, might defend against the attempt to enforce it. But where the property mentioned in the description could be assessed and the assessment followed the return, as it did here, the company ought, at least, to be held estopped from saying that the description was ambiguous.

It is said that plaintiff in error should not be bound by this statement because it was on printed blanks prepared by the board, but when plaintiff in error filled out and swore to the statement of its property "as being subject to taxation," and the blank form called on plaintiff in error to give a statement of the value of its franchise within the state for the purpose of assessment and taxation, if it had intended to claim that its state and Federal franchises were so merged as to render the former not subject to taxation, or that it had no franchise subject to taxation, it was its duty to so indicate in making the return. Nothing in the law and nothing in the blank form could have compelled it to make a statement contrary to the facts.

Plaintiff in error attempted to rebut the case made by introducing evidence which it claimed tended to show that the franchise assessed covered franchises derived from the United States as well as from the state, but the findings of fact of the trial court were to the contrary, and there being a conflict of evidence on the point, the supreme court treated the findings as conclusive in accordance with the well-settled rule on the subject in that jurisdiction. In *Reay* v. *Butler*, 95 Cal. 206, 214, it 115]was said: "It has been held here in *more than a hundred cases, commencing with *Payne* v. *Jacobs*, 1 Cal. 39, in the first published book of reports of this court, and ending with *Dobinson* v. *McDonald*, 92 Cal. 33, in the last volume of such reports, that the finding of a jury or court as to a fact decided upon the weight of evidence will not be reviewed by this court."

That rule is equally binding on us. *Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315 [23: 515]; *Dower* v. *Richards*, 151 U. S. 658 [38: 305].

It was argued in the supreme court of California, as it has been here, that because the trial judge, after having determined as a fact from the preponderance of the evidence before him, that the Federal franchise was not assessed, stated that he thought that if the parol evidence offered had not weighed in plaintiff's favor, and that if by a preponderance of such evidence defendant could have shown that the board intended to and did include a Federal franchise in the assessment, the court would have to disregard it as incompetent, because the effect would be to contradict the record, therefore the evidence had been disregarded by the court in making its decision, and that the rule in respect of the conclusiveness of a determination of facts on a conflict of evidence did not apply. We entirely concur with the disposition of this suggestion by the supreme court, which said: "It clearly appears, however, that the court did not disregard the evidence, but that, after determining as a fact from the preponderance of evidence before it that the Federal franchise had not been assessed, it stated that if the preponderance of evidence had been otherwise, it would have held as a matter of law that the assessment must be tested by its own language. The fact that a court, after giving its decision upon an issue, gives its opinion upon the manner in which it would have decided the issue under other circumstances, does not constitute an error to be reviewed in this court."

Counsel for plaintiff in error also urge that inasmuch as it appeared in the proceedings to assess for 1888 that the board placed "the franchise of the Central Pacific Company derived from the state of California" at $1,250,000, and then assessed *"the franchise derived [116 from the state of California, the roadway, roadbed, and rolling stock of said company within said state at the total sum of $15,000,000," it should be inferred from the difference in the language used in the assessment of 1887, and the difference in the total amount, that the franchise then assessed included the Federal franchise. But it also appeared that the return of the company for 1888 in respect of this matter was as follows:

The value of the franchise derived from the state within this state	$25 00
The value of the entire roadway, roadbed, rolling stock, and rails within this state is	9,376,607 00
	$9,376,632 00

And we think that neither the difference in valuation nor the difference in the mode of statement has a material bearing on the assessment of 1887. The proceedings in 1888 showed greater care on the part of the company in making the return and on the part of the board in making the assessment, and possibly if plaintiff in error had been equally careful in relation to the assessment in 1887, it might have resulted that the valuation would have been less, although it does not follow that the reduction in 1888 might not be attributed to a change of financial conditions.

After all, these are considerations which were presented to the trial judge, in connection with all the evidence, and they have been disposed of adversely to the company.

Exceptions were saved to the action of the trial court in respect of the exclusion of certain evidence, but we are unable to find in these rulings or in the decision of the supreme court thereon, the denial of any title, right, privilege, or immunity specially set up or claimed under the Constitution or laws of the United States.

The rulings passed on by the supreme court, and which we must assume were all that were

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called to its attention, relate to the cross-examination of the witness Wilcoxen, as to statements previously made by him, which the superior court confined to the assessment for 117] 1887, in respect of which he had *been examined in chief. The supreme court held that, under the circumstances disclosed by the record, the superior court did not err in this particular.

And also to the exclusion of the evidence of Maslin as to the conversations of members of the board, in making the assessment, in relation thereto. The supreme court held as to this that "the intention of the board or of any of its members, or the signification to be given to the term 'franchise,' as used in the assessment, could not be shown in this manner, and the evidence could not be used for impeaching purposes, unless the members of the board had been previously questioned thereon."

The correctness of these rulings commends itself to us, but it is enough to say that it is impossible to predicate error raising a Federal question as to these or any of the rulings on evidence referred to by counsel.

Clearly no such error was committed in the rejection of the general offers of proof if we should treat them as open to consideration, notwithstanding the apparent abandonment of the exceptions in that regard in the supreme court. The issue was upon the assessment for the year 1887. The decision in *California* v. *Central P. R. Co.* 127 U. S. 1 [32:150], 2 Inters. Com. Rep. 153, was announced April 30, 1888, but the last of the judgments of the circuit court therein considered and affirmed was rendered July 15, 1886. And the action of the board in years prior to 1887, as sought to be shown, was not necessarily relevant or material. Offers of proof must be offers of relevant proof, specific, not so broad as to embrace irrelevant and immaterial matter, and made in good faith. The exercise of the discretion of the trial court in rejecting these offers cannot properly be reviewed by us.

The errors assigned as to the nondeduction of outstanding mortgages from the valuation of the property are expressly waived, though it is assigned for error in the brief that the court erred in not holding that, as the state franchise was subject to the lien of a mortgage to the United States, the assessment was invalid because in effect taxing the interest of the United States in that franchise created by the 118]mortgage. *As to this, no such question was raised or passed on in the state court: and, moreover, the objection is without merit, on principle and authority, on grounds hereafter stated.

We are thus brought to the consideration of the real question in the case, presented in various aspects and argued with much ability by counsel for plaintiff in error, namely, that the company's franchises are one and inseparable, constituting an indivisible unit, which cannot be subjected to taxation by the state of California because that would be necessarily to subject the Federal franchise to taxation.

The argument is that the franchise of railroads authorized by the state Constitution and the provisions of the Political Code to be assessed is nothing but the right to operate the railroad and charge and take tolls thereon; that the right of the Central Pacific Railroad Company to construct, maintain, and operate its railroad in California was conferred upon that company by, and derived by it from, the United States; and that the right is a single right, though granted also by the state.

The company is a corporation of California, made up of two California corporations consolidated by articles of association entered into under the laws of California, and recognized as a California corporation by the acts of Congress through which it obtained Federal assistance and Federal franchises, subsequently to its incorporation in 1861 (12 Stat. at L. 489; 13 Stat. at L. 356; 13 Stat. at L. 504; 20 Stat. at L. 56), and never otherwise regarded in the legislation of the state. Indeed, by the act of April 4, 1864 (Cal. Stat. 1863-64, chap. 417), passed to "enable the said company more fully and completely to comply with and perform the provisions and conditions of said act of Congress" of July 1, 1862, California authorized the company to construct, maintain, and operate the road and telegraph in the territory lying east of the state, with the usual incidental rights, privileges, and powers, also vesting in the company the rights, franchises, and powers granted by Congress, with the express reservation that the company should be "subject to all the *laws of this state con-[119 cerning railroad and telegraph lines, except that messages and property of the United States, of this state, and of the said company, shall have priority of transportation and transmission over said line of railroad and telegraph." *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 754 [25:514]. Severance of the allegiance of the corporation to the state that created it, and deprivation or transfer of the powers and privileges conferred by the state, were not the object of the grant by the United States, nor the consequence of the acceptance of that grant by the corporation as thereto authorized by the state. *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 296 [30:83,88]. But it was not contended at the bar that the company ever became a corporation of the United States, or that it is other than a state corporation.

Even in respect of railway corporations created by act of Congress the claim of an exemption of their property from state taxation has been repeatedly denied. This was so ruled in *Union P. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5, 30, 36 [21:787, 791, 793], and *Mr. Justice* Strong said:

"It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The states are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their effi-

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cient exercise. . . . It is therefore manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents or upon the mode of their constitution or upon the fact that they are 120] agents, but upon the effect of the tax; *that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thomson* v. *Union P. R. Co.* 76 U. S. 9 Wall. 579 [19:792]. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of despatches, nor the transportation of United States mails or troops or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state, of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and if it is not, it is prohibited by no constitutional implication."

In *Thomson* v. *Union P. R. Co.* 76 U. S. 9 Wall. 579 [19: 792], the Union Pacific Railway Company, eastern division, a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road to become one link in the transcontinental line known as the Union Pacific system, in accordance with the same acts of Congress relating to plaintiff in error, and conferring the same functions and privileges. The state of Kansas having subsequently taxed the roadbed, rolling stock, and certain personal property of the corporation, its stockholders sought to enjoin the collection of the tax on the ground that the property was mortgaged to the United States and that it was bound under the congressional grant to perform certain duties and ultimately pay 5 per cent of its net earnings to the United States, and that state taxation would retard and burden it in the discharge of its obligations to the general government. But the contention was overruled, and *Mr. Chief Justice* Chase said: 121] *"But we are not aware of any case in which the real estate or other property of a corporation not organized under an act of Congress has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government. It is true that some of the reasoning in the case of *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 [4: 579], seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States. And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon state taxation, derived from the express permission to tax shares in the national banking associations, is to be so construed as not to embarrass the imposition or collection of state taxes to the extent of the permission fairly and liberally interpreted. . . . We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch* v. *Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection. . . . No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National government, but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection. *Lane County* v. *Oregon*, 74 U. S. 7 Wall. 77 [19: 105]; *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 [19: 701]. We perceive no limits to the principle of *exemption which the [122 complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government. . . .

"The nature of the claims to exemption which would be set up is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the general government. The allegation is that the government has advanced large sums to aid in the construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this state corporation, owing its being to state law, and indebted for these benefits to the consent and active interposition of the state legislature, has a constitutional right to hold its property exempt from state taxation; and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government."

In his dissenting opinion in *Union P. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 48 [21: 797], *Mr. Justice* Bradley distinguishes *Thomson* v. *Union P. R. Co.* 76 U. S. 9 Wall. 579 [19: 792], from that case thus: "That was a state corporation deriving its origin from state laws, and subject to state regulations and responsibilities. It would be subversive of all our ideas of the necessary independence of the national and state governments, acting in their

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respective spheres, for the general government to take the management, control, and regulation of state corporations out of the hands of the state to which they owe their existence, without its consent, or to attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions, to which their position, as creatures of state legislation, renders them liable."

Both these cases were referred to with ap-[123] proval by *Mr. *Justice* Miller in *Western U. Teleg. Co.* v. *Atty. Gen. of Massachusetts*, 125 U. S. 530 [31: 790], and by *Mr. Justice* Brewer in *Reagan* v. *Mercantile Trust Co.* (No. 1), 154 U. S. 413, 416 [38: 1028, 1030, 4 Inters. Com. Rep. 575]. In the latter case it was contended that as the Texas & Pacific Railway was a corporation organized under the laws of the United States, it was not subject to the control of the state even as to rates of transportation wholly within the state. The argument was that the company received all its franchises from Congress; that among those franchises was the right to charge and collect tolls, and that the state had not the power, therefore, in any manner to limit or qualify such franchise. But that position was not sustained, and *Mr. Justice* Brewer, delivering the opinion, said "that, conceding to Congress the power to remove the corporation in all its operations from the control of the state, there is in the act creating the company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."

Although the Central Pacific Company is not a Federal corporation, it is nevertheless true that important franchises were conferred upon the company by Congress, including that of constructing a railroad from the Pacific ocean to Ogden, in the territory of Utah. But, as remarked in *California* v. *Central P. R. Co.* 127 U. S. 1 [32: 150, 2 Inters. Com. Rep. 153], "this important grant, though in part collateral to, was independent of, that made to the company by the state of California, and has ever since been possessed and enjoyed." That case came up from the circuit court of the United States for the northern district of California, and the circuit court found that the assessment made by the state board of equalization "included the full value of all franchises and corporate powers held and exercised by the defendant;" and as it could not be denied that that embraced franchises conferred by the United States, it was held that the assessment was invalid, but it was not held nor intimated that if the board [124] of *equalization had only included the state franchise, the same result would have followed.

Mr. Justice Bradley, delivering the opinion of the court, said:

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the state. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the state of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the state. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as 'a royal privilege or grant of the King's prerogative, subsisting in the hands of the subject.' 2 Bl. Com. 37. Generalized and devested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is *the same as to say that the right of emi-[125] nent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

Mr. Justice Bradley then referred to *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 [4: 579]; *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 788 [6: 204], and *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], to the proposition that a power given to a person or corporation by the United States cannot be subjected to taxation by a state, and added "that these views are not in conflict with the decisions of this court in *Thomson* v. *Union P. R. Co.* 76 U. S. 9 Wall. 579 [19: 792], and *Union P. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5 [21: 787]. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. 85 U. S. 18 Wall. 35, 37 [21: 793, 794]."

Thus it was reaffirmed that the property of a corporation of the United States might be taxed, though its franchises, as for instance its corporate capacity and its power to transact its appropriate business and charge therefor, could not be. It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a state may

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tax the property of the agents, subject to the limitations pointed out in *Union P. R. Co.* v. *Peniston, supra; Van Brocklin* v. *Anderson*, 117 U.S. 151, 177 [29: 845, 854].

Of course, if Congress should think it necessary for the protection of the United States to declare such property exempted, that would present a different question. Congress did not see fit to do so here, and unless we are prepared to overrule a long line of well-considered decisions the case comes within the rule therein laid down. Although in *Thomson's Case* it was tangible property that was taxed, that can make no difference in principle, and the reasoning of the opinion applies.

Under the laws of California plaintiff in error obtained from the state the right and privilege of corporate capacity: to construct, maintain, and operate; to charge and collect fares and **126**]*freights; to exercise the power of eminent domain; to acquire and maintain right of way; to enter upon lands or waters of any person to survey a route; to construct road across, along, or upon any stream, watercourse, roadstead, bay, navigable stream, street, avenue, highway, or across any railway, canal, ditch, or flume; to cross, intersect, join, or unite its railroad with any other railroad at any point on its route; to acquire right of way, roadbed, and material for construction; to take material from the lands of the state, etc. Cal. Stat. 1861, 607; 2 Deering, Cal. Anno. Codes and Stat. 114.

It is not to be denied that such rights and privileges have value and constitute taxable property.

The general rule, as stated by *Mr. Justice* Miller in *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575, 603 [23: 663, 670], "that the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business and by the state which creates them, admits of no dispute at this day." And the Constitution of California expressly declares that the word "property" as used in § 1 of art. 13, providing that "all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value," includes franchises as well as all other matters and things capable of private ownership.

The question here is not a question of the value of the state franchise, but whether that franchise existed, for if in 1887 plaintiff in error possessed any subsisting rights or privileges, otherwise called franchises, derived from the state, then they were taxable, and the extent of their value was to be determined by the board of equalization.

So far as the ability of the company to discharge its duties and obligations to the general government is concerned, it is difficult to see that taxation of the state franchise would tend to impair that ability any more than taxation of the roadway, roadbed, rails, and rolling stock. If the necessary effect of a tax on such tangible property is not to unconstitutionally hinder the efficient exercise of the power to serve the government, neither can it be so in re- **127**]spect of the state franchise. *Indeed the taxation by the state of the franchise granted by it does not and could not prevent plaintiff in error from acting under its Federal franchise.

This was an action to recover judgment against the company under the statute, and the franchise was only an element in arriving at the valuation in making the assessment, but if the power to tax the state franchise involved the power to dispose of it at delinquent tax sale or on execution, such sale would be subject to the superior and independent rights of the United States, and the fact that this would affect the value is of no consequence. If the state franchise should be voluntarily surrendered by the company to the state, or forfeited by the state, yet the United States through the Federal franchise could still operate the road in California. And, on the other hand, should plaintiff in error in any manner be deprived of its Federal franchise, it would not thereby be prevented from operating in California under its state franchise. The right and privilege, or franchise, of being a corporation, is of value to its members and is considered as property separate and distinct from the property which the corporation may acquire; but, apart from that, if the state franchise to be assessed were confined to the right to operate the road and take tolls, such a franchise was originally granted by the state to this company, and as such was taxable property. If the subsequent acts of Congress had the effect of creating a Federal franchise to operate the road, that merely rendered the state right subordinate to the Federal right, and did not destroy the state right nor merge it into the Federal right, and no authority is cited to sustain any such proposition. No act of Congress in terms attempted to bring about this result, and no such result can be deduced therefrom by necessary implication. Whether plaintiff in error now operates its road under the franchise derived from the United States or from the state is immaterial, as the supreme court well said. The right to operate the road is valuable, whether it is being exercised or not, and the question, we repeat, relates to the existence of the franchise, and not to the extent of its value.

When we consider that plaintiff in error returned its *franchise for assessment, de- [**128** clined to resort to the remedy afforded by the state laws for the correction of the assessment as made if dissatisfied therewith, or to pay its tax and bring suit to recover back the whole or any part of the tax which it claimed to be illegal, we think its position is not one entitled to the favorable consideration of the court; but without regard to that, we hold, for the reasons given, that the state courts rightly decided that the company had no valid defense to the causes of action proceeded on.

Judgment affirmed.

Mr. Justice **White** concurred in the result.

Mr. Justice **Field** dissenting:

I am unable to concur with my associates in their opinion or judgment in the present case.

The case comes before us on writ of error to the supreme court of California, affirming the judgment of the superior court of the city and county of San Francisco, and an order of that court denying a new trial in an action brought by the People of the state against the Central Pacific Railroad Company to recover moneys alleged to be due by it to the state for taxes for the fiscal year of 1887, upon

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assessments made by the state board of equalization. The supreme court of the state affirmed the judgment of the superior court against that company in disregard, in my opinion, of the long-established doctrine of this court that the powers of the general government and the instrumentalities of the state called into exercise in enforcement of those powers cannot be impaired or their efficiency lessened by taxation or any other action on the part of the state. This doctrine has been constantly asserted by this court when called upon to express its opinion thereon, its judgment being pronounced by the most illustrious Chief Justice in its history with the unanimous concurrence of his associates. It has become a recognized principle, made familiar in the courts of the country by the decision of this court in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 [4: 579], and *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 [6: 204]. **129**] The disregard *of this doctrine in the present case recalls the aphorism of Coleridge, applied with equal force, but not more applicable, to moral principles. "Truths," he says, "of all others the most awful and interesting, are too often considered as so true that they lose all the power of truth and lie bedridden in the dormitory of the soul, side by side with the most despised and exploded errors." It would seem that the truth of the constitutional doctrine has lost some of its force by the very fact that it has heretofore been considered so true as never to be questioned.

By the act of Congress of July 1, 1862 (12 Stat. at L. 489), the Union Pacific Railroad Company was organized by Congress, and authorized and empowered to lay out, construct, furnish, and maintain a continuous railroad and telegraph, with the appurtenances, from a point on the 100th meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, to the western boundary of Nevada territory; and was vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of the act. In aid of the great work thus inaugurated, railway corporations by the states through which the overland railroad projected was to pass were called into existence. If rights, powers, privileges, and immunities were conferred by state authority upon these state corporations, they constituted a portion of their franchises, subordinate to those conferred by the general government, and comprised, with those of that government, an essential part of the means for the efficiency and usefulness of the auxiliary corporations.

The powers, privileges, and immunities conferred upon the state corporations by the United States were necessarily paramount to those derived from the state. When the powers, privileges, and immunities of such state corporations were derived solely from the authority of the state they were generally designated, when spoken of collectively, as the state franchise or franchises of the corporation, and when the rights, powers, privileges, and im- **130**] munities were supposed to be *derived solely from the United States they were generally designated, when spoken of collectively, as the Federal franchise or franchises of the corporation. When no indication of the source of the franchise or franchises was specified, the rights, powers, privileges, and immunities involved in that term held by the defendant were usually designated as the franchise or franchises of the company specifically, without other description, and the term included the powers, privileges, and immunities conferred by both Federal and state authority. The term embraced all those powers, duties, and immunities which were conferred, or supposed to be conferred, upon the railroad company for its operation from either source or from both sources.

By § 9 of the general act of 1862, mentioned above, the Central Pacific Railroad Company was authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions in all respects as were contained in the act for the construction of the overland railroad and telegraph line, and to meet and connect with the railroad and telegraph line on the eastern boundary of California. Each of the companies was required to file its acceptance of the conditions of the act in the Department of the Interior within six months after its passage.

By the 10th section of the general act the Central Pacific Railroad Company, after completing its road across the state of California, was authorized to continue the construction of the railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified in the act, upon the routes indicated, on the terms and conditions provided in the act in relation to the Union Pacific Railroad Company, until the roads should meet and connect, and the whole line of the railroad and branches and telegraph should be completed.

By § 16 of the act mentioned power was given to the Central Pacific to consolidate with the other companies named therein.

*By § 17 it was provided that in case the [**131** company or companies failed to comply with the terms and conditions of the act, Congress might pass an act to insure the speedy completion of the road and branches, or put the same in repair and use, and direct the income of the railroad and telegraph line to be thereafter devoted to the use of the United States; and further, that if the roads mentioned were not completed so as to form a continuous line from the Missouri river to the navigable waters of the Sacramento river by July 1, 1876, the whole of the railroads mentioned and to be constructed under the provisions of the act, together with all their property of every kind and character, should be forfeited to and taken possession of by the United States.

The 18th section provided that when the net earnings of the entire road should reach a certain percentage upon its cost, Congress might reduce the rates of fare thereon, if unreasonable in amount, and might fix and establish the same by law; and it declared that the better to accomplish the object of the act, namely, to promote the public interest and welfare by the construction of the railroad and telegraph

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line, and to keep the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress might, at any time, having due regard for the rights of the companies named, add to, alter, amend, or repeal the act, and the companies were required to make annual reports as to the matters mentioned to the Secretary of the Treasury.

By the act of Congress of July 2, 1864, amendatory of the act of July 1, 1862, additional powers, rights, privileges, immunities, and property were granted to the companies engaged in the great national work proposed by Congress in the former act, in order to secure the completion of that work, which, at that time, was of imminent necessity.

By § 16 of this last act it was provided that should the Central Pacific Railroad Company complete its line to the eastern boundary of the state of California before the line of the 132] *Union Pacific Railroad shall have been extended westward so as to meet the line of the first-named company, that company might extend its line eastward 150 miles on the established route so as to meet and connect with the line of the Union Pacific Railroad, complying in all respects with the provisions and restrictions of the act as to the Union Pacific Railroad, and when it was completed should enjoy all the rights, privileges, and benefits conferred by the act on the latter company.

It is found by the court that the Central Pacific Railroad Company accepted the provisions of the acts of 1862 and 1864; and that on or about October 21, 1864, that company assigned to the Western Pacific Railroad Company, a corporation created and then existing under the laws of California, all its rights under the acts of Congress so far as they related to the construction of the railroad and telegraph line between the cities of San José and Sacramento, in California; and that this assignment was ratified and confirmed by Congress, in the act of March 3, 1865, to amend the constituting acts of 1862 and 1864.

The act of March 3, 1865, provided that § 10 of the act of July 2, 1864, should be so modified and amended as to allow the Central Pacific Railroad Company, and the Western Pacific Railroad Company of California, the Union Pacific Railroad Company, and the eastern division of the Union Pacific Railroad Company, and all other companies provided for in the act of July 2, 1864, to issue their 6 per cent thirty years' bonds, interest payable in any lawful money of the United States, upon their separate roads. And the companies were thereby authorized to issue respectively their bonds to the extent of 100 miles in advance of a continuous completed line of construction, and the assignment made by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of the state, of the right to construct all that portion of the railroad and telegraph from the city of San José to the city of Sacramento, was thereby ratified and confirmed to the Western Pacific 133] Railroad Company, *with all the privileges and benefits of the several acts of Congress relating thereto, subject to the conditions thereof.

The Central Pacific Railroad Company was empowered by the state of California to construct within its limits various lines of railroad, and to equip them with the appurtenances essential to give to their operations efficiency and usefulness. It is conceded that until April 4, 1864, the Central Pacific Railroad Company and other railroad corporations of the state exercised and enjoyed what are termed the franchises of its corporations, that is, the rights, powers, privileges, and immunities conferred upon them by state authority, and also various powers, duties, privileges, and immunities conferred upon them by the general government, and which are termed their Federal franchises. But on that date, the 4th of April, 1864, the legislature of California abrogated the state franchises of those corporations, and substituted by adoption in their place the Federal franchises which have remained in force ever since.

The provisions of the act of Congress of July 1, 1862, and of July 2, 1864, state with entire distinctness the rights, powers, duties, privileges, and immunities of the principal railroad—that of the Union Pacific—and of the auxiliary roads connecting therewith. The most essential features are the following:

1. The act of July 1, 1862, authorized the Union Pacific Railroad Company to construct its road, vesting it with all powers necessary for that purpose, and requiring it to transport mails, troops, and munitions of war. This was a plain exercise of the express power "to establish post roads" and of the implied power to construct military roads.

2. The same act authorized the Central Pacific Railroad Company to construct its road on the same terms and conditions as those of the Union Pacific.

3. The 3d section of the act of July 2, 1864, provided in the usual form for the exercise by both companies of the Federal right to acquire the right of way for the construction of these post and military roads.

4. The Central Pacific Company was thus made the agent of the government in its exercise of the constitutional *power to establish [134 post roads and military roads. No state law could have obstructed or impeded the Federal government in the exercise of this power or in any degree whatever have limited or facilitated the Central Pacific Company in the enjoyment of the Federal franchise thus conferred.

5. If the consent of the state was necessary to the establishment of this road by the United States it will be found in the statute of California enacted in 1852, which, independent of its preamble, reads as follows:

"Sec. 1. The right of way through this state is hereby granted to the United States for the purpose of constructing a railroad from the Atlantic to the Pacific ocean." Cal. Stat. 1852, § 1, p. 150.

If the consent of the state was necessary to the complete substitution of the Federal franchise for any then existing state franchise for the construction of the road, it will be found in the act of the legislature of the state of California of April 4, 1864, which, after a comprehensive grant to the company of all necessary privileges and powers, including the state's right of eminent domain, made, as the act re-

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cites, "to enable said company more fully and completely to comply with and conform to the provisions and conditions of said act of Congress," concludes with the following language: "Hereby confirming to and vesting in said company all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said act of Congress; hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act or the rights and privileges herein granted." Cal. Stat. 1863-64, § 1, p. 471. In the opinion of the majority of the court, delivered by the Chief Justice, it is said that the general rule expressed by *Mr. Justice* Miller in *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575 [23: 663], "that the franchises, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business and by the state which creates them," admits of no dispute at this day, and then the opinion adds that the question here is not a question of the value of **135**] the state franchises, but *whether those franchises existed, for if, in 1887, the plaintiff in error (the Central Pacific Railroad Company) possessed any subsisting rights or privileges, otherwise called franchises, derived from the state, then they were taxable, and the extent of their value was to be determined by the board of equalization. A complete answer to the ground of the opinion is found in the act of the legislature of California of April 4, 1864, passed twenty-three years before 1887, to which I have above referred, which abrogated the state franchises previously existing, and substituted in their place the Federal franchises.

The Federal franchises for the construction of the Central Pacific railroad from the Pacific coast to the eastern boundary line of California as a part of the continuous military and post road to the Missouri river established by Congress could have had no rival in a state franchise for the construction of the same road; but in order that this might never be questioned, the legislature of the state of California obliterated its own franchises when it ratified and confirmed the franchises given by the Federal government to the Central Pacific Railroad Company. How, then, can the state twenty-three years later tax alleged state franchises claimed by its authorities to underlie the Federal franchises? Suppose the alleged state franchises should be sold for a delinquent tax thereon under the authority of the state, and an attempt should be made to place the purchaser in possession, a Federal judge would, of course, be applied to for an injunction, which would undoubtedly be granted, and the shadow of the shade of the state franchises would appear no more.

But, notwithstanding this express abrogation of the state franchises, meaning by that the powers, duties, rights, privileges, and immunities of the state corporations conferred by the legislature of the state of California, and the substitution in place thereof of the franchises conferred by the general government, the state of California has, since the abrogation of the state franchises and the substitution of the Federal franchises in various ways, subjected that railroad and its franchises, whether derived from state or Federal authority, *which [**136** were essential to the successful working of the road brought into existence by the Federal government, to heavy burdens in the way of taxation, and thus imposed an additional obstacle to the efficiency of the Central Pacific Railroad in the execution of the general operations of the overland railroad.

The question presented is whether the burden thus imposed upon the franchises, roadbed, rails, and rolling stock of railroads, whether or not operated in more than one county, can be lawfully assessed upon them when they constitute the grant of the general government, or an essential part of or are appurtenant to the franchises of the state corporation which is used as an instrumentality of the overland road. The state board of equalization has assessed the franchises of the state as a distinct element in the estimate of the valuation of the railroad, carrying its estimate to an enormous sum in many instances, as, in the present case, to the sum of $18,000,000; and at the same time it has assessed the Federal franchises, that is, those derived from the general government, as a distinct and separate element in the estimate of the valuation of the railroad, and has blended the two franchises in determining the valuation of the railroad for the purpose of taxation.

It seems to me as an extravagant, if not an absurd, position, in the face of the specific legislation by the state, abrogating its franchises of the Central Pacific Railroad Company, and substituting the Federal franchises in their place, to contend that the state franchises still exist and can be enforced and be made the subject of estimate in the valuation of the railroad for taxation. The Federal franchises, standing alone, cannot be impeded or hampered in any way by state legislation. This would follow had not the state expressed itself in the emphatic way it has done: "Confirming to and vesting in said company all the rights, privileges, franchises, powers, and authority conferred by the grant to or vested in said company by said act of Congress, hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted." The state franchises thus abrogated and discarded cannot be again *restored to life by mere [**137** words, however often repeated and with whatever asseveration made. The dishonored franchises are gone forever.

Independently of this view, the two franchises, the so-called state franchise and the so-called Federal franchise, if both exist at the same time, are to be treated as necessarily so blended together that they cannot be separated and given a distinct valuation in the total estimate. And even when separated, were that possible, the inevitable blending follows the moment the value of the railroad becomes a matter of serious consideration for the purpose of fixing the amount of the assessment. I construe the state and Federal franchises as being simply the right conferred upon them to complete and operate the road. And whatever part the state or Federal franchises may have played in accomplishing this result, the separate effect of either cannot be distinguished from the other, and apply to each and every mile of the road. The two franchises have in-

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terlaced each other at every step of their exercise. It follows that the separate estimation of the taxation of the so-called state franchises when it existed, which, as appears, was only for a limited period, was impossible, and, for many reasons which we will state, it was never intended that such state franchises should be assessed and taxed as a separate entity in the estimate of the value of the railroad.

In the case of *California* v. *Central P. R. Co.* 127 U. S. 34 [32: 155, 2 Inters. Com. Rep. 153], this court decided that, as the assessments of the state board of equalization against the Central Pacific Railroad Company of 1883 and 1884, and the assessment against the Southern Pacific Railroad Company of 1883, included the franchises conferred by the United States upon those corporations, respectively, the assessments were void as repugnant to the Constitution and laws of the United States and the power of Congress to regulate commerce among the several states. 127 U. S. 41-43 [32: 157-159].

It appears by the record that the complaint in this action contains nineteen counts, upon the same number of alleged causes of action. The first count is for state taxes; the other counts are for county taxes.

138] *In *People* v. *Central P. R. Co.* 83 Cal. 398, 399, it was held by the supreme court of the state that § 3670 of its Political Code, prescribing a special form of complaint, was in conflict with its Constitution, and that a complaint in an action to recover taxes levied upon a railroad could not join causes of action in favor of the several counties through which the road runs. But that is not material in the present action.

Each of the eighteen counts alleges that the defendant is a corporation organized and existing under the laws of California, engaged in operating a railroad in more than one county of the state. The state sets forth its claims for a recovery, and asks for judgment in its favor for the several assessments stated against the franchises, or some portion thereof, which constitute a grant of the general government, or appurtenances to the grant of the state corporation, rendering it efficient and useful as an instrumentality of the overland road, the great work undertaken by the general government. The complaint alleges in its several counts that in August, 1887, which, as stated above, was twenty-three years after the state franchises to the defendant had been abrogated and annulled, the state board of equalization, for the purpose of state and county taxation for the fiscal year ending June 30, 1888, assessed to the defendant, then the owner and operator thereof in more than one county in the state, the franchise, roadway, roadbed, rails, and rolling stock of the defendant's railway, then within the state, at the sum of $18,000,000; and that within ten days after the 3d Monday in August of that year the board apportioned the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of the defendant to the counties in the state in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amounts of the total assessment thus apportioned by the board to the counties respectively, and the number of miles of defendant's railway laid in the counties respectively.

The complaint concludes with a demand for judgment *against the defendant for the [139 several sums of state and county tax alleged to be delinquent and unpaid as stated therein, aggregating the sum of $295,740.71, with 5 per cent thereon for delinquency and nonpayment, with interest at the rate of 2 per cent on the amount from the last of December, 1887; also for the costs of suit and for attorney's fees.

To the complaint a demurrer, general and special, was interposed by the defendant. The superior court overruled the demurrer with leave to the defendant to answer the complaint.

The answer of the defendant puts in issue most of the material allegations of the complaint, and sets up various special and affirmative defenses. One of those defenses is that the "franchise" assessed to the defendant by the state board of equalization was derived from the government of the United States through certain acts of Congress (commonly known as the Pacific railroad acts); that the same is held and used by the defendant as one of the means and instrumentalities of the Federal government, and was therefore not taxable by the state; and that the assessment of this franchise was so blended with the whole assessment as not to be separable therefrom; and that the whole assessment was therefore void.

On the trial of the issues presented by the pleadings, the complainant was allowed by the court, against the objection of the defendant, to introduce in evidence (1) the duplicate record of assessment of railways by the state board of equalization for 1887, filed in the office of the comptroller of the state of California, October 11, 1887. The court overruled the objections of the defendant and admitted the paper in evidence, and an exception was taken to the ruling of the court. The duplicate record of assessment of railways by the state board of equalization for 1887, which was dated August 13, 1887, simply states that the defendant owns a certain railway in the state, operated in more than one county, being the entire railway of the company in the state, and then follows this paragraph, without any evidence in support of its averment:

"And it appearing that the actual value of the franchises, *roadway, roadbed, rails, and [140 rolling stock of said company within the state, at the said date and time, was and still is the sum of $18,000,000; therefore it is hereby ordered that the said franchise, roadway, roadbed, rails, and rolling stock, for the year 1887, be, and the same are hereby, assessed to the said Central Pacific Railroad Company at the sum of $18,000,000."

The evidence mentioned in the duplicate record of assessment of railways was the only proof offered by the plaintiff in support of any of its causes of action, and that evidence, it is plain, was not entitled to any weight in the determination of the case, not being supported by any other evidence.

On the part of the defendant evidence was offered to show that the state board of equalization knowingly included the value of the "Federal franchise" in the assessment in question, as it had done in the assessment which

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was afterwards before this court, and declared void, in *California* v. *Central P. R. Co.* 127 U. S. 1 [32: 150, 2 Inters. Com. Rep. 153], and in other assessments.

The findings of the superior court, as to the allegations of the complaint, were that they were true, except as to counsel fees, as to which it was found that a reasonable compensation for the services of two of the counsel employed was 7½ per cent on the amount recovered, and 2½ per cent for the third counsel.

As to the affirmative allegations of the answer the court among other things found:

"That on the 13th day of August, 1887, the state board of equalization of the state of California did, for the purposes of taxation for the fiscal year 1887, assess, as a unit, and not separately, the franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad, then being and situate within the state, at the sum and value mentioned in the amended complaint, and did then and there enter such assessment upon its minutes and in its record of assessments; that such assessment is the one upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the one aforesaid was ever made by the board of equalization or other assessor of the property of defendant for the fiscal year; **141**] *that the board did, at the time and in the manner alleged in the amended complaint, apportion the assessment and transmit it and the apportionment to the county and city and county auditors, and the assessment and the apportionment thereof were entered upon the assessment rolls of the counties and the cities and counties as alleged in the amended complaint, as hereinbefore found.

"That the board of equalization, in making the assessment, did assess the franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad at their full cash value, without deducting therefrom the value of the mortgage or any part thereof, or the value of the bonds issued under the acts of Congress, given and existing thereon, as aforesaid, to secure the indebtedness of the company to the holders of the bonds, and, in making such assessment the board did not deem nor treat the mortgage or bonds as an interest in the property, but it assessed the whole value of the property as assessed to defendant in the same manner it would have done had there been no mortgage thereon."

The conclusions of law from the findings were that plaintiff was entitled to recover judgment for the several principal sums of state and county taxes found in the record of assessments of railways to be delinquent and unpaid; also interest upon the principal sums from the 27th day of December, 1887, at the rate of 7 per cent per annum, up to the date of judgment; also to recover 5 per cent penalty upon the principal sums; also fees for legal services rendered herein by two of the counsel, a sum equal to 7½ per cent on the amount recovered, and by the third counsel a sum equal to 2½ per cent of that amount.

Judgment was entered upon the findings in favor of the plaintiff for the sums mentioned, and a motion for a new trial was overruled.

The majority of the supreme court of the state, in their opinion, sustained the contentions of the state upon the questions presented, with the exception of the questions in respect to interest on the amount of taxes, and the fees of one of the counsel, and affirmed the judgment entered.

*Mr. Justice McFarland dissented from [**142** the opinion of the court. This dissenting opinion expresses so fully and clearly and satisfactorily the views which I entertain that they are set forth in full:

"In my opinion," says Justice McFarland, "the assessment in question [that of 1887] is void under the decisions of the Supreme Court of the United States in the case of *California* v. *Central P. R. Co.* 127 U. S. 1 [32: 150, 2 Inters. Com. Rep. 153], because it includes a Federal franchise, and thus attempts to tax 'one of the means or instrumentalities employed by the United States government for carrying into effect its sovereign powers.' That this cannot be done by a state has been the established law ever since the decision of the United States Supreme Court in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 [4: 579], which was rendered in 1819. The principle was fully recognized and declared by this court in *San Benito County* v. *Southern P. R. Co.* 77 Cal. 518, and *San Francisco* v. *Western U. Teleg. Co.* 96 Cal. 140 [17 L. R. A. 301].

"The only difference between the above-mentioned cases in 127 U. S. 1 [32: 150, 2 Inters. Com. Rep. 153], and the case at bar is that in the former the trial court found that the state board of equalization included in the assessment the value of 'all franchises and corporate powers held and exercised by the defendant,' while in the case at bar the court below found that the said board in making the assessment for the year 1887 'did *not* include in its said assessment any Federal franchise.' But the assessment in both instances was exactly the same, namely, '*the* franchise' of the railroad. In the former cases it does not appear that the trial court received any evidence on the question as to what 'the franchise' included; and it is probable that the finding was based upon the language of the assessment alone. In the case at bar the court did receive evidence as to what the members of the board intended by the words 'the franchise,' and it appears in the record that the court, after having concluded that 'from a preponderance of evidence before it the Federal franchise of defendant was not assessed or included in the assessment,' proceeded to say that 'if by a preponderance of such evidence defendants could have shown that the state *intended to and [**143** did include the Federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done.' Now, if it was competent to introduce testimony to show the intent of the members of the board when they made the assessment, then the court clearly erred in ruling out certain evidence offered on that point by appellant. . . .

"On the other hand, if the record of the board should alone be considered, then it simply appears that 'the franchise' was assessed; and I cannot possibly see how that phrase can be construed to mean anything else than the *whole* franchise of the railroad—all the fran-

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chises belonging to it. It means just what the lower court had found it to mean, as above quoted, in the said case in 127 U. S. 1 [32: 150, 2 Inters. Com. Rep. 153]. The words 'the franchise' clearly, in my judgment, include the right of the appellant to do business—and the whole of that right. That right is a unit and inseparable. The court below found [see finding 30] that the board 'did assess as a unit, and not separately, the franchise, roadway,' etc. And I cannot conceive how a court can, first, separate it, or, second, if it could, how it could determine which part to throw away. Moreover, the main foundation of the doctrine of *McCulloch* v. *Maryland, supra*, is that the power to tax includes the power to destroy; and thus a state might, under the guise of taxation, destroy or materially cripple an instrumentality of the Federal government. And is it not manifest that in the case at bar that principle protects the instrumentality here involved from injury or destruction under the pretense that only that part of the unity which comes from the state is taxed? Are not the effects and consequences the same? In my opinion, therefore," adds the dissenting justice, "without discussing the other questions involved, the judgment should be reversed."

To review and reverse the judgment of the supreme court affirming the judgment of the superior court for the city and county of San Francisco, a writ of error to the supreme court of the state was sued out of this court, and **144**] several *assignments of error were filed for its consideration. My attention will be confined to those deemed the most important.

1st. The supreme court should have reversed the judgment of the superior court for the city and county of San Francisco on the ground that upon the finding of facts in the record the value of the "franchise" of the Central Pacific Railroad, derived from the United States, called Federal franchise, was included in the assessment of the franchise, roadway, roadbed, rails, and rolling stock of the railroad, made by the state board of equalization for the year 1887, and was inseparable therefrom; and that the whole of the assessment was therefore illegal and void under the Constitution and laws of the United States.

2d. The supreme court should have reversed the judgment of the superior court because that court found that the state board of equalization on August 3, 1887, did, for the purpose of taxation for the fiscal year, 1887, assess as a unit, and not separately, the franchise, roadway, roadbed, and rolling stock of the Central Pacific Railroad, then being within the state of California.

3d. The supreme court should have reversed the judgment of the superior court upon the ground that the property of the Central Pacific Railroad Company, including the franchise, and every part of the franchise, of the railroad, was and is subject to the lien of the mortgage of the United States to secure the indebtedness of that company to it, and the United States had and have an interest and ownership therein to the extent of the lien, and therefore the franchise of the railroad could not and cannot be taxed or assessed for taxation by the state of California, under the Constitution and laws of the United States.

4th. The supreme court should have reversed the judgment of the superior court on the ground that that court admitted in evidence the portion of the duplicate record of assessment of railways by the state board of equalization for the year 1887, relating to the assessment of the property of the plaintiff in error for that year *without proof of its correctness*.

The facts which are the basis of the several assignments of *error are contained in the [**145** legislation or authorized statements of Congress or of the states mentioned, or in the findings of the court. Their legality and validity are thereby fully established.

By the legislation of Congress to which I have referred, as well as by the legislation of the state of California, it is plain that the Central Pacific Railroad Company was made one of the means of accomplishing the great work of Congress, and whenever, by any act of the state authorities of California, the franchise of the Central Pacific Railroad Company was included in the assessment of the franchise, roadway, roadbed, rails, and rolling stock of that company, there was necessarily included the franchise thus derived from the legislation of Congress. Indeed, treating the franchise of the railroad as meaning its power to construct the work contemplated and to conduct its operations, it is difficult to see how, in any respect, its franchise could be treated other than as one entire whole. Its power to construct the road authorized by the government and to carry on its operations could not be under the control of the state authorities so as to interfere in any respect with the full exercise of the powers, privileges, and immunities granted by Congress.

And it was specially found by the court below, in its thirtieth finding of fact, that the state board of equalization on August 13, 1887, for the purpose of taxation for the fiscal year 1887, assessed as a unit and not separately the franchise, roadway, roadbed, rails, and rolling stock. It was therefore unlawful that its taxation by the state should in any respect impede, retard, or delay the exercise of the powers conferred by Congress upon the Central Pacific Railroad Company or defeat its action. Nor could any part of the powers, privileges, and immunities conferred upon the railroad be separated from the rest, so as to be treated as an independent part thereof, and any part considered as the special grant of the state and superior to or in any way impairing the control thereof by the United States pursuant to their legislation.

It also appears from the legislation of Congress that the Secretary of the Treasury was authorized to issue and did *issue to the Central [**146** Pacific Railroad Company bonds of the United States, in designated amounts per mile, to aid in the construction of its road, which bonds and interest were to be repaid by the company at their maturity, and that, to secure such repayment, the United States were to hold a lien upon all the property of the railroad company to the extent of the bonds thus issued. Any taxation of the property or franchises of

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the Central Pacific Railroad Company, without the consent of Congress, was hence an impairment of such lien of the United States, and therefore invalid.

The superior court of the city and county of San Francisco erred in receiving in evidence the portion of the duplicate record of the assessment of railways by the state board of equalization for the year 1887, relating to the assessment of the property of the plaintiff in error, for the obvious reason that such duplicate in no way established the legality and validity of the assessment.

This court, in the case of *California* v. *Central P. R. Co.* 127 U. S. 1 [32: 150, 2 Inters. Com. Rep. 153], adjudged that the state of California had no power, without the consent of Congress, to tax the franchises derived by the Central Pacific Railroad Company from the government of the United States, or any franchise conferred on it by that government, or any part of any franchise granted to that company by the United States. The opinion of the court was delivered by *Mr. Justice* Bradley.

"Assuming," he said, "that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the state. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the state of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the state. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? . . . Generalized, and devested of the special form 147] *which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society. . . . Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a state without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed or render it valueless. As *Chief Justice* Marshall said in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 [4: 579], 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws, and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity but subversive of the powers of the government and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this *subject. The principles laid down [148 by this court in *McCulloch* v. *Maryland, supra; Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 [6: 204], and *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], and numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson* v. *Union P. R. Co.* 76 U. S. 9 Wall. 579 [19: 792], and *Union P. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5 [21: 787]. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. 85 U. S. 18 Wall. 35-37 [21: 793, 794].

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be $10,000 or $1,000,000 as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases."

The important cases bearing upon the subject intervening between *McCulloch* v. *Maryland, Osborn* v. *Bank of United States*, and *Brown* v. *Maryland*, and *Thomson* v. *Union P. R. Co.* and *Union P. R. Co.* v. *Peniston*, were *Weston* v. *Charleston*, 27 U. S. 2 Pet. 467 [7: 487]; *Dobbins* v. *Erie County Comrs.* 41 U. S. 16 Pet. 435 [10: 1022]; *New York* v. *New York Tax Comrs.* 67 U. S. 2 Black, 620 [17: 451]; *New York* v. *Connelly* ("*The Banks* v. *The Mayor*") 74 U. S. 7 Wall. 16 [19: 57]; and *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 358 [19: 702]; and in those cases the doctrine was consistently maintained and enforced that a state cannot lay a tax which bears upon a power of the national government, or, in the judgment of the court, may hinder, impair, or burden any "operation" of that government, or interfere with or affect the efficiency of any "agency" of the national government in performing the functions by which it is designed to serve the United States.

In *Weston* v. *Charleston* this court declared the tax on the stock of the United States in-

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volved to be unconstitutional because it "op-[149]erated upon the power" to borrow *money on the credit of the United States, and was deemed by the court to be "a burden, however inconsiderable," on "the operations of government."

The court, speaking by *Chief Justice* Marshall, in that case, again declared that the state cannot by taxation or otherwise "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

The case of *Dobbins* v. *Erie County Comrs.* adjudged that a state tax on an officer of the United States for his office or its emoluments was void, mainly because of "its interference with the constitutional means" employed by the government to execute its powers.

The court, speaking by *Mr. Justice* Wayne, said: "Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution."

The principles declared in *Weston* v. *Charleston*, 27 U. S. 2 Pet. 467 [7: 487], governed the decisions of the court in *New York* v. *New York Tax Comrs.* 67 U. S. 2 Black, 620 [17: 451], and in *New York* v. *Connelly* ("*The Banks* v. *The Mayor*") 74 U. S. 7 Wall. 16 [19: 57], which adjudged that the bonds and other securities of the United States are "as much beyond the taxing power of the states as the operations themselves in furtherance of which they were issued."

The court again declared, in those cases, that any interference by the state governments tending to the interruption of, or in derogation of, the full legitimate exercise of the powers granted to the national government was prohibited by the Constitution.

The theory of the majority of the court below was that the franchise of this railroad can be segregated into two franchises, a state franchise and a Federal franchise. But the franchise of the railroad, or the right in the company to operate its railroad, is a single right from [150] how many sources soever *derived; and being derived from the national government, that right could not be assessed for taxation, agreeably to the Constitution of the United States, whether or not the right had been granted by the state also to the railroad company. The theory of the separation of the franchise into two distinct rights for the purpose of taxation by California is effectually disposed of by Mr. Justice McFarland, at the close of his opinion, in these few words:

"The court below found that the board 'did assess as a unit, and not separately, the franchise, roadway,' etc. And I cannot conceive how a court can, first, separate it, or second, if it could, how it could determine which part to throw away. Moreover, the main foundation of the doctrine of *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 [4: 579], is that the power to tax includes the power to destroy, and thus a state might, under the guise of taxation, destroy or materially cripple an instrumentality of the Federal government. And is it not manifest that in the case at bar that principle protects the instrumentality here involved from injury or destruction under the pretense that only that part of the unity which comes from the state is taxed? Are not the effects and consequences the same?"

The fact that each government has granted the right does not create two rights. The two grants taken together confer nothing more than each of them separately conferred. A tax on "the franchise" of the Central Pacific Railroad, being nothing more nor less than a tax on the right of the company to operate its road, is a tax on its right to operate its railroad granted by the United States, or on the franchise granted by that government.

How is that part of the franchise granted by the state to be separated from that part granted by the general government? What part of the life of this being is at the mercy of the state? Upon what member of its body may the tax collector execute his judgment of death?

If we should consider the right of the Central Pacific Railroad Company to operate its road, derived from the state, as one thing, and its same right derived from the United States *as another and distinct or different [151] thing, what results will follow? Plainly these:

If the state can tax the right so derived from itself, it can levy a tax upon it as it pleases, and may sell the right assessed, in case of nonpayment of the tax. There can be no such thing as taxable property which cannot be sold for the tax, and the title to which cannot be transferred to the purchaser. By such a sale the property will pass from the delinquent to the purchaser. If a sale could be made of this particular right, then the Central Pacific would lose the right, and the purchaser would gain it.

It is obvious that the right to operate its railroad cannot, by virtue of the state's taxing powers, be taken from the Central Pacific Railroad Company, or conferred upon any other corporation or individual. Nothing, then, would pass by such a sale, and as there is nothing to sell or transfer, there can be nothing to assess.

If the position asserted by the defendant in error, the state of California or the people of the state (considering both expressions as meaning substantially the same contesting organization), that the so-called state franchise of the Central Pacific Railroad can be separated from the Federal franchise of that company, and separately valued, and subjected to taxation, be maintained, destructive consequences would follow, as will be seen from a brief consideration.

In *Northern P. R. Co.* v. *Rockne* ("*Northern P. R. Co.* v. *Traill County*") 115 U. S. 610 [29: 480], the court, in referring to a sale, for taxes, of lands belonging to a railroad company, said: "A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the state, must carry the title to the property sold, and if it does not do this, it is because the assessment is void. It follows that if the assessment of these taxes [those previously stated to have been levied upon the lands of the company] is valid and the proceedings well conducted, the sale confers a title paramount to all others, and

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thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it." There would seem to be no doubt, 152] *therefore, that the state cannot be held to have had the power to tax the so-called state franchise of the Pacific railroad so long as it was of any validity, and previously and subsequently to its abrogation the state plainly possessed no such power unless the court is prepared to decide expressly as the effect of the legislation that Congress intended that the state should be able to devest the company of that franchise, and to transfer by a tax sale the title of the franchise to the purchaser as against both the company and the United States; and in that way to destroy the right and interest of the government of the United States in the franchise. There is clear and conclusive evidence in the Pacific railroad legislation that Congress intended that the so-called state franchise so long as it remained of any value should not be subject to state legislation, and that the right and interest of the United States therein, whilst of any value, should not be destroyed by the state in the exercise of its taxing power. For example, § 5 of the act of July 1, 1862, provides that the issue and delivery of bonds to the company, referring to bonds the issue and delivery of which were authorized by the act, shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and on the refusal or failure of the company to redeem its bonds, or any part of them, when required by the Secretary of the Treasury in accordance with the provisions of the act, then the road, with all rights, functions, immunities, and appurtenances thereunto belonging, also all lands granted to the company by the United States, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The only change made in this provision in regard to the security of the United States for the subsidy bonds is by § 10 of the act of 1864, which is that "the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the 6th section of the act, to which this act is an amendment relating to the transmission of despatches, 153] *and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States."

The subsidy bonds are therefore a mortgage upon any subsisting state franchise of the railroad, which may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States, on the refusal or failure of the company to redeem the bonds, or any part of them, when required by the Secretary of the Treasury. Congress manifestly intended that the rights of the United States under this mortgage, in respect to the state franchise, if any such existed, should not be destroyed or disturbed by the state in the exercise of its taxing power, or any other power. If the so-called state franchise of the railroad is a thing of value, as the assessment in these cases claims it to be, in the estimation of the state board of equalization, it is a valuable part of the security of the United States for the redemption of the subsidy bonds, which the Secretary of the Treasury has the right to take possession of in the contingency mentioned in the act. The franchise, if it existed and possesses any value, cannot, therefore, in my opinion, be taken from under the mortgage and transferred to a purchaser at a tax sale by the state of California.

Take, again, the provisions of the sinking fund act of May 7, 1878, which appropriates and applies the earnings of the company in the exercise of all the franchises of the company for the purposes and in the manner named. In the face of that act, it cannot be believed that Congress supposed that there was power reserved to the state to control or affect its interest or right in the franchise or franchises of the railroad, so long as it or they possessed any value.

There can be no doubt that a tax to be levied on the so-called state franchise whilst it was in existence was a tax upon the instrumentality by which the government effects its objects, and a tax upon the operations of that instrumentality, within the doctrines of this court in the great cases to which I have referred.

The United States selected this corporation as an agency for carrying out a national object, and the right of the *corporation to oper- [154 ate its railroad, or, in other words, the franchise of the railroad, whether conferred by state or national authority, or by both the state and nation, is an instrumentality by which the United States effects its objects.

As a tax on the franchise of the Central Pacific Railroad while in existence was nothing more nor less than a tax on the right of the company to operate its railroad, such a tax was a tax on its right to operate its railroad derived from the government of the United States, and therefore unconstitutional.

There are no operations of the corporation, as an agency of the government, which are performed exclusively in the exercise of any state franchise in connection with its railroad, assuming the existence of any such franchise, but all its operations are in the exercise of its entire franchise, and a tax purporting to be levied on any state franchise is therefore a tax on the operations of the corporation in the exercise of the Federal franchise, and a tax directly on the Federal franchise itself.

In *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 358 [19: 702], where the right of the states to tax the shares of the national banks was reaffirmed, it was expressly conceded that the agencies of the national government are uncontrollable by state legislation so far as it may interfere with or impair their efficiency, in performing the service or the functions for which they are employed or designed to perform.

The supreme court of California in the case of *San Benito County* v. *Southern P. R. Co.* 77 Cal. 518, accepted the authority of the decision of this court in *California* v. *Central P. R. Co.* 127 U. S. 1 [32: 150, 2 Inters. Com. Rep. 153], and held that an ordinance of the board of supervisors of San Benito county im-

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posing a license tax upon corporations or individuals engaged in the business of carrying persons or freight for hire on railroad cars in the county was void, so far as it assumed to affect the Southern Pacific Railroad Company, as the tax was deemed to be levied upon the use of the franchise granted to the company by the United States, or the operations of the railroad in the exercise of that franchise.

155] *It was determined that the franchise of that company and its use were equally beyond the taxing power of the state, or any of its political subdivisions, agreeably to the decision of this court in *California* v. *Central P. R. Co. supra*, which the court felt constrained to obey.

"The franchise" of a railroad, which is contemplated by the state Constitution and authorized to be assessed for taxation by the state board of equalization, is nothing but the right to operate the railroad, including the incidental right to charge and take tolls thereon and the like.

The Constitution applies equally to all railroads, whether owned by corporations or associations or individuals, and the assessment provided for is wholly independent of the ownership or the character of the ownership of the railroad property assessed.

The tax proposed by the Constitution is consequently and necessarily a tax upon the operations of the railroad, in the exercise of the franchise or right to operate the property.

The right of the Central Pacific Railroad Company to construct, maintain, and operate its railroad, in the state of California, was conferred upon the company by and derived by it from the government of the United States, and any assessment of the right of the company to maintain and operate its railroad, in that state, for state taxation, is void, under the Constitution and laws of the United States, whether or not the company received the same right from the state of California.

The right of the company to operate its railroad in the state is a single right and a single thing, whether the right was derived by the company from one or more than one government, and it cannot be subjected to taxation by the state of California.

In conclusion it appears beyond all controversy that the state imposed burdens in the way of taxation upon the exercise of powers and privileges conferred by the Congress of the United States upon the Central Pacific Railroad Company and other companies of the state, rights, powers, and privileges which were granted in furtherance of the great object 156]*of Congress in the creation and operation of the overland railroad, and also imposed burdens by taxation upon the mortgage held by the United States as security for the subsidy bonds issued to the company. And for such irregular and illegal action the judgment of the supreme court of the state should be reversed.

I have shown that the franchises granted by the state of California to the Central Pacific Railroad Company were abrogated and annulled by express legislation of the state on the 4th of April, 1864, and that the taxation was subsequently made against the railroad company upon an assessment of the value of its franchises thus discarded and thrown away, and after the Federal franchises that is, franchises derived by grant of the United States, had been substituted in their place and confirmed by the state, with a release of all inconsistent and conflicting provisions with the rights and privileges thus granted.

I have also shown that the assessment of the property of the defendant made in 1887 was twenty-three years after the law was passed abrogating and annulling the franchises of the state upon which the valuation for taxation was made.

I have also shown that the United States hold a lien, constituting a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, as security for certain subsidy bonds issued to the company, and on the refusal or failure of the company to redeem such bonds, or any part of them, when required by the Secretary of the Treasury, in accordance with the provisions of the act, then the road, with all rights, functions, immunities, and appurtenances thereunto belonging, also all lands granted to the company by the United States, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.

If the taxation levied in the present case can be enforced against the defendant, in face of the facts thus stated, there will be developed a new and unknown power of taxation possessed by the state, in the existence of which I shall not willingly believe.

*It seems to me clear as the sun at noon-[157 day, that the taxation imposed by the state of California upon the exercise of the powers, rights, privileges, and immunities constituting the franchises of the United States, or of the state to the overland railroad company, or to any of its auxiliary companies, to aid in the construction of the overland railroad and its connecting roads, is directly inimical to the rights and interests of the United States, and that the blending of the franchises of the United States and of the state, and the subjection of either to taxation and to sale, which must follow if the taxation be valid, would necessarily lead to the direct and speedy destruction of the different roads; and thus we should see, in the same century in which this greatest enterprise of our country was undertaken by its government and carried to completion and successful operation, that enterprise utterly destroyed—the completeness of the ruin being marked by the contrast with its original construction and successful operation, rendering its destruction the more significant and deplorable.

I am of opinion that the judgment of the supreme court of California affirming the judgment of the superior court of the city and county of San Francisco, and an order of that court denying a new trial in an action brought by the people of the state against the plaintiff corporation, should be reversed and a new trial in that action granted.

Mr. Justice **Harlan** dissenting:

On the trial of this case in the state court of original jurisdiction, the secretary of the state board of equalization, from April, 1880, to March, 1891, was called as a witness by the defendant. His examination showed that he

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was present at the meetings of that board and kept the record of its proceedings. He said that from his knowledge of what passed at such meetings he could state what elements of value were considered by the board in making their estimate for the total values for 1887. He was asked the following questions separately: "From the various sources of knowledge 158] which you *have enumerated, please state to the court what elements were taken into consideration by the state board of equalization in making the assessment of this company for the year 1887? Did you hear any conversation between the members of the state board of equalization during the meeting when the assessment of this company was made for the year 1887, with reference to the elements that they proposed to and did include in the assessment? "At the time that the assessment of 1887 was made by the state board of equalization upon the property of the Central Pacific Railroad Company, what was said and done at the meeting of the state board of equalization on that day in your presence?"

The state objected to each question, as it was propounded, and its objection was sustained, the defendant excepting.

The company then made the following offer: "Now, in view of the ruling of the court on this subject, we now offer to prove by this witness that from the time of the organization of the state board of equalization in 1880 down to and including the year 1887, that board had every year considered the value of the Federal franchise—that is, the franchise derived from the United States by the acts of Congress of the government of the United States, belonging to and owned by the Central Pacific Railroad Company, as an element of value in assessing the total value of the property of that railroad company; and that in 1888, in consequence of the decision of the Supreme Court of the United States upon the subject, the state board of equalization for the first time ceased to consider this Federal franchise as an element of value, and hence reduced their valuation by the sum of $3,000,000 on the Central Pacific Railroad Company's property." This offer was disallowed, and the company duly excepted.

Notwithstanding this action of the court, the state was permitted to prove by two members of the board, who participated in the assessment of 1887, that the Federal franchise was not included in that assessment.

One of the findings of fact was in these words: "That in making its assessment and valuation therefor of defendant's franchise said state board 159] of equalization did not include, *assess, or value any franchise or corporate power held or exercised by defendant under the acts of Congress hereinbefore mentioned, or under any act of Congress whatever. And said board, in making said assessment and valuation therefor, upon defendant's franchise, roadbed, roadway, rails, and rolling stock, for purposes of taxation for the fiscal year 1887, did not include in its said assessment and valuation therefor any Federal franchise, then possessed by defendant, nor any franchise or thing whatsoever, which said board could not legally include in such assessment or valuation. That the franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad were valued and assessed by said state board of equalization, for purposes of taxation for the fiscal year 1887, at their actual value, and in proportion to their values respectively."

A statement, on motion, was filed for a new trial and *approved by the court*. In that statement will be found the following: "In its written opinion, upon which the findings were based, the court after determining as a fact, from a preponderance of the evidence before it, that the Federal franchise of defendant was not assessed or included in the assessment of the property of defendant by the state board of equalization, for the year 1887, uses the following language: 'But if the parol evidence offered did not weigh in plaintiff's favor, and if by a preponderance of such evidence defendants could have shown that the state intended to and did include a Federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done. The best and only evidence of the acts and intentions of deliberate bodies must be drawn from the record of its intentions. . . . From both standpoints of fact and of law, the findings must be that a Federal franchise was not included in these assessments.'"

It thus appears that the trial court permitted the state to prove by oral testimony that the state board did not include the Federal franchises in its assessment, but denied to the defendant the privilege of showing, by the same kind of evidence, that such franchises were, in fact, included in the *assessment. This, 160] in my judgment, was error, and directly affected the proper determination of the Federal question. The recitals in the records of the board were not conclusive of the question. If, in fact, the board did include the Federal franchise in its assessment, the defendant should have been allowed to prove it by the best evidence capable of being produced; otherwise, it would be without remedy against a false statement on the records of the board.

Independently of this error, the judgment of the court below should be reversed upon the ground that the franchises of the Central Pacific Railroad Company are not subject to be taxed at all by the state, although some of its visible property may, according to the principles announced in former decisions of this court, be taxable for state purposes.

In the *Sinking Fund Cases*, 99 U. S. 700, 727 [25: 496, 504], this court, speaking by *Chief Justice* Waite, and referring to the Central Pacific Railroad Company, said: "By the act of 1862, Congress granted this corporation a right to build a road from San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of the state, and from there through the territories of the United States until it met the road of the Union Pacific Company. For this purpose all the rights, privileges, and franchises were given this company that were granted the Union Pacific Company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company. The land grants and the subsidy bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right

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of amendment was reserved. Each of the companies was required to file in the Department of the Interior its acceptance of the conditions imposed before it could become entitled to the benefits conferred by the act. This was promptly done by the Central Pacific Company, and in this way that corporation voluntarily submitted itself to such legislative control by Congress as was reserved under the power of amendment. . . . But for the corporate powers and financial aid granted by Congress it is not probable that the road would have been built."

161] *In *California* v. *Central P. R. Co.* 127 U. S. 1, 38 [32: 150, 157, 2 Inters Com. Rep. 153], this court, referring to the Pacific Railroad acts, so far as they related to the Central Pacific Railroad, said: "Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the act of 1862 and the subsequent acts to construct a railroad from the Pacific ocean across the state of California and the Federal territories until it should meet the Union Pacific, which it did meet at Ogden in the territory of Utah."

In the case of *United States* v. *Stanford*, 161 U. S. 412 [*ante*, 751], recently decided, we said: "In *United States* v. *Union P. R. Co.* 91 U. S. 91 [23: 283], this court, speaking by *Mr. Justice* Davis, held that the construction of a railroad connecting the Missouri river with the Pacific ocean was a national work, because such a road would be a great national highway, under national control; that the scheme for establishing that highway originated in national necessities, the country being involved at the time in a civil war which threatened the disruption of the Union, and endangered the safety of our possessions on the Pacific; and that the enterprise required national assistance, because private capital was inadequate for an undertaking of such magnitude. It appears upon the face of the act of 1862, as amended by the act of 1864, that Congress had in view the promotion of the public interest and welfare by the construction of a railroad and telegraph line that could be used by the government at all times, but particularly in time of war, for postal, military, and other purposes, and that, so far as the government and the public were concerned, such road and telegraph were to be operated as one continuous line. These ends were to be attained through the agency of a corporation created by Congress, and of certain corporations organized under state laws which Congress selected as instruments to be employed in accomplishing the public objects specified in its legislation." Again, in the same case: "Although the Central Pacific Railroad Company of California became an artificial being under the laws of that state, its road owes its existence to the national government; for, all that was accomplished by the corporation that constructed and owns it was accomplished 162] in the *exercise of privileges granted by, and because of the aid derived from the United States. . . . The relations between the California corporation and the state were of no concern to the national government at the time the purpose was formed to establish a great highway across the continent for governmental and public use. Congress chose this existing artificial being [the Central Pacific Railroad Company] as an instrumentality to accomplish national ends, and the relations between the United States and that corporation ought to be determined by the enactments which established those relations."

The relations of this railroad company to the United States as to the state is shown by the act of the legislature of California, approved April 4, 1864, entitled "An Act to Aid in Carrying out the Provisions of the Pacific Railroad and Telegraph Act of Congress and Other Matters Relating thereto," Cal. Stat. 1863-4, chap. 417, p. 471. That statute referred to the act of Congress of July 1, 1862 (12 Stat. at L. 489, chap. 120), and to enable the Central Pacific Railroad Company, therein named, more fully and completely to comply with and perform its provisions and conditions, provided that that company are "hereby authorized and empowered, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate the said railroad and telegraph line, not only in the state of California, but also in said territories lying east of and between said state and the Missouri river, with such branches and extensions of said railroad and telegraph line, or either of them, as said company may deem necessary or proper; and also the right of way for said railroad and telegraph line over any lands belonging to this state, and on, over, and along any streets, roads, highways, rivers, streams, water, and watercourses, but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same; and also the right to condemn and appropriate to the use of said company such private property, rights, privileges, and franchises as may be proper, necessary, or convenient for the purposes of said railroad and telegraph, the compensation therefor to be *ascertained and paid under 163] and by special proceedings, as prescribed in the act providing for the incorporation of railroad companies, approved May twentieth, eighteen hundred and sixty-one, and the acts supplementary and amendatory thereof; said company to be subject to all the laws of this state concerning railroad and telegraph lines, except that messages and property of the United States, of this state, and of the said company shall have priority of transportation and transmission over said line of railroad and telegraph; hereby confirming to and vesting in said company all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said act of Congress; hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted."

Looking at the question in the light most favorable to the state, it may be said that the franchises which the railroad company possesses, with reference to the construction and maintenance of its road within California, came jointly from the United States and the state. If the rights, privileges, and franchises granted by the United States to this company were not all that was needed for the accomplishment of the objects had in view by the construction of a national highway between the Missouri river and the Pacific ocean, the state enactment of

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1864, carried into the charter of the company, looking at the company simply as a state corporation, all the powers and franchises granted by the United States.

If the assessment in question had been separately upon the visible property of the company, as distinguished from its franchises, the case would have presented a different aspect; and we should then have been compelled to re-examine the question as to the extent to which the property of the company, used in accomplishing the objects designed by Congress, could be taxed by the state. But, as the opinion of the court shows, the present assessment was upon the franchise, roadway, roadbed, rails, and rolling stock of the company without stating separately their respective values. That which was invalid cannot be separated from that [164] which was valid. So *that the question is presented whether it is competent for the state to sell for its taxes the franchise of the company. If it cannot, the whole assessment is void. *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394, 415 [30: 118, 125].

The court says that the railroad company obtained from the state the right and privilege of corporate capacity; to construct, maintain, and operate its road; to charge and collect fares and freight; to exercise the power of eminent domain; to acquire and maintain right of way; to enter upon lands or waters of any person to survey route; to construct road across, along, or upon any stream, watercourse, roadstead, bay, navigable stream, street, avenue, highway, or across any railway, canal, ditch, or flume; to cross, intersect, join, or unite its railroad with any other railroad at any point on its route; to acquire right of way, roadbed, and material for construction; to take material from the lands of the state, etc.

But did it not acquire those rights and privileges also from the United States? Did not the United States grant "the fundamental franchise" to construct and maintain a railroad from San Francisco across the state and through the territories, until it met the Union Pacific Railroad? If that franchise be sold by the state for its taxes, how are the national objects contemplated by Congress to be accomplished? What becomes of the mortgage of the United States upon the entire property of the company, roadbed, right of way, rolling stock, station houses, etc., which mortgage was taken in order to secure the payment of the bonds issued by the United States under the acts of Congress? What becomes of the power of the United States reserved in the acts of Congress for the general government, in certain contingencies, to take possession of this railroad? In *Northern P. R. Co.* v. *Rockne* (*Northern P. R. Co.* v. *Traill County*) 115 U. S. 600 [29: 477], where the question was as to the power of a state or territory to tax certain lands that had been granted by Congress to aid in the construction of the Northern Pacific Railroad Company, *Mr. Justice* Miller, speaking for the court, said: "No sale of land for taxes, no taxes can be assessed on any property but [165] by virtue of the *sovereign authority in whose jurisdiction it is done. If not assessed by direct act of the legislature itself, it must, to be valid, be done under authority of a law enacted by such legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the state, must carry the title to the property sold, and if it does not do this, it is because the assessment is void. It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it."

It may be said that the franchise which the state may sell is that which was granted by it. But is the state franchise so distinct and separate from the franchise granted by the United States that it can be sold separately from the franchise granted by the United States? It seems to me that the franchise to build, operate, and maintain a railroad from San Francisco to a point of junction with the Union Pacific Railroad is a unit, and that it is utterly impracticable to separate and sell so much of that franchise as originally came from the state, and leave intact that which was derived from the United States. The state cannot lawfully do anything to impair or cripple the franchise, rights, and privileges derived from the United States. What was said in *Union P. R. Co.* v. *Myers* (*Pacific R. Removal Cases*) 115 U. S. 1, 16 [29: 319, 324], in reference to the relations between the Union Pacific Railroad Company and certain state corporations which consolidated with that company, is applicable here: "The whole being, capacities, authority, and obligations of the company thus consolidated are so based upon, permeated by, and enveloped in the acts of Congress referred to, that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities, which have their source and foundation in these acts, from those which are derived from state or territorial authority."

This court has often declared that the Central Pacific Railroad Company was one of the instrumentalities that had been *selected and [166] was being employed by the United States in accomplishing important national objects, to which the United States is competent under the Constitution. Upon the franchises, and upon all the property of that corporation, rests a mortgage to secure the government against liability for the bonds it issued to that corporation. With the consent of the state, if such consent was necessary, that corporation has received large grants of land upon the condition that it would meet and perform all the obligations imposed upon it by the acts of Congress. I cannot agree that the franchise which the corporation has received from the United States and the state can be assessed by the state for taxation, along with its roadbed, right of way, etc., and then sold. That is taxation of one of the instrumentalities of the national government, which no state may do without the consent of the Congress of the United States. Of course, this corporation ought to contribute its due share to the support of the government of each state within whose limits its property is situated and its privileges exercised. But it is for Congress to prescribe the rule of taxation to be applied at least to the franchises of the corpora-

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tion, which, although created by the state, is as much a Federal agency as if it had been created a corporation by national enactment. It has never heretofore been recognized that a state could, without the assent of Congress, sell for its taxes the franchises, rights, and privileges employed, under the authority of the national government, to accomplish national objects, particularly where such franchises, rights, and privileges are under mortgage to secure the government against specified liabilities.

For the reasons stated, I dissent from the opinion and judgment of the court.

167] SOUTHERN PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* PEOPLE OF THE STATE OF CALIFORNIA.

Case followed.

(See S. C. Reporter's ed. 167-170.)

The record in this case is substantially a duplicate of the record in *Central Pacific Railroad Company* v. *California*, 162 U. S. 91 [*ante*, 903], and presents the same questions, and the decision herein is the same as in that case.

[No. 560.]

Argued January 15, 16, 1896. Decided March 16, 1896.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming the judgment of the Superior Court of the City and County of San Francisco, and affirming an order of the last-named court denying a new trial in an action brought by the People of the State of California against the Southern Pacific Railroad Company for the recovery of taxes. *Affirmed.*

See same case below, 105 Cal. 576.

The facts are stated in the opinion.

Messrs. **J. Hubley Ashton** and *Charles H. Tweed* for plaintiff in error.

Messrs. **J. P. Langhorne, Jno. H. Miller,** and *W. F. Fitzgerald*, Attorney General of California, for defendant in error.

THE CHIEF JUSTICE: This is a writ of error to a judgment of the supreme court of the state of California affirming the judgment of the superior court of the city and county of San Francisco, and affirming an order of the superior court denying a new trial, in an action brought in the name of the People of the State of California against the Southern Pacific Railroad Company, under § 3670 of the Political Code of California, for the recovery of moneys alleged to be due as taxes to the state, and the thirteen counties of the state in which the Southern Pacific Railroad is operated, under an assessment made by the state board of equalization, for the purpose of state and county taxation for the fiscal year 1887. The congressional and state legislation calls for no special remark as contradistinguished from that in respect of the Central Pacific Company. 14 Stat. at L. 292, chap. 278; 16 Stat. at L. 573, chap. 122; 17 Stat. at L. 59, chap. 132; Cal. act of April 4, 1870 (Cal. Stat. 1869-70, 883, chap. 579); *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394, 399 [30: 118, 119]. The record is *substantially a duplicate, [168 *mutatis mutandis*, of the record of the case in *Central P. R. Co.* v. *California*, and the supreme court of California on appeal decided this case on the authority of its decision in that. 105 Cal. 576. We have just affirmed that judgment of the supreme court of California, and this must take the same course.

Judgment affirmed.

Mr. Justice **Field** dissenting:

I am unable to concur with my associates in their opinion or judgment in this case also, for the reason, as in the case of *Central P. R. Co.* v. *California*, that the judgment recovered against the Southern Pacific Railroad Company is based upon a pretended valuation of that road, in which valuation an assumed franchise granted to the company by the state of California is included.

It is conceded that until April 4, 1870, the Southern Pacific Railroad Company of the state exercised and enjoyed what are termed the franchises of its corporation, that is, the rights, powers, privileges, and immunities conferred upon it by state authority, and also various powers, duties, privileges, and immunities conferred upon it by the general government, and which are termed its Federal franchises. But on that date, the 4th of April, 1870, the legislature of California abrogated the state franchises of that corporation, and substituted by adoption in their place the Federal franchises which have remained in force ever since.

The provisions of the act of Congress of July 27, 1866 (14 Stat. at L. 292), and the subsequent amendments thereto, state with entire distinctness the rights, powers, duties, privileges, and immunities of the Southern Pacific Railroad Company. We recite the most essential features:

Section 1 authorized the Atlantic & Pacific Railroad Company to construct its road, vesting it with all powers *necessary for that pur- [169 pose (14 Stat. at L. 293), and § 3 made grants of land to the company "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores" over the route of its line of railway and branches. (14 Stat. at L. 294). This was a plain exercise of the power "to establish post roads" and of the implied power to construct military roads.

Section 18 of the same act authorized the Southern Pacific Railroad to connect with the Atlantic & Pacific Railroad, made to it similar grants of land, and made it subject to all the conditions and limitations provided in the act for the latter road. 14 Stat. at L. 299.

The Southern Pacific Railroad Company was thus made the agent of the Federal government in its exercise of the constitutional power to establish post and military roads.

If the consent of the state was necessary to the complete substitution of the Federal franchises thus granted for any then existing state franchises for the construction of the road, it

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will be found in the act of the legislature of the state of California of April 4, 1870, which, after referring to the grants made and the rights, privileges, powers, and authority vested in and conferred upon the Southern Pacific Railroad Company, provided that "to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of Congress and all other acts of Congress now in force or which may hereafter be enacted, the state of California hereby assents to said act . . . and the right, power, and privilege is hereby granted to, conferred upon, and vested in it to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of Congress, *hereby confirming* to and vesting in the said company, its successors and assigns, all the rights, privileges, *franchises*, power, and authority conferred upon and granted to or vested in said company by the said act of Congress and any act of Congress which may be hereafter enacted." Cal. Stat. 1869-70, p. 883.

The Federal franchises for the construction 170] of the Southern *Pacific Railroad from the Pacific coast to the eastern boundary line of California as a part of a continuous military and post road across the continent established by Congress could have had no rival in a state franchise for the construction of the same road; but in order that this might never be questioned, the legislature of the state of California obliterated its own franchise when it ratified and confirmed the franchise given by the Federal government to the Southern Pacific Railroad Company.

No assessment could, therefore, be laid upon any merely assumed state valuation, and consequently no tax enforced upon its alleged assessment. It follows that the judgment of the supreme court of California, affirming the judgment of the superior court of the city and county of San Francisco, should be reversed.

COUNT JOSEPH TELFENER, *Plff. in Err.*, *v.* GEORGE W. RUSS.

Action for purchase money—insufficient survey.

(See S. C. Reporter's ed. 170-183.)

1. A vendor of a right in public lands in Texas under application for their purchase cannot maintain an action for breach of the contract, when he has not filed the surveys, maps, and field notes of the land within the prescribed time, as required by the statute in order to make his claim valid against the state, and as his contract required that he should do.
2. A survey not actually made in the field, but made up from office documents, is not sufficient under the Texas act of 1879 relating to purchases of the public lands.

[No. 462.]

Argued March 2, 3, 1896. Decided March 30, 1896.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Western District of Texas in favor of the plaintiff, George W. Russ, against Count Joseph Telfener, for damages for breach of a contract for the sale of an interest in lands. *The judgment of the Circuit Court of Appeals and judgment of the Circuit Court reversed*, and cause remanded with direction for a new trial.

See same case below, 60 Fed. Rep. 228.

Statement by *Mr. Justice* **Field:**

This case comes up on a writ of certiorari issued to the United States circuit court of appeals for the fifth circuit. The action was brought for damages for an alleged breach of a contract for the sale, by the defendant to the plaintiff, of certain unappropriated public lands of the state of Texas, the right to the title of which he claimed to have acquired from the state, and it arose upon the following facts: In July, 1879, the legislature of that state passed an act for the sale of a portion of its unappropriated public lands and the investment of its proceeds. It provided that any person, firm, or corporation desiring to purchase any of such lands set apart and reserved for sale might do so by causing the tract of land which the parties desired to purchase to be surveyed by the authorized public surveyor of the county or district in which the land was situated. And it was made the duty of the surveyor, to whom *application was made by responsible par-[172 ties, to survey the lands designated in such application within three months from the date thereof, and within sixty days after the survey, to certify to record and map the field notes of the survey, and to return to and file the same in the general land office, as required by law in other cases. The statute also provided in its 5th section that within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field notes of the land desired, it should be the right of the parties who had the same surveyed to pay or cause to be paid into the treasury of the state the purchase money therefor at the rate of 50 cents per acre, and that upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for the purchase money, the commissioner should issue to the applicant a patent for the tract or tracts of land thus surveyed and paid for.

The statute declared that no tract of land should be sold under the provisions of the act which contained more than 640 acres, and that no tract should have a greater frontage on any running stream or permanent water than 1 vara per acre for each survey of 320 or less, and ¼ of 1 vara per acre for all other surveys.

The statute also enacted that after the survey of any of the public domain authorized, it should not be lawful for any person to file or locate upon the lands surveyed, and that such

NOTE.—*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

As to contracts: performance, when excused by nonperformance of other party or his prevention of performance,—see note to United States v. Peck, 26: 46.

As to certiorari in United States courts, see note to Clark v. Hackett, 17: 69.

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file or location should be void. It also declared that should any applicant for the purchase of public lands fail, refuse, or neglect to pay for the same at the rate of 50 cents per acre within the time prescribed in § 5 of the act, that is, within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field notes, he should forfeit all rights thereto, and should not thereafter be allowed to purchase the same, and that the land thus surveyed might be sold by the commissioner of the general land office to any other person, firm, or corporation who would pay into the treasury the purchase money therefor.

The plaintiff below, the defendant in error in 173] this case, *George W. Russ, a citizen of Texas, alleged that some time in October, 1882, he, being a responsible party, and intending to purchase a body of land which was subject to purchase and sale, applied, under the act of Texas, as amended to the surveyor of the county of El Paso, for the purchase from the state and for the survey of 1830 sections of land of 640 acres each, *being, in the aggregate*, 1,160,320 acres, situated in that county, and forming part of the Pacific Reservation; that the application was made in two instruments, describing different portions of the land, and that his applications were filed and recorded in the office of the surveyor; that on the 1st of November, 1882, he was about to proceed to have the lands surveyed into tracts of 640 acres each, when the defendant below, Telfener, offered to assume the payment thereof and to contract for the sale and assignment of his, Russ's, right to purchase the lands applied for from the state, and that thereupon a contract was executed between them, Russ and Telfener, bearing date on that day, in two separate instruments, constituting, however, only one distinct contract in its entirety, and as such contract, with dependent conditions, it was declared upon, by the terms of which Russ, claiming to have made application in due form for the purchase of about 1,000,000 acres of land in El Paso county, and reciting that Telfener was desirous of purchasing of him all his right, title, and interest in the lands under the applications made for their purchase, provided they were regularly made under the act of July 14, 1879, agreed and promised to transfer and assign to Telfener all his (Russ's) right, title, and interest in the lands applied for, the consideration being 25 cents per acre, which consideration Telfener promised to pay, and Russ also agreed to have the surveys made and filed with the maps and field notes in the general land office, for which Telfener was to pay him 5 cents per acre. It was for an alleged breach of this contract that the action of Russ, the plaintiff below, v. Telfener was instituted.

Messrs. **Andrew Wesley Kent** and **J. L. Peeler**, for plaintiff in error:

The defendant in error never at any time acquired an interest under the statutes in the whole body of land.

An application for a survey made under the statutes confers no right upon the applicant.

Campbell v. *Blanchard* (Tex.) 2 Posey, U. C. 321; *State* v. *Work*, 63 Tex. 148; *White* v. *Martin*, 66 Tex. 340.

It is only when the survey authorized by the statutes is made, that a right is vested in the applicant.

Jumbo Cattle Co. v. *Bacon*, 79 Tex. 3; *Campbell* v. *Wade*, 132 U. S. 37 (33: 242).

No survey of the whole body of land had been made, or in any manner attempted, on the 1st day of November, 1882.

Benj. Sales, § 501.

The defendant in error never acquired an interest under the statutes in any of the lands, because the same were not surveyed on the ground, as required by law.

Horton v. *Pace*, 9 Tex. 84; *Jenkins* v. *Chambers*, 9 Tex. 231; *Jones* v. *Burgett*, 46 Tex. 283; *Styles* v. *Gray*, 10 Tex. 506; *Thomson* v. *Houston & T. C. R. Co.* 68 Tex. 392; *Stafford* v. *King*, 30 Tex. 257, 94 Am. Dec. 304.

Assuming the lands to have been surveyed on the ground, the defendant in error acquired no interest in the 1,144,960 acres, because the field notes thereof were not filed as required by the statutes.

Campbell v. *Wade*, 132 U. S. 37 (33: 242).

The defendant in error, having failed to secure any interest under the statutes in the 1,144,960 acres, there was a total failure of consideration and the contract became void.

Messrs. **Clarence H. Miller, Joseph Wheeler**, *Josiah Patterson*, *Frank Fiset*, *S. R. Fisher*, and *E. B. Hancock*, for defendant in error:

This court has laid down the rule which should govern the amount of damages due Russ in a breach of contract like this.

Anvil Min. Co. v. *Humble*, 153 U. S. 551 (38: 818).

Plaintiff's claim was assignable.

Graham v. *Henry*, 17 Tex. 164; *Merriweather* v. *Kennard*, 41 Tex. 273; *Capp* v. *Terry*, 75 Tex. 395; *Briggs* v. *United States*, 143 U. S. 346 (36: 180); *Butt* v. *Ellett*, 86 U. S. 19 Wall. 544 (22: 183); *Brown* v. *Chambers*, 12 Ala. 697; *Ensign* v. *Kellogg*, 4 Pick. 1; *Rodgers* v. *Dibrell*, 6 Lea, 69; *Dyer* v. *Burnham*, 25 Me. 9; *Coverdale* v. *Aldrich*, 19 Pick. 391; Burrill, Assignments, ¶ 65, *note 4*.

Timber culture and desert claims are very different.

Hobbs v. *McLean*, 117 U. S. 576 (29: 944); *Jumbo Cattle Co.* v. *Bacon*, 79 Tex. 13; *Bacon* v. *State*, 2 Tex. Civ. App. 692.

In consequence of Telfener's failure to pay for the land, the second contract never became operative, and Russ was under no obligation to have the land surveyed.

Pollard v. *Dwight*, 8 U. S. 4 Cranch, 421 (2: 666); *Griffith* v. *Bradshaw*, 4 Wash. C. C 171; *Chanter* v. *Leese*, 5 Mees. & W. 701.

Mr. Justice **Field**, after stating the provisions of the act of Texas as above, delivered the opinion of the court:

No right, title, or interest in the lands which Russ desired and applied to purchase passed to him solely by his application for the survey Until that was followed by the survey, map and field notes of the survey, and they were filed in the general land office of the state, it gave no right to the applicant to purchase the land.

In *White* v. *Martin*, 66 Tex. 340, the court, referring to the act of July 14, 1879, asks the

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pertinent question, How may an applicant for lands under that statute become a purchaser? and replies as follows:

"The statute answers the question. He 'may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed.' When this is done *as the act contemplates*, then *and not before, the state contracts, upon the purchaser's complying with the other requirements of the act, that it will convey to him the land surveyed.* When this point was reached there existed an executory contract which gave the purchaser a vested right, upon complying with his part of the contract, to have the land purchased."

In *Campbell* v. *Wade*, 132 U. S. 34 [33: 240], which was in this court at the October term, 1889, it was stated that it was contended in the state courts, and the contention was renewed here, that the petitioner (who desired to purchase a portion of the unappropriated lands of Texas), by his application for a survey, had acquired a vested interest in the lands he desired to purchase, which could not be impaired [175] by their subsequent withdrawal *from sale. But the court replied that this position was clearly untenable; that the application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the state. The application was to be followed by a survey, and the surveyor was allowed three months in which to make it. By the express terms of the act, it was only after the return and filing in the general land office of the surveyor's certificate, map, and field notes of the survey that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter. "But for this declaration of the act," said the court, "we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the state. Clearly," the court adds, "there was no such right in advance of the survey. The state was under no obligation to continue the law in force because of the application of any one to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter; nor, in the absence of other proceedings, could it bind the state to sell the lands."

There is another view of this case which merits consideration. The contract between Russ and Telfener was for Russ to sell to the latter his right to purchase from the state the entire tract of 1813 sections of its public lands for which he had applied, not for any particular portion of that tract. Telfener had never proposed to take any less than the whole amount nor contracted to do so. An offer of any less by Russ, had it been made, of which there is no evidence, would never have been a compliance with his contract with Telfener.

It does not appear that the entire tract of land was surveyed until after November 1, 1882. At that time 98 sections, embracing 62,720 acres of the tract, were unsurveyed, and it could not, in truth, be alleged that on the 1st day of that month the plaintiff was the sole owner of a valuable, valid, and transferable interest in the whole body of land, embracing 1813 tracts, amounting to more than 1,000,000 acres of *land, as averred by [176 him in his declaration. On the contrary, he possessed no interest in the whole body of land of that amount, and if the contract for the purchase was possessed of any validity, it must have applied to the whole body in its entirety and not to any particular portion thereof. And of the land surveyed, payment at the rate of 50 cents per acre was only made on twenty-five of the surveys, at least there was no evidence of the payment on any other land surveyed. And the applicant Russ had acquired no vested right to purchase of the state the whole of the land because he had not complied with the law in that behalf.

The 9th section of the statute declared in express terms that should the applicant for the purchase of public lands fail, refuse, or neglect to pay for the same, at the rate of 50 cents per acre, within the time prescribed in § 5 of the act, which was within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field notes of the land desired, he should forfeit all right thereto, and should not thereafter be allowed to purchase the same, and the land thus surveyed might be sold by the commissioner to any other party who would pay into the treasury the money therefor. No official survey, as it appears, was made of the whole amount of the lands which the plaintiff below, Russ, desired to purchase, and no map or field notes of the whole amount were ever made and returned to the general land office, and no payment for the lands was ever made or tendered to the treasurer of the state. The claim, therefore, of having acquired any right or title in and to the whole amount of the lands by the proceedings taken was manifestly groundless. The plaintiff below could not convey any proprietary interest in the whole amount of the lands desired until the required payment therefor was made, and any promise by the defendant below, Telfener, to pay to him 25 cents, or any amount, for an acre of such hoped for and not acquired land, or for any less quantity, was worthless, without any value or consideration. The plaintiff below, however, pushed his claim for the compensation of 25 cents an acre, which not being recognized, he brought an action against Telfener *to recover the same and for the surveys [177 and the return and filing of the same and the map and field notes in the district court for the county of Travis, in Texas. The defendant below, Telfener, appeared to the action, and on his motion it was removed to the circuit court of the United States for the western district of Texas. He then answered the petition, denying its allegations, and averring that his pretended agent, one Baccarisse, through whom Russ alleged the contract was made, never had any authority to make a contract of the kind, and that Russ never acquired by his applications any right or interest in the land, the right to purchase which he claimed to have sold to the defendant, the survey, map, and field notes never having been returned to the general land office as required by the 3d section of the statute of Texas, and he never having made or tendered any payment for the

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same as also required by that section, and that any interest thus acquired was without any tangible or appreciable value.

The case was tried in the circuit court of the United States at Austin, Texas, and a judgment therein was rendered in favor of Russ against Telfener, the plaintiff in error, in July, 1893, for the sum of $518,440.50.

The latter thereupon took the case on writ of error to the United States court of appeals for the fifth circuit, where the judgment was affirmed in February, 1894.

He then filed a petition for rehearing in the court of appeals, which was overruled in May, 1894, and the case was afterwards removed into this court on petition of the plaintiff in error upon a writ of certiorari in October, 1894.

The plaintiff in error now submits, upon the writ of certiorari from this court, that there was manifest error in the rulings of the circuit court of appeals requiring the reversal of its judgment, in this:

First. That the law of Texas expressly restricted the right of the applicant to purchase any portion of the unappropriated public lands of the state to 640 acres in one tract, and in this case the plaintiff claimed, and the court of appeals sustained his claim, that he had ac-[178] quired a *right pursuant to the proceedings taken under the statute, to purchase 1,160,320 acres in one tract of the unappropriated lands of the state.

Second. That the evidence in the record shows that the alleged contract between the plaintiff in error and Russ was made on the 1st day of November, 1882, and that after that date Russ caused 98 sections of the lands, embracing over 62,720 acres (the right or privilege to purchase which he pretended to have previously sold to the plaintiff in error) to be surveyed, and though, until such survey and its completion and return with map and field notes to the commissioner of the general land office and filing of the same in that office, no right or privilege on the part of Russ to purchase any portion of the 98 sections was initiated, the court of appeals held that Russ had a valuable and assignable right in those sections, whether the survey thereof and its field notes were returned and filed in the general land office or not, directly in contravention of the 3d section of the statute of Texas, which declares that "it shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record, and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in other cases." And also in disregard of the forfeiture of any right acquired by Russ to purchase the lands for which he had applied, imposed by section 9 of the statute of Texas, which declares in express terms that should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same at the rate of 50 cents per acre within the time prescribed in § 5 of this act, that is, within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field notes of the land desired, he shall forfeit all right thereto, and shall not thereafter be allowed to purchase the same, but *the land so [179] surveyed may be sold by the commissioner of the general land office to any other person, firm, or corporation who shall pay into the treasury the purchase money therefor. And the evidence contained in the record shows the fact to be that out of the 1813 sections of land of which survey was desired, only the field notes of a portion of the sections were returned and filed within the time required, yet the circuit court of appeals held that it was wholly immaterial whether the surveys under the application of Russ were made and returned within the sixty days designated, or not returned at all, which ruling was plainly in disregard of the express provisions of the act of the Texas legislature, providing for the sale of any of the unappropriated public lands of the state.

Third. That the testimony contained in the record of the cause further shows that none of the sections which Russ alleged that he had requested to be surveyed, and had obtained a survey thereof, were surveyed on the ground, but that which was alleged to be a survey of the sections and returned as such consisted of work done in the office of the commissioner of the general land office and presented as a survey, and although it was held by the laws of Texas and the decision of its supreme court that the surveys of its unappropriated public land must be made on the ground that the surveys not thus made were null and void, and did not confer upon the applicant any right of purchase, the court of appeals held that it was immaterial whether the surveys were actually made on the ground or consisted of office work.

Fourth. But assuming that the plaintiff finally pursued fully all the proceedings required to obtain a right to purchase of Texas the whole amount of her unappropriated lands claimed, namely, 1,160,320 acres, and the contract alleged between Russ, the plaintiff, and Telfener, the defendant, was made, yet such contract was conditional and dependent upon the performance by the respective parties of the conditions devolving upon each party at the time stipulated, and ceased to be binding upon either one on the failure of the other to *comply with the performance stipulated [180] on his part. Russ, the plaintiff, was to acquire of the state such interest in the property as would authorize him to sell and transfer to the defendant a valid title thereto, and to acquire such a valid title he was bound to make performance of his contract with the defendant by filing the surveys, map, and field notes of the whole within the prescribed time so that the defendant might have the right to demand patents of the state on payment of the purchase money of such property to its treasury, which he never did, and therefore released the defendant of all obligations to perform the alleged contract on his part. Authority for this position will be found in the cases of *Bank of Columbia* v. *Hagner*, 26 U. S. 1 Pet. 465 [7: 223]; *Hill* v. *Grigsby*, 35 Cal. 656; and *Englander* v. *Rogers*, 41 Cal. 421.

In *Bank of Columbia* v. *Hagner*, 26 U. S. 1 Pet. 455, 465 [7: 219, 223], this court, speaking

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by *Mr. Justice* Thompson of the distinctions made in covenants or promises of parties to a contract for the purchase and sale of real property, whether they were to be considered as independent or dependent, said: "It is evident that the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration upon the contracts containing dependent undertakings, and that averment must be supported by proof."

In this case there was no offer or tender of performance by the plaintiff to the state, which was essential to create an obligation to pay any money on the part of the defendant. There is therefore no ground for recovery by the plaintiff upon his alleged contract with the defendant, there having been no such perform-[181]ance, or offer of performance, on his *part to the state as would enable him to acquire such an interest in the property that he could comply with his engagement to the defendant.

In *Hill* v. *Grigsby* the supreme court of California held that "in a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or as soon as it is paid, the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform, on his part. Performance, or an offer to perform, on the one part, is a condition precedent to the right to insist upon a performance on the other part." 35 Cal. 656.

And in *Englander* v. *Rogers* the same court held that "the obligations of the parties to an agreement for the sale of land are mutual and dependent, where one is to convey, and the other at the same time to pay, the purchase money; and neither can put the other in default, except by tendering a performance on his part, unless the other party waives the tender or by his conduct renders it unnecessary." 41 Cal. 420.

It is only upon the return and filing in the general land office as stated above that any right to the land surveyed attaches to the applicant, and until such filing the state does not agree to part with any interest in the lands surveyed and the purchaser does not acquire any.

Such was the decision of this court when the case was before it at the October term of 1891. 145 U. S. 522, 532 [36: 800,805]. "An applicant," we there said, "under the laws of Texas, for the purchase of a portion of its unappropriated public lands, could acquire no vested interest in the land applied for, that is, no legal title to it, until the purchase price was paid, and the patent of the state was issued to him. If the price was not paid within sixty days after the return to the general land office of a map of the land desired and the field notes of its survey, he forfeited all right to the land and was not thereafter allowed to purchase it." We added, however, that he had "the right to complete the purchase and secure a patent within *the prescribed period, *after the map* [182] *and field notes of the survey were filed* in the general land office," which is designated in the decisions of the supreme court of the state as a vested right that could not be defeated by subsequent legislation.

This reserved right, however, only applies where the map and field notes of the survey have been previously filed in the general land office. No such reserved right could be asserted in the present case, for no such field notes of all the lands were previously filed. The claim of Russ, the plaintiff below, was that he had an assignable right on November 1, 1882, to 1813 sections of land for which he had made application in October of that year. There are objections to recognizing that the field notes of such alleged 1813 sections were filed before the expiration of three months. They were of no validity if not made on the ground, and it is not pretended that the field notes were made by a survey on the ground, and it is not shown that they were made or could be made in any other way.

Each of the 1813 sections was to be in a tract of 640 acres. It appears by the record that the field notes of the survey purport to have been made between the 13th of October and the 3d of November, 1882, except sections 1-24. It is to be borne in mind that each section of 640 acres comprises a distance around it of 4 miles, and the 1813 sections, leaving out the 24 sections which are claimed to have been surveyed on the 9th of November, 1882, would embrace a circumference of 7,156 miles, and the survey of the 24 sections would have embraced 96 miles additional. No survey of land on the ground, of that extent, could have been made during the time designated. Neither the 24 sections, embracing 96 miles, could have been surveyed in one day—the 9th of November—nor the 1,789 remaining, embracing 7,156 miles, in the *twenty-one days between the 13th [183] of October and the 3d of November, 1892. Therefore, if any surveys were returned in such sections they must have been made up from office documents, and not by actual survey on the ground.

In *Bacon* v. *State*, 2 Tex. Civ. App. 692, the court of civil appeals of Texas decided that under the act of July 14, 1879, as amended by act of March 11, 1881, providing that any person desiring to purchase any unappropriated land may do so by causing the tract which said person desires to purchase "to be surveyed" by the authorized public surveyor of the county in which the land is situated, a survey not actually made in the field, but copied from the field notes of a prior survey on file in the surveyor's office, is not such a survey as is contemplated by the act of the legislature; and that such a survey does not entitle the proposed purchaser to a deed to the land.

The claim that the plaintiff below, Russ, had parted with valuable property, for which he was entitled to a judgment exceeding half a million of dollars from Count Telfener, for having transferred to him his hopes of securing 1,000,000 acres of land from the state, for

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which he did not hold any promise or obligation of the state, does not merit consideration. As a claim it rests upon no solid foundation.

It follows that, for the errors stated, *the judgment of the circuit court of appeals should be reversed, and the judgment of the circuit court should also be reversed*, and the cause remanded with a direction to set aside the verdict and grant a new trial, and it is so ordered.

184] CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY ET AL., *Appts.*,

v.

INTERSTATE COMMERCE COMMISSION.

INTERSTATE COMMERCE COMMISSION, *Appt.*,

v.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 184-197.)

Railroad company, when amenable to interstate commerce act—foreign traffic—jurisdiction of Interstate Commerce Commission—inquiry by Commission—function of Commission.

1. When a railroad company enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce.
2. A railroad company which has elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the Interstate Commerce Commission, cannot limit that control in respect to foreign traffic to certain points on its road, and exclude other points.
3. It is within the jurisdiction of the Interstate Commerce Commission to consider whether a railroad company transporting interstate freight, and charging a higher rate for a shorter than for a longer distance over the same line in the same direction, is doing it under substantially similar circumstances and conditions.
4. It is not proper for railroad companies to withhold the larger part of their evidence from the Interstate Commerce Commission, and first adduce it in the circuit court in proceedings by the Commission to enforce its order; but the purposes of the act of Congress to regulate commerce call for a full inquiry by the commission in the first instance.
5. The power of the Interstate Commerce Commission to pass upon the reasonableness of existing rates of carriers does not necessarily imply a right on the part of the Commission to prescribe rates for carriers, in advance of any issue made on the subject, but the function of the Commission is to consider and give proper weight to the facts on which the reasonableness of a rate in a given case depends when such a case is presented.

[Nos. 394, 473.]

Argued January 30, 31, 1896. Decided March 30, 1896.

APPEALS from a decree of the United States Circuit Court of Appeals for the Fifth Circuit reversing the decree of the Circuit Court of the United States for the Northern District of Georgia, and remanding to the latter court the cause with instructions to enter a decree in favor of the Interstate Commerce Commission, and against the Cincinnati, New Orleans, & Texas Pacific Railway Company *et al.*, commanding the latter to cease and desist from making any greater charge on freight from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

*On October 18, 1889, the James & [185 Mayer Buggy Company, a corporation of the state of Ohio, and doing business at Cincinnati, filed a complaint before the Interstate Commerce Commission against the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, alleging that said defendants were common carriers "under a common control, management, or arrangement for continuous carriage or shipment," and charged the same rate for transporting vehicles shipped by the complainants from Cincinnati, whether shipped to Atlanta, Georgia, a distance of about 474 miles, or to Augusta, Georgia, a distance of 645 miles, and charged 30 cents per 100 pounds more on such vehicles shipped to Social Circle, Georgia, than when shipped to either Atlanta or Augusta.

The Cincinnati, New Orleans, & Texas Pacific Railway extends from Cincinnati to Chattanooga, Tennessee; the road of the Western & Atlantic Railroad Company begins at Chattanooga and extends to Atlanta; and that of the Georgia begins at Atlanta and ends at Augusta. These respondents filed answers, from which, and from the allegations of the complaint, it appeared that the complainants shipped their goods, at first-class rates, by through bills of lading, from Cincinnati to Atlanta, to Social Circle, and to Augusta; that through rates, of $1.07 per 100 pounds, were charged to both Atlanta and to Augusta, of which the Cincinnati, New Orleans, & Texas Pacific Railway Company received $55\frac{7}{10}$ cents; the Western & Atlantic, $22\frac{9}{10}$ cents; and the Georgia Railroad Company, $28\frac{4}{10}$ cents. Social Circle is a local station on the Georgia Railroad, 52 miles east of Atlanta, and 119 miles west of Augusta. When goods were shipped to Social Circle the complainants had to pay

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NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to tonnage tax, see note to Inman S. S. Co. v. Tinker, 24: 118.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute, when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid,—see note to Harmon v. Chicago, 37: 216.

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$1.37 per hundred pounds, of which 75 9/10 cents went to the Cincinnati, New Orleans, & Texas Pacific Company, 31 1/10 to the Western & Atlantic, and 30 cents to the Georgia,—the said amount of 30 cents per 100 pounds being the local charge made by the Georgia company on similar freight carried by it from Atlanta to Social Circle.

186]*The complainants contended that as the rate to Augusta was $1.07 per 100 pounds, that charge was excessive when made against similar freight carried to Atlanta, which is 171 miles nearer to the point of shipment. They also contended that the charge of $1.37 to Social Circle was excessive and undue, as the defendants carried similar freight for $1.07 to Augusta, a greater distance of 119 miles.

The respondents claimed that they were justified in charging the same rate to Augusta as to Atlanta, because the former was a competitive point; and as to the rates to Social Circle, they claimed that the goods were not carried to that point under a common control, management, or arrangement for continuous carriage or shipment, but that the additional 30 cents per 100 pounds was the local charge for similar service by the Georgia company, and that therefore the case of goods carried to Social Circle was not within the provisions of the act to regulate commerce.

The controversy before the Commission resulted in an order requiring the defendants to cease and desist from making any greater charge in the aggregate on buggies, carriages, and other freight of the first class, carried in less than car loads from Cincinnati to Social Circle, than they charged on such freight from Cincinnati to Augusta, and to cease and desist from making any charge for the transportation of such freight from Cincinnati to Atlanta in excess of $1 per 100 pounds. This order was dated June 29, 1891, and was to operate from July 20, 1891.

The defendants having refused to obey this order and failed to alter or modify their charges, the Interstate Commerce Commission filed a bill or petition in the circuit court of the United States for the northern district of Georgia, seeking to enforce the said order.

To this bill the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company of Georgia filed a joint and several answer, in which they alleged that the said companies jointly operated the railroad from Atlanta to Augusta as assignees of one William Wadley, to whom that road had been 187] previously leased by "the Georgia *Railroad and Banking Company," a corporation of the state of Georgia, and that they so operated said railroad under the adopted name of the "Georgia Railroad Company," but that there was no such corporation as the "Georgia Railroad Company." This answer further denied the allegation of the petition of the Commission in so far as they charged that rates charged by them were undue or excessive, or in disregard of the provisions of the act to regulate commerce.

An answer was filed by the Cincinnati, New Orleans, & Texas Pacific Railway Company, traversing the allegations of the bill, so far as it alleged the charging of undue or unreasonable rates to Atlanta or to Social Circle. The Western & Atlanta Railroad Company set up in its answer that it had no existence as a corporation at the time of the proceedings before the Interstate Commerce Commission, and had no connection with the matters therein complained of, and therefore prayed that, as against it, the petition of the Commission should be dismissed. (This position was subsequently abandoned.)

Under the issues thus formed a considerable amount of testimony was taken; the cause came on to be heard, was argued by counsel, and thereupon, on June 5, 1893, the court, holding that the matters of equity alleged in the bill were fully denied in the answers, and were not sustained by the proof, decreed that the bill be dismissed.

From this decree an appeal was taken to the United States circuit court of appeals for the fifth circuit, and was there so proceeded in that on May 27, 1894, the decree of the circuit court was reversed, and the cause was remanded to that court with instructions to enter a decree in favor of the Interstate Commerce Commission and against the defendants, commanding the latter to cease and desist from making any greater charge in the aggregate on buggies, carriages, and on other freight of the first class carried in less than car loads, from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta.

Appeals were taken from this decree and errors assigned respectively by the defendants and by the Commission.

Messrs. **N. J. Hammond** and **George F. Edmonds** for Interstate Commerce Commission.

Messrs. **Ed. Baxter,** *Edw. Colston, Geo. Hoadley, Jr., Jos. B. Cumming, Geo. Hillyer,* and *Payne & Tye* for Cincinnati, New Orleans, & Texas Pacific Railway Company *et al.*

Mr. Justice **Shiras** delivered the opinion of the court:

The investigation before the Interstate Commerce Commission resulted in an order in the following terms:

"It is ordered and adjudged that the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, do, upon and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater compensation in the aggregate for the transportation in less than car loads of buggies, carriages, and other articles classified by them as freight of first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the state of Ohio, to Social Circle, in the state of Georgia, than they charge or receive for the transportation of said articles in less than car loads for the longer distance over the same line from Cincinnati aforesaid to Augusta, in the state of Georgia; and that the said defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, do also, from and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and other first class articles in less than car

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loads, from Cincinnati aforesaid to Atlanta, in the state of Georgia, $1 per 100 pounds."

The decree of the circuit court of appeals, omitting unimportant details, was as follows:

"It is ordered, adjudged, and decreed . . . that this cause be remanded to the circuit court, with instructions to enter a decree in favor of the complainant, the Interstate Com-
189] merce *Commission, and against the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge in the aggregate on buggies, carriages, and on all other freight of the first class carried in less than car loads from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta; that they so desist and refrain within five days after the entry of the decree, and in case they or any of them shall fail to obey said order condemning the said defendants and each of them to pay $100 a day for every day thereafter they shall so fail, and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta."

It will be observed that in its said decree the circuit court of appeals adopted that portion of the order of the Commission which commanded the defendants to make no greater charge on freight carried to Social Circle than on like freight carried to Augusta, and disapproved and annulled that portion which commanded the Cincinnati, New Orleans, & Texas Pacific Railway Company and the Western & Atlantic Railroad Company to desist from charging for the transportation of freight of like character from Cincinnati to Atlanta more than $1 per 100 pounds.

The railroad companies in their appeal complain of the decree of the circuit court of appeals in so far as it affirmed that portion of the order of the Commission which affected the rates charged to Social Circle. The Commission in its appeal complains of the decree in that it denies the relief prayed for in relation to charges on freight from Cincinnati to Atlanta.

The first question that we have to consider is whether the defendants in transporting property from Cincinnati to Social Circle are engaged in such transportation "under a common control, management, or arrangement for a continuous carriage or shipment," within the meaning of that language as used in the act to regulate commerce.

190]*We do not understand the defendants to contend that the arrangement whereby they carry commodities from Cincinnati to Atlanta and to Augusta at through rates which differ in the aggregate from the aggregate of the local rates between the same points, and which through rates are apportioned between them in such a way that each receives a less sum than their respective local rates, does not bring them within the provisions of the statute. What they do claim is that, as the charge to Social Circle, being $1.37 per 100 pounds, is made up of a joint rate between Cincinnati and Atlanta amounting to $1.07 per 100 pounds, and 30 cents between Atlanta and Social Circle, and as the $1.07 for carrying the goods to Atlanta is divided between the Cincinnati, New Orleans, & Texas Pacific and the Western & Atlantic, $75\frac{1}{10}$ cents to the former and $31\frac{1}{10}$ cents to the latter, and the remaining 30 cents, being the amount of the regular local rate, goes to the Georgia company, such a method of carrying freight from Cincinnati to Social Circle and of apportioning the money earned, is not a transportation of property between those points "under a common control, management, or arrangement for a continuous carriage or shipment."

Put in another way, the argument is that, as the Georgia Railroad Company is a corporation of the state of Georgia, and as its road lies wholly within that state, and as it exacts and receives its regular local rate for the transportation to Social Circle, such company is not, as to freight so carried, within the scope of the act of Congress.

It is no doubt true that under the very terms of the act, its provisions do not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, not shipped to or from a foreign country from or to any state or territory.

In the answer filed by the so-called "Georgia Railroad Company" in the proceedings before the Commission there was the following allegation: "This respondent says that while no arrangement exists for a through bill of lading from Cincinnati to Social Circle, as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made *on a [**191**
through bill of lading, the rate of which was fixed by adding this respondent's local rate from Atlanta to Social Circle to the through rate from Cincinnati to Atlanta."

The answer of the Louisville & Nashville Railroad Company and Central Railroad & Banking Company of Georgia, which companies, as operating the Georgia railroads, were sued by the name of the "Georgia Railroad Company," in the circuit court of the United States, contained the following statement:

"So far as these respondents are concerned they will state that on July 3, 1891, E. R. Dorsey, general freight agent of said Georgia Railroad Company, issued a circular to its connections earnestly requesting them that thereafter, in issuing bills of lading to local stations on the Georgia railroad, no rates be inserted east of Atlanta, except to Athens, Gainesville, Washington, Milledgeville, Augusta, or points beyond. Neither before nor since the date of said circular have these respondents, operating said Georgia railroad, been in any way parties to such through rates, if any, as may have been quoted, from Cincinnati or other western points to any of the strictly local stations on said Georgia railroad. The stations excepted in said circular are not strictly local stations. Both before and since the date of said circular respondents have received at Atlanta east bound freight destined to strictly local stations on the Georgia railroad, and have charged full local rates to such stations—said rates being such as they were authorized to charge by the Georgia railroad commission. Said rates are reasonably low and are charged to all persons alike without discrimination."

Upon this part of the case the conclusion of

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the circuit court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company, was local, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the Interstate Commerce Commission.

We are unable to accept this conclusion. It may be true that the "Georgia Railroad Com- 192] pany" as a corporation of the *state of Georgia, and whose entire road is within that state, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another state. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the state of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the Commission, by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the state of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points.

The circuit court sought to fortify its position in this regard by citing the opinion of *Mr. Justice* Brewer in the case of *Chicago & N. W. R. Co.* v. *Osborne*, 10 U. S. App. 430, 52 Fed. Rep. 912, 4 Inters. Com. Rep. 257, when that case was before the United States circuit court of appeals for the eighth circuit. It is quite true that the opinion was expressed that railroad 193] companies, *incorporated by and doing business wholly within one state, cannot be compelled to agree to a common control, management, or arrangement with connecting companies, and thus be deprived of its rights and powers as to rates on its own road. It was also said that it did not follow that, even if such a state corporation did agree to form a continuous line for carrying foreign freight at a through rate, it was thereby prevented from charging its ordinary local rates for domestic traffic originating within the state.

Thus understood, there is nothing in that case which we need disagree with in disapproving the circuit court's view in the present case. All we wish to be understood to hold is, that when goods are shipped under a through bill of lading, from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested.

Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the Commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property, in transit between states, under "substantially similar circumstances and conditions."

We do not say that, under no circumstances and conditions, would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line, but it is for the tribunal appointed to enforce the provisions of the statute, whether the Commission or the court, to consider whether *the [194 existing circumstances and conditions were or were not substantially similar.

It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion.

We understand the record as disclosing that the Commission, in view of the circumstances and conditions in which the defendants were operating, did not disturb the rates agreed upon whereby the same charge was made to Augusta as to Atlanta, a less distant point. Some observations made by the Commission in its report on the nature of the circumstances and conditions which would justify a greater charge for the shorter distance, gave occasion for an interesting discussion by the respective counsel. But it is not necessary for us, in the present case, to express any opinion on a subject so full of difficulty..

These views lead to an affirmance of the decree of the circuit court of appeals, in so far as the appeal of the defendant companies is concerned; and we are brought to a consideration of the appeal by the Interstate Commerce Commission.

That appeal presents the question whether

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the circuit court of appeals erred in its holding in respect to the action of the Interstate Commerce Commission in fixing a maximum rate of charges for the transportation of freight of the first class in less than car loads from Cincinnati to Atlanta.

This question may be regarded as twofold, and is so presented in the assignment of error filed on behalf of the Commission, namely: Did the court err in not holding that, in point of law, the Interstate Commerce Commission had power to fix a maximum rate? and, If such power existed, did the court err in not holding that the evidence justified the rate fixed by the Commission and not decreeing accordingly?

It is stated by the Commission, in its report, that "the only testimony offered or heard as 195] to the reasonableness of the rate *to Atlanta in question was that of the vice president of the Cincinnati, New Orleans, & Texas Pacific Company, whose deposition was taken at the instance of the company." And in acting upon the subject, the Commission say:

"This statement or estimate of the rate from Cincinnati to Atlanta ($1.01 per 100 pounds in less than car loads), we believe is fully as high as it may reasonably be, if not higher than it should be, but without more thorough investigation than it is now practicable to make we do not feel justified in determining upon a more moderate rate than $1 per 100 pounds of first-class freight in less than car loads. The rate on this freight from Cincinnati to Birmingham, Alabama, is 89 cents as compared with $1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or in fact to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati."

But when the Commission filed its petition in the circuit court of the United States, seeking to enforce compliance with the rate of $1 per 100 pounds, as fixed by the Commission, the railroad companies, in their answers, alleged that "the rate charged to Atlanta, namely $1.07 per 100 pounds, was fixed by active competition between various transportation lines, and was reasonably low."

Under this issue evidence was taken and we learn from the opinion of the circuit court that, as to the rate to Birmingham, there was evidence before the court which evidently was not before the Commission, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been $1.08, was forced down to 89 cents by the building of the Kansas City, Memphis, & Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and by reason of water route to the northwest such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result.

Without stating the reasoning of the circuit court, which will be found in the report of the case in 64 Fed. Rep 981, the conclusion reached was that the evidence offered in that court was 196] *sufficient to overcome any prima facie case that may have been made by the findings of the Commission, and that the rate complained of was not unreasonable.

As already stated, the circuit court of appeals adopted the views of the circuit court, in respect to the reasonableness of the rate charged on first class freight carried on defendants' line from Cincinnati to Atlanta; and as both courts found the existing rate to have been reasonable, we do not feel disposed to review their finding on that matter of fact.

We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the circuit court. The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as prima facie evidence, that the facts of the case are to be disclosed before the Commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission, but that the purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved.

Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel.

We do not find any provision of the act that expressly or by necessary implication confers such a power.

It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of *withholding judgment in such a matter[197 until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable.

We prefer to adopt the view expressed by the late *Justice* Jackson, when circuit judge, in the case of *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 43 Fed. Rep. 37, 3 Inters. Com. Rep. 92, and whose judgment was affirmed by this court, 145 U. S. 263 [36: 699], 4 Inters. Com. Rep. 92:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

The decree of the court of appeals is affirmed.

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TEXAS & PACIFIC RAILWAY COMPANY, *Appt.*, *v.* INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 197-255.)

Interstate Commerce Commission is a corporate body—ocean competition—act regulating commerce—lawfulness of rates—welfare of communities—carrier companies—general orders—disparity in rates—decision, when reversed—duty of circuit court—undue discrimination.

1. The Interstate Commerce Commission is a body corporate, with legal capacity to be a party plaintiff or defendant in the Federal courts. It has an official seal, and may apply by petition for the enforcement of its orders.
2. A railroad company which participated in through rates is not a necessary, although it is a proper, party to a proceeding by the Interstate Commerce Commission against another company for disobedience of an order of the Commission in the matter of such rates.
3. Ocean competition may constitute a dissimilar condition, and circumstances and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic.
4. The entire commerce of the United States, foreign and interstate, is subject to the provisions of the act of Congress to regulate commerce.
5. The legitimate interests of carrying companies, as well as of traders and shippers, should be considered in determining the lawfulness of rates under the act of Congress to regulate commerce.
6. The welfare of the communities occupying the localities where goods are delivered is to be considered, as well as that of the communities which are in the localities of the place of the shipment, in considering the question of undue preference or advantage between localities.
7. In deciding as to the lawfulness of lower rates to import traffic than to domestic traffic, in order to secure foreign freights which would otherwise go by other competitive routes, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered.
8. General orders promulgated by the Interstate Commerce Commission should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected,—as well the carriers as the traders and consumers of the country.
9. That the disparity in rates between import and domestic traffic was too great to be justified by ocean competition cannot be made by the circuit court of appeals the basis of an affirmance of a decision by the circuit court sustaining an order of the Interstate Commerce Commission denying that ocean competition should be regarded, when there was no allegation or testimony in the court below as to the extent to which a disparity in rates could be justified by ocean competition.
10. An erroneous decision of the circuit court affirming the validity of an order of the Interstate Commerce Commission made under a misconception of the extent of its powers should be reversed by the circuit court of appeals, and the order set aside, and the cause remanded to the Commission, in order that the latter, if it sees fit, may proceed therein according to law, and the circuit court of appeals should not undertake of its own motion to find and pass upon the questions of fact involved which were not considered by the Commission.
11. If the commission has unduly restricted its inquiries upon a mistaken view of the law, the circuit court ought not to accept the findings of the Commission as a legal basis for its own action.
12. The mere fact that the disparity between the through and the local rates was considerable did not of itself warrant the court in finding that such disparity constituted an undue discrimination; much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable,—especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.

[No. 321.]

Argued January 29, 30, 1896. Decided March 30, 1896.

APPEAL from a decree of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the Circuit Court of the United States for the Southern District of New York, declaring that a certain order of the Interstate Commerce Commission was lawful and that the same had been disobeyed by the defendant, the Texas & Pacific Railway Company, and enjoining defendant from further disobeying said order. *Decree of the Circuit Court of Appeals and decree of Circuit Court reversed*, and cause remanded with directions to dismiss the suit.

See same case below, 4 Inters. Com. Rep. 408, 20 U. S. App. 1.

Statement by *Mr. Justice* **Shiras**:

This is an appeal from a decree of the United States circuit court of appeals for the second circuit, affirming a decree of the circuit court of the United States for the southern district of New York, filed October 5, 1892.

The original bill of complaint was brought by the Interstate Commerce Commission created by virtue of an act of Congress, entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended by an act approved February 10, 1891, against the Texas & Pacific Railway Company, a corporation chartered and existing under and by virtue of the laws of the United States, having its principal office at New York city.

The object of the bill was to compel the defendant company to obey an order of the Interstate Commerce Commission made on January 29, 1891, whereby the said defendant was ordered to "forthwith cease and desist from carrying any article of imported traffic shipped

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23; and Brown v. Maryland, 6: 678.

As to tonnage tax, see note to Inman S. S. Co. v. Tinker, 24: 118.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute, when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid,—see note to Lemmon v. Chicago, 37: 216.

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from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of 200]*destination or at any other than the same rates established in such inland tariff for the carriage of other like kind of freight, in the elements of bulk, weight, value, and expense of carriage;" and which order the said defendant was alleged to have wholly disregarded and set at naught.

It appears by the bill that on March 23, 1889, the Commission, on its own motion and without a hearing of the parties to be affected, had made a certain order wherein, among other things, it was provided as follows:

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights." 2 I. C. C. Rep. 658, 2 Inters. Com. Rep. 454.

Subsequently complaint was made to the Interstate Commerce Commission, in a petition filed by the New York Board of Trade & Transportation, that certain railroad companies were disregarding said order, and, in violation of the act to regulate commerce, were guilty of unjust discrimination in that they were in the habit of charging the regular tariff rates upon property when delivered to them at New York and Philadelphia for transportation to Chicago and other western points, while charging other persons rates which were lower and even 50 per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions, when the property was delivered to them at New York or Philadelphia by vessel or steamship lines, under through bills of lading from foreign ports and foreign interior points, issued under an arrangement between the said railroad companies and such vessels and steamship lines and foreign railroads, for the continuous carriage at joint rates from the point or port of shipment to Chicago and other western points, the railroad companies' share of each through rate being lower than their regular tariff rates.

The Commercial Exchange of Philadelphia and the San Francisco Chamber of Commerce intervened and became parties complainant also.

The companies first warned and called upon 201] to answer the *complainant were the Pennsylvania Railroad Company, the Pittsburg, Ft. Wayne, & Chicago Railway Company, and the Pittsburg, Cincinnati, & St. Louis Railway Company, but after the coming in of the answers of said companies, it was deemed necessary to make quite a number of other railroad companies parties defendant,—among them the Texas & Pacific Railway Company, the defendant in the present case, and the Southern Pacific Company. The several defendant companies filed answers. The answer of the Texas & Pacific Railway Company, admitting that both before and since March 23, 1889, it had carried imported traffic at lower rates than it contemporaneously charged for like traffic originating in the United States, justified by claiming that through shipments from a foreign country to the interior of the United States differ in circumstances and conditions from shipments originating at the American seaboard bound for the same interior points, and that defendant company has a legal right to accept for its share of the through rate a lower sum than it receives for domestic shipment to the same destination from the point at which the imported traffic enters this country.

The result of the hearing before the Interstate Commerce Commission was, so far as the present case is concerned, that the Commission held that the Texas & Pacific Railway Company was not justified in accepting, as its share of a through rate on imported traffic, a less charge or sum than it charged and received for inland traffic between the port of reception and the point of delivery, and the said order of January 29, 1891, commanding that said company desist from distinguishing in its charges between foreign and inland traffic was made. *New York Bd. of Trade & T.* v. *Pennsylvania R. Co.* 4 I. C. C. Rep. 447, 3 Inters. Com. Rep. 417.

As the Texas & Pacific Railway Company declined to observe said order, the Commission filed its present bill against said company in the circuit court of the United States for the southern district of New York.

The railway company filed a plea in abatement, denying that its principal office was in the southern district of New York, and denying that it had violated or disobeyed the order of the Commission within the state of New York, or *at any place within the jurisdic- [202 tion of the circuit court. Certain affidavits were filed, upon a stipulation as to the facts, and, after hearing, the plea was overruled, and also a motion to dismiss the proceedings for want of jurisdiction was denied; and to these rulings exceptions were taken and allowed.

The defendant company answered, alleging that the Interstate Commerce Commission was not a corporation, person, or body politic capable of bringing or maintaining this suit; that the petition or bill failed to allege or show any facts constituting a violation by the defendant of the order of January 29, 1891, and did not show or allege any specific act or acts by the defendant in violation of the act of Congress; that the Southern Pacific Company, as participant with the defendant in the making and division of the through rates, was a necessary party; and that the bill should be dismissed for want of such necessary party.

The answer, admitting that the company had charged and received, since January 29, 1891, rates for the transportation of commodities from Liverpool and London, England, *via* New Orleans and the Texas & Pacific Railway and the Southern Pacific Company to San Francisco, California, different from the rates charged and received for the transportation of inland commodities from New Orleans by the same route to San Francisco, asserted that it had a legal right so to do; and that such action was not in violation of the act of Congress regulating commerce or of any valid order of the Interstate Commerce Commission. The answer sets up a number of facts which it alleged sustained its defense.

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The cause was heard upon the petition, answer, and sundry exhibits, and resulted in a decree declaring that the order of January 29, 1891, was lawful, and that the same had been disobeyed by the defendant, and enjoining the defendant from further continuing such disobedience of said order. An appeal, with errors assigned, was taken from this decree to the circuit court of appeals of the second circuit, by which, on June 3, 1893, the decree of the circuit was affirmed with costs. 20 U. S. App. 1, 4 Inters. Com. Rep. 408. An appeal was then taken, on errors assigned, from said decree to this court.

Messrs. **John F. Dillon, Ed. Baxter,** and *Winslow S. Pierce* for appellant.

Messrs. **Simon Sterne** and **John D. Kernan** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

It was claimed in the courts below, and it is also urged in this court, that the Interstate Commerce Commission is not a corporate body or person in whose name a suit can be instituted. It seems to be thought that the Commission can only sue in the names of the persons composing it.

The 16th section of the act to regulate commerce, as amended March 2, 1889, provides that "whenever any common carrier, as defined in and subject to the provisions of that act, shall violate or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by the act, not founded upon a controversy requiring a trial by jury, as provided by the 7th Amendment to the Constitution of the United States, it shall be lawful for the Commission, or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do equity in the premises."

204] *The language contained in the 11th section creating the Commission is as follows: "That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. . . . No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission," and in the 17th section it is provided that "said Commission shall have an official seal, which shall be judicially noticed."

In the case of *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* a suit was instituted by the Commission in the circuit court of the United States for the southern district of Ohio, and the decree of that court was affirmed by this court. 145 U. S. 264 [36: 699], 4 Inters. Com. Rep. 92. Likewise, in the case of *Interstate Commerce Commission* v. *Atchison, T. & S. F. R. Co.* a suit was brought in the circuit court of the United States for the district of California, by the Commission, *eo nomine* against that company, wherein it was held by this court that an appeal did not lie directly to this court since the creation of the circuit court of appeals. 149 U. S. 264 [37: 727], 4 Inters. Com. Rep. 847.

In neither of these cases was any objection made to the right of the Commission to sue by its statutory designation.

We think that the language of the statute, in creating the Commission and in providing that it shall be lawful for the Commission to apply by petition to the circuit court sitting in equity, sufficiently implies the intention of Congress to create a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts.

Another formal objection made to the jurisdiction of the circuit court was raised by a plea in abatement denying that the Texas & Pacific Railway Company had its principal office in the state of New York, or that the acts complained of took place within the judicial district of said court.

Upon facts made to appear by affidavits submitted by both parties, under a stipulation, the circuit court overruled the plea. Our examination of the facts so submitted, and which *are brought before us by a bill of excep-[205 tions, has not convinced us that the court erred in overruling the plea.

Another objection urged is that, as the order of the Commission involves rates participated in by the Southern Pacific Company, as owner of a portion of the line over which the through freight is carried, that company was a necessary party. Undoubtedly that company would have been a proper party, but we agree with the circuit court in thinking that it was not a necessary one.

We come now to the main question of the case, and that is whether the Commission erred, when making the order of January 29, 1891, in not taking into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the seaboard in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic.

The answer of the Texas & Pacific Railway Company to the petition of the New York Board of Trade & Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the Commission filed in the circuit court, allege that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are, in effect, fixed and controlled by the competition of sailing vessels

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for the entire distance; by steamships and sailing vessels in connection with railroads across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these under through arrangements with the Southern Pacific Company to San Francisco. That unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company. That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and 206] work no injury to that *community, because if said company is prevented from participating in said traffic, such traffic would move *via* the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage. That the foreign or import traffic is upon orders by persons, firms, and corporations in San Francisco and vicinity buying direct of first hands in London, Liverpool, and other European markets, and if the order of the Commission should be carried into effect it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event. That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City, and other Missouri river points. That by such order the defendant company would be prevented from competing for freight to important points in the state of Texas with the railroad system of that state, having Galveston as a receiving port, and which railroad system is not subject to the control of the Interstate Commerce Commission. These allegations of the answer were not traversed or denied by the Commission, but are confirmed by the findings of the Commission attached as an exhibit to the petition in the case: and by said findings it further appears that the proportion the Texas & Pacific Railway receives of the through rate is remunerative. That the preponderance of its empty cars go north during eight months of the year, and if something can be obtained to load, it is that much found, and anything is regarded as remunerative that can be obtained to put in its cars to pay mileage. That the competition which controls the making of rates to the Pacific coast is steamship by way of the Isthmus and in cheap heavy goods around Cape Horn. That the competition to interior points, such as Missouri river points and Denver, is from the trunk lines direct from the Atlantic seaboard—that the ships engaged in carrying to San Francisco around Cape Horn are almost wholly British bottoms. That the through bill of lading furnishes a collateral for the transaction of business; takes from the shipper and consignee both the care as to intermediate charges, elevators, wharves, and cost of handling, and puts 207] it on the *carrier; it reduces the intermediate charges, very much facilitates the transaction of business, and helps to swell its volume. That the tendency of the through bill of lading is to eliminate the obstacles between the producer and consumer, and it has done much in that direction.

These and other uncontroverted facts that appear in this record would seem to constitute "circumstances and conditions" worthy of consideration, when carriers are charged with being guilty of unjust discrimination or of giving unreasonable and undue preference or advantage to any person or locality.

But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts, that it was shut up by the terms of the act of Congress, to consider only such "circumstances and conditions" as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada.

It is proper that we should give the views of the Commission in its own words:

"The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail, and partly by water, or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country, on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received and at which it is delivered and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and as between these ports has provided for no publication of *tariffs of rates and charges, but has left 208] it to the unrestrained competition of ocean carriers and all the circumstances and conditions surrounding it. These circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the states of the American Union by rail carriers; but as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction. To hold otherwise would be for the Commission to create exceptions to the operation of the statute not found in the statute; and no other power but Congress can create such exceptions in the exercise of legislative authority.

"In the one case the freight is transported from a point of origin in the United States to a destination within the United States, or port of transhipment, if it be intended for export,

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upon open published rates, which must be reasonable and just, not unjustly preferential to one kind of traffic over another, and relatively fair and just as between localities; and the circumstances and conditions surrounding and involved in the transportation of the freight are in a very high degree material. In the other case the freight originates in a foreign country, its carriage is commenced from a foreign port, it is carried upon rates that are not open and published, but are secret, and in making these rates it is wholly immaterial to the parties making them whether they are reasonable and just or not, so they take the freight and beat a rival, and it is equally immaterial to them whether they unjustly discriminate against surrounding or rival localities in such foreign country, or not. Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of rates made in the ocean 209] *carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the act to regulate commerce must be under the inland tariff from such port of entry to such place of destination, covering other like kind of traffic in the elements of bulk, weight, value, and of carriage; and no unjust preference must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from the port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition under the operation of the act to regulate commerce which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line. . . .

"The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls, rates, or charges for, or any difference in the treatment of home and foreign merchandise in respect to the same or similar service rendered in the transportation when this transportation is done under the operation of this statute. Certainly it would require a proviso or exception plainly engrafted upon the face of the act to regulate commerce before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates, or charges made for, or any difference in its treatment for, the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the opera-210]tion of this statute, when *handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges, and treatment for similar services rendered.

"The business complained of in this proceeding is done in the shipment of foreign merchandise from foreign ports through ports of entry of the United States, or through ports of entry in a foreign country adjacent to the United States, to points of destination in the United States, upon through bills of lading." *New York Bd. of Trade & T.* v. *Pennsylvania R. Co.* 4 I. C. C. Rep. 512-516, 3 Inters. Com. Rep. 443, 444.

It is obvious, therefore, that the Commission, in formulating the order of January 29, 1891, acted upon that view of the meaning of the statute which is expressed in the foregoing passages.

We have, therefore, to deal only with a question of law, and that is, What is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not.

Before we consider the phraseology of the statute, it may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making *unjust discriminations between shippers[211 and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies and by general enactments by the several states, such as clauses restricting the rates of toll and forbidding railroad companies from becoming concerned in the sale or production of articles carried and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers—particularly that one which requires uniformity of treatment in like conditions of service.

As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general

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demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result.

The scope or purpose of the act is, as declared in its title, to regulate commerce. It would therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.

Addressing ourselves to the express language of the statute, we find, in its 1st section, that the 212] carriers that are declared *to be subject to the act are those "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as that going to or coming from foreign countries.

In a later part of the section it is declared that "the term 'transportation' shall include all instrumentalities of shipment or carriage."

Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the section proceeds to declare that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

The significance of this language, in thus extending the judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers, is obvious.

*Proceeding to the 2d section, we learn [213 that its terms forbid any common carrier, subject to the provisions of the act, from charging, demanding, collecting, or receiving "from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of the act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," and declares that disregard of such prohibition shall be deemed "unjust discrimination," and unlawful.

Here, again, it is observable that this section contemplates that there shall be a tribunal capable of determining whether, in given cases, the services rendered are "like and contemporaneous," whether the respective traffic is of a "like kind," and whether the transportation is under "substantially similar circumstances and conditions."

The 3d section makes it "unlawful for any common carrier, subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatever." It also provides that every such common carrier shall afford "all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their respective lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

The 4th section makes it unlawful for any such common carrier to "charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being within *the longer distance, but this shall not [214 be construed as authorizing any such common carrier to charge and receive as great compensation for a shorter as for a longer distance," and provision is likewise made that, "upon application to the Commission appointed under the provisions of the act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property;" and that "the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of the act."

The powers of the Interstate Commission are not very clearly defined in the act, nor is its method of procedure very distinctly outlined. It is, however, declared in the 12th section, as amended March 2, 1889, and February 10, 1891,

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that the Commission "shall have authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of the act." It is also made the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court, and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of the act and for the punishment of all violations thereof. And provision is made for complaints to be made by any person, firm, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, before the Commission, and for an investigation of such complaints to be made by the Commission; and it is made the duty of the Commission to make reports in writing in respect thereof, which shall include the findings of fact upon which the conclusions of the Commission [215] are based, together with *its recommendation as to what reparation, if any, should be made by any common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter in all judicial proceedings be deemed prima facie evidence as to each and any fact found.

In the present case no complaint seems to have been made before the Commission by any person, firm, company, or other organization against the Texas & Pacific Railway Company, of any disregard by said company of any provision of the statute resulting in any specific loss or damage to any one, nor has the Commission, in its findings, disclosed any such loss or damage to any individual complainant. And it is made one of the contentions of the defendant company that the entire proceeding was outside of the sphere of action appointed by the act to the Commission, which only had power, as claimed by defendant, to inquire into complaint made by some person or body injured by some described act of the defendant company.

The complaint in the present case was made by certain corporations of New York, Philadelphia, and San Francisco, known as boards of trade, or chambers of commerce, which appear to be composed of merchants and traders in those cities, engaged in the business of reaching and supplying the consumers of the United States with imported luxuries, necessities, and manufactured goods generally, and as active competitors with the merchants at Boston, Montreal, Philadelphia, New Orleans, San Francisco, Chicago, and merchants in foreign countries who import direct on through bills of lading issued abroad.

We shall assume, in the disposition of the present case, that a valid complaint may be made before the Commission, by such trade organizations, based on a mode or manner of treating import traffic by a defendant company, without disclosing or containing charges of specific acts of discrimination or undue preference, resulting in loss or damage to individual persons, corporations, or associations.

We do not wish to be understood as implying that it would be competent for the Commission, without a complaint made *before [216] it, and without a hearing, to subject common carriers to penalties. It is also obvious that if the Commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the Commission.

With these provisions of the act and these general principles in mind, we now come to consider the case in hand.

After an investigation made by the Commission on a complaint against the Texas & Pacific Railway Company and other companies, by the boards of trade above mentioned, the result reached was the order of the Commission made on January 29, 1891, a disregard of which was complained of by the Commission in its bill or petition filed in the circuit court of the United States.

The Texas & Pacific Railway Company, a corporation created by laws of the United States, and also possessed of certain grants from the state of Texas, owns a railroad extending from the city of New Orleans, through the state of Texas, to El Paso, where it connects with the railroad of the Southern Pacific Company, the two roads forming a through route to San Francisco. The Texas & Pacific Railway Company has likewise connections with other railroads and steamers, forming through freight lines to Memphis, St. Louis, and other points on the Missouri river, and elsewhere.

The defendant company admitted that, as a scheme or mode of obtaining foreign traffic, it had agencies by which, and by the use of through bills of lading, it secured shipments of merchandise from Liverpool and London and other European ports to San Francisco and to the other inland points named. It alleged that, in order to get this traffic, it was necessary to give through rates from the places of shipment to the places of final destination, and that, in fixing said rates, it was controlled by an ocean competition by sailing and steam vessels by way of the Isthmus and around the Horn, and also, *to some extent, by a [217] competition through the Canada route to the Pacific coast. These rates, so fixed and controlled, left to the defendant company and to the Southern Pacific Company, as their share of the charges made and collected, less than the local charges of said companies in transporting similar merchandise from New Orleans to San Francisco, and so, too, as to foreign merchandise carried to other inland points. The defendant further alleged that unless it used said means to get such traffic the merchandise to the Pacific coast would, none of it, reach New Orleans, but would go by the other means of transportation; that neither the community of New Orleans nor any merchant or shipper

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thereof was injured or made complaint; that the traffic thus secured was remunerative to the railway company and was obviously beneficial to the consumers at the places of destination, who were thus enabled to get their goods at lower rates than would prevail if this custom of through rates was destroyed.

As we have already stated, the Commission did not charge or find that the local rates charged by the defendant company were unreasonable, nor did they find that any complaint was made by the city of New Orleans, or by any person or organization there doing business. Much less did they find that any complaint was made by the localities to which this traffic was carried, or that any cause for such complaint existed.

The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the "circumstances and conditions" attendant upon the foreign traffic as such "circumstances and conditions" as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of "unjust discrimination," within the meaning of the act.

In so construing the act we think the Commission erred.

218] *As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition.

So far from finding such language, we read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public.

Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions and is therefore most likely to have been the construction intended *by[219 the lawmaking power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

The principal purpose of the 2d section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not "unjust." Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission.

The 3d section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact. The mere circumstance that there is, in a given *case,[220 a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat

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as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

The same observations are applicable to the 4th section, or the so called long and short haul provision, and it is unnecessary to repeat them.

The only argument urged in favor of the view of the Commission that is drawn from the language of the statute is found in those provisions of the statute that make it obligatory on the common carriers to publish their rates, and to file with the Commission copies of joint tariffs of rates or charges over continuous lines or routes operated by more than one common carrier; and it is said that the place at which it would seem that joint rates should be published for the information of shippers would be at the place of origin of the freight, and that this cannot be done, or be compelled to be done, in foreign ports.

The force of this contention is not perceived. Room is left for the application of these provisions to traffic originating within the limits of the United States, even if, for any reason, they are not practically applicable to traffic originating elsewhere. Nor does it appear that the Commission may not compel all common car-[221] riers within the reach of their *jurisdiction to publish such rates, and to furnish the Commission with all statements or reports prescribed by the statute. Nor was there any allegation, evidence, or finding, in the present case, that the Texas & Pacific Railway Company has failed to file with the Commission copies of its joint tariffs, showing the joint rates from English ports to San Francisco, nor that the company has failed to make public such joint rates in such manner as the Commission may have directed.

Another position taken by the Commission in its report and defended in the briefs of counsel is that it is the duty of the Commission to so construe the act to regulate commerce as to make it practically co-operate with what is assumed to be the policy of the tariff laws. This view is thus stated in the report:

"One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent, from the evidence in this case, that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute." *New York Bd. of Trade & T.* v. *Pennsylvania R. Co.* 4 I. C. C. Rep. 514, 515, 8 Inters. Com. Rep. 444.

Our reading of the act does not disclose any purpose or intention, on the part of Congress, to thereby reinforce the provisions of the tariff laws. These laws differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government, and those of their provisions whereby Congress seeks to so adjust rates as to protect American manufacturers and producers from competition by foreign low-priced labor, operate equally in all parts of the country.

*The effort of the Commission, by a [222] rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the act to remedy.

Similar legislation by the Parliament of England may render it profitable to examine some of the decisions of the courts of that country construing its provisions.

In fact, the 2d section of our act was modeled upon § 90 of the English "railway clauses consolidation act" of 1845, known as the "equality clause," and the third section of our act was modeled upon the 2d section of the English "act for the better regulation of the traffic on railways and canals" of July 10, 1854, and the 11th section of the act of July 21, 1873, entitled "An Act to Make Better Provision for the Carrying into Effect the Railway and Canal Traffic Act, 1854, and for Other Purposes Connected therewith."

One of the first cases that arose under the act of 1854 was that of *Hozier* v. *Caledonian R. Co.* 1 Nev. & MacN. 27, where Hozier filed a petition against the Railway Company, alleging that he was aggrieved by being charged 9 shillings for traveling between Motherwell and Edinburgh, a distance of 43 miles, while passengers traveling in the same train and in the class of carriage between Glasgow and Edinburgh were charged only 2 shillings, which was alleged to amount to an undue and unreasonable preference. But the petition was dismissed, and the court said: "The only case stated in the petition is that passengers passing from Glasgow to Edinburgh are carried at a cheaper aggregate rate than passengers from Motherwell to either of these places. Now that is an advantage, no doubt, to those passengers traveling between Edinburgh and Glasgow. But is it an *unfair* advantage over other passengers traveling between intermediate stations? The complainant must satisfy us that there is something *unfair* or *unreasonable* in what he complains of, in order to warrant any interference. I have read the statements in the petition and listened to *the argument in [223] support of it to find what there is *unreasonable* in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer

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was given to this, except that there was none. This petitioner's complaint may be likened to that of the laborer who, having worked all day, complained that others who had worked less received a penny like himself."

The case of *Foreman* v. *Great Eastern R. Co.* 2 Nev. & MacN. 202, was decided by the English Railway Commissioners in 1875. The facts were that the complainants imported coal, in their own ships, from points in the north of England to Great Yarmouth, and forwarded the coal to various stations on the defendants' railway, between Great Yarmouth and Petersborough. The complaint was that the defendants' rates for carrying coal from Yarmouth to stations in the interior, at which complainants dealt, were unreasonably greater than the rates charged in the opposite direction, from Petersborough to such stations, and that such difference in rates was made by the defendants for the purpose of favoring the carriage of coal from the interior as against coal brought to Yarmouth by sea, and carried thence into the interior over the defendants' railway. The Commissioners found that it was true that the defendants did carry coal from the interior to London, Yarmouth, and other seaports on their line at exceptionally low rates, but that this was done for the purpose of meeting the competition existing at those places. It appeared that the rate from Petersborough to Thetford, 51 miles, was 4 shillings, while the rate from Petersborough to Yarmouth, 100 miles, was only 3 shillings. The Commissioners said: "As, however, the complainants do not, as far as their trade in Yarmouth itself is concerned, use the Great Eastern Railway at all, the company cannot be said to prefer other traffic to theirs; nor does the traffic act prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other routes or other modes of carriage with which theirs is in competition."

In *Harris* v. *Cockermouth R. Co.* 1 Nev. & MacN. 97, the court held it to be an undue pref-[224] erence *for a railway company to concede to the owner of a colliery a lower rate than to the owners of other collieries, from the same point of departure to the same point of arrival, merely because the person favored had threatened to build a railway for his coal, and to divert his traffic from defendant's railway. But Chief Justice Cockburn said: "I quite agree that this court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic. . . . As, for instance, in respect of terminal traffic, there might be competition with another railway; and in respect to terminal traffic as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionately so, than they could over an intermediate part of the line."

In the case of *Budd* v. *London & N. W. R. Co.* 4 Eng. Ry. & Canal Traffic Cas. 393, and in *Evershed* v. *London & N. W. R. Co.* L. R. 3 App. Cas. 1029, it was held that it was not competent for the railway company to make discriminations between persons shipping from the same point of departure to the same point of arrival, but, even in those cases, it was conceded that there might be circumstances of competition which might be considered. At any rate, those cases have been much modified if not fully overruled by the later cases—particularly in *Denaby Main Colliery Co.* v. *Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97, and in *Phipps* v. *London & N. W. R. Co.* [1892] 2 Q. B. 229.

The latter was the case of an application under the railway and canal traffic acts for an order enjoining the defendants to desist from giving an undue preference to the owners of Butlins and Islip furnaces, and from subjecting the traffic of the complainants to an undue preference, in the matter of the rates charged for the conveyance of coal, coke, and pig iron traffic: and also for an order enjoining the defendants to desist from giving an unreasonable preference or advantage to the owners of Butlins and Islip furnaces and the *traffic [225 therefrom, by making an allowance of 4 pence per ton in respect of coal, coke, and pig iron conveyed for them by the defendants. The sidings of the Duston furnaces, belonging to the complainants, were situated on the London & Northwestern Railway, at a distance of about 60 miles from the Great Bridge, one of the pig iron markets to the westward. The sidings of the Butlins and Islip furnaces were situated on the same railway to the east of the Duston furnaces, and a distance from the pig iron market as to Butlins, of about 71 miles, and as to Islip of about 82 miles. Duston had only access to the London & N. W. Railway, but Butlins and Islip had access not only to the London & N. W. Railway, but also to the Midland Railway. The London & N. W. Railway Co., which carried the Butlins pig iron 11 miles further and the Islip pig iron 20 miles further than the Duston pig iron, charged Butlins 0.95*d* per mile, and Islip 0.84*d*. per mile, while they charged Duston 1.05*d*. per mile, so that the total charge per ton of pig iron from Duston to the western markets was 5 shillings, 2 pence, while the total charge per ton from either Butlins or Islip was 5 shillings, 8 pence.

When the case was before the railway commissioners, it was said by Wills, J.: "It is complained that, although along the London & N. W. Railway every ton of pig iron, every ton of coal, and every ton of coke travels a longer distance in order to reach Islip than in order to reach the applicant's premises, the charge that is put upon it, although greater than the charge which is put upon the traffic which goes to the applicant's premises, is not sufficiently greater to represent the increased distance. . . . I first observe that these are, in my judgment, eminently practical questions, and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief and no good. . . . It seems to me that we must take into account the fact that at Butlins and Islip there is an effective competition with the Midland. Although *effective competition with anoth-[226 er railway company or canal company will not of itself justify a preference, which is otherwise quite beyond the mark, yet still it is not a cir-

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cumstance that can be thrown out of the question, and I think there is abundance of authority for that. It follows also, I think, from the view which I am disposed to take of these, being eminently practical questions, that you must give due consideration to the commercial necessities of the companies as a matter to be thrown in along with the others. . . . I wish emphatically to be considered as not having attempted to lay down any principles with regard to this question of undue preference, or as to the grounds upon which I have decided it. In my judgment, undue preference is a question of fact in each case."

The railway commissioners refused to interfere, and the case was appealed. Lord Herschell stated the case and said:

"This application is made under the 2d section of the railway and canal traffic act 1854, which provides that 'no railway company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company or particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.'

"The question, therefore, which the tribunal, whether it be the court or the commissioners before whom such a question comes, has to determine is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage as compared with the other. I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

"Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or un-227]reasonable preference or *prejudice. And it cannot be doubted that whether in particular instances there has been an undue or unreasonable prejudice or preference is a question of fact. In *Palmer* v. *London & S. W. R. Co.* L. R. 1 C. P. 593, Chief Justice Erle said: 'I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused, being a question of fact depending on the matters proved in each case.'

"In *Denaby Main Colliery Co.* v. *Manchester, S. & L. R. Co.* 3 Ry. & Canal Traffic Cas. 426, 8 Nev. & MacN. 441, when it was before the court of appeals, on an appeal arising out of the proceedings before the railway commissioners, Lord Selborne, then Lord Chancellor, said: 'The defendants gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable, but, under these circumstances, is not the reasonableness a question of fact? Is it not a question of fact and not of law whether such a preference is due or undue? Unless you can point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law, but of fact.'

"The Lord Chancellor there points out that the mere circumstance that there is an advantage does not of itself show that it is an undue preference within the meaning of the act, and further, that whether there be such undue preference or advantage is a question of fact and of fact alone. No rule is given to guide the court or tribunal in the determination of cases or applications made under this 2d section. The conclusion is one of fact to be arrived at, looking at the matter broadly and applying common sense to the facts that are proved. I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the one case from the other, you cannot say that a difference of circumstances represents or is equivalent to such a fraction of a penny *difference of charge in the one case [228 as compared with the other. A much broader view must be taken, and it would be hopeless to attempt to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at; because, of course, the very question in this case is whether a particular circumstance ought or ought not to be considered; but keeping in view all the circumstances which may legitimately be taken into consideration, then it becomes a mere question of fact. . . . Now, there is no doubt that in coming to their determination the court below did have regard to competition between the Midland and the Northwestern, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that in point of law that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little, becomes a question of fact and not of law. The point is undoubtedly a very important one. . . .

"As I have already observed, the 2d section of the act of 1854 does not afford to the tribunal any kind of guide as to what is undue or unreasonable. It is left entirely to the judgment of the court on a review of the circumstances. Can we say that the local situation of one trader, as compared with another, which enables him by having two competing routes to enforce upon the carrier by either of these routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. *It is said that[229

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it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competitive routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the matter as a matter of what is reasonable and right as between the two traders, I cannot understand.

"Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantages which he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the act which indicates that when you are left at large, for you are left at large, as to whether as between two traders the company is showing an undue and unreasonable preference to the one as compared with the other, you are to leave out that circumstance any more than any other circumstance which would affect men's minds. . . . One class of cases, unquestionably intended to be covered by the section, is that in which traffic from a distance, of a character that competes with the traffic nearer the market, is charged low rates, because unless such low rates were charged, it would not come into the market at all. It is certain unless some such principle as that were adopted, a large town would necessarily have its food supply greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one [230] which makes it *possible for those at a greater distance to compete with those situate nearer to it. . . . I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence is one of the cases which may be taken into account under those provisions, and which would fall within the terms of the enactment.

"Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that these members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charges, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices."

The learned judge then proceeded to discuss the authorities, and pointed out that the case of *Budd* v. *London & N. W. R. Co.* 4 Eng. Ry. & Canal Traffic Cas. 393, and *Evershed* v. *London & N. W. R. Co.* L. R. 3 App. Cas. 1029, are no longer law, so far as the 2d section of the act of 1854 is concerned.

Lindley and Kay, Lord Justices, gave concurring opinions, and the conclusion of the court was that the commissioners did not err in taking into consideration the fact that there was a competing line, together with all the other facts of the case, and in holding that a preference or advantage thence arising was not undue or unreasonable.

The precise question now before us has never been decided in the American cases, but there are several in which somewhat analogous questions have been considered.

Atchison, T. & S. F. R. Co. v. *Denver & N. O. R. Co.* 110 U. S. 667 [28: 291], was a case arising under a provision of the Constitution of the state of Colorado which declares "that all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or *unreasonable discrimi- [231] nation shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." This court held that under this constitutional provision a railroad company which had made provisions with a connecting road for the transaction of joint business at an established union junction was not required to make similar provisions with a rival connecting line at another near point on its line, and that the constitutional provision is not violated by refusing to give to a connecting road the same arrangement as to through rates which are given to another connecting line, unless the conditions as to the service are substantially alike in both cases.

The 6th section of the act of Congress, July 1, 1862, relative to the Union Pacific Railroad Company, provided that the government shall at all times have the preference in the use of the railroad "at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service." In the case of *Union P. R. Co.* v. *United States*, 117 U. S. 355 [29: 920], it was, in effect, held that the service rendered by a railway company in transporting local passengers from one point on its line to another is not identical with the service rendered in transporting through passengers over the same rails.

A petition was filed before the Interstate Commerce Commission by the Pittsburg, Cincinnati, & St. Louis Railway Company, against the Baltimore & Ohio Railroad Company, seeking to compel the latter company to withdraw from its lines of road upon which business competition with that of the petitioner was transacted the so-called "party rates," and to decline to give such rates in the future—also for an order requiring said company to discontinue the practice of selling excursion

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tickets at less than the regular rate. The cause was heard before the Commission, which held the so-called party-rate tickets, in so far as they were sold for lower rates for each member of a party of ten or more than rates contemporaneously charged for the trans-
232]portation of single *passengers between the same points, constituted unjust discrimination and were therefore illegal. The defendant company refusing to obey the mandate of the Commission, the latter filed a bill in the circuit court of the United States for the southern district of Ohio, asking that the defendant be enjoined from continuing in its violation of the order of the Commission. The circuit court dismissed the bill. Some of the observations made by Jackson, Circuit Judge may well be cited. *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 43 Fed. Rep. 37, 8 Inters. Com. Rep. 192: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services?" Again: "The English cases . . . establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage it is not only legitimate, but proper, to take into consideration, besides the mere difference in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other as competitive or otherwise."

The case was brought to this court and the judgment of the circuit court dismissing the bill was affirmed. 145 U. S. 263 [36: 699], 4 Inters. Com. Rep. 92. The court, through *Mr. Justice* Brown, cited with approval passages from the opinion of *Judge* Jackson in the court below, and among other things said:
233]"It is not all *discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable."

Again, speaking of the sale of a ticket for a number of passengers at a less rate than for a single passenger, it was said: "It does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously toward any one it is to the rival road, which has not adopted corresponding rates, but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. . . . If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing."

The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at *a low rate to secure [234
foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. That if the Commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country.

It may be said that it would be impossible for the Commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law-making power, and that the general orders made by the Commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy.

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This is manifest from the facts furnished us in the report and findings of the Commission, attached as an exhibit to the bill filed in the circuit court.

It is stated in that report that the Illinois Central Railroad Company, one of the respondents in the proceeding before the Commission, averred in its answer that it was constrained, by its obedience to the order of March, 1889, to decline to take for shipment any import traffic, and, to its great detriment, to refrain from the business, for the reason that to meet the action of the competing lines it would have to make a less rate on the import than on the domestic traffic.

235] *Upon this disclosure that their order had resulted in depriving that company of a valuable part of its traffic (to say nothing of its necessary effect in increasing the charges to be finally paid by the consumers), the Commission in its report naively remarks: "This lets the Illinois Central Railway Company out." *New York Bd. of Trade & T.* v. *Pennsylvania R. Co.* 4 I. C. C. Rep. 458, 3 Inters. Com. Rep. 421.

We also learn from the same source that there was competent evidence adduced before the Commission, on the part of the Pennsylvania Railroad Company, that since that company, in obedience to the order of March, 1889, has charged the full inland rate on the import traffic, the road's business in that particular has considerably fallen off; that the steamship lines have never assented to the road's charging its full inland rates, and have been making demands on the road for a proper division of the through rate; that if it were definitely determined that the road was not at liberty to charge less than the full inland rate, the result would be that it would effectually close every steamship line sailing to and from Baltimore and Philadelphia.

The Commission did not find it necessary to consider this evidence, because the Pennsylvania Railroad Company was before it in the attitude of having obeyed the order.

We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the Commission or by the courts below in respect to what were proper rates to be charged by the Texas & Pacific Railway Company. That was a question of fact, and if the inquiry had been conducted on a proper basis we should not have felt inclined to review conclusions so reached. But we mention them to show that there manifestly was error in excluding facts and circumstances that ought to have been considered, and that this error arose out of a misconception of the purpose and meaning of the act.

The circuit court held that the order of January 29, 1891, was a lawful order, and enjoined the defendant company from carrying any article of import traffic shipped from any foreign port through any port of entry in the United States, or any port of entry in a foreign 236] country adjacent to the *United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over its line from such port of entry to such place of destination, or from charging or accepting for its share of through rates upon imported traffic a lower sum than it charges or receives for domestic traffic of like kind to the same destination from the point at which the imported traffic enters the country.

In treating the facts of the case the court says: "It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are, in effect, fixed and controlled by the competition of sailing vessels between these ports, and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the act to regulate commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to revert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic, by reason of the competition referred to, and the revenue derived therefrom, unless it carries at the lower rates, and by so doing it is enabled to get a part of it which would otherwise go from London and Liverpool to San Francisco around the Horn or by the Isthmus." *Interstate Commerce Commission* v. *Texas & P. R. Co.* 52 Fed. Rep. 187, 4 Inters. Com. Rep. 114.

The circuit court did not discuss the case at length, either as to its law or facts, but, in effect, approved the order of January 29, 1891, as valid, and enjoined the defendant company from disregarding it.

The circuit court of appeals seems to have disapproved of the construction put on the act by the Commission. The language of the court was as follows: "The Commission contended that upon these facts the defendant had violated the 2d section of the act to regulate commerce, which prohibits unjust discrimination in the compensation charged for like and contemporaneous *services in the transportation[237 of a like kind of traffic under substantially similar circumstances and conditions, and had also violated the 3d section, which prohibits any undue or unreasonable preference or advantage to any particular description of traffic. . . . The defendant insisted that the dissimilar conditions growing out of the ocean competition freed its conduct from the prohibition of the statute. The Commission, in deciding the original case, held that this class of dissimilar conditions was not in the contemplation of the statute, and was not to be regarded in the regulation of inland tariffs of rates." Then, after citing a passage from the report of the Commission, the court proceeds to say: "Its conclusion was that foreign and home merchandise 'under the operation of the statute, when handled and transported by interstate carriers engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges, and treatment for similar services rendered.' This rule, having been founded upon a construction of the statute, is a very broad one. It is applicable to all the foreign circumstances and conditions which affect rates, and the question whether it must be universally applied without regard to any circumstances which may exist in a foreign country, and whether dissimilarities which have a foreign origin are to be ex-

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cluded from consideration under the operation of the statute, is an exceedingly important one, the ultimate decision of which may have a wider influence upon the interstate commerce of the country than we can foresee. This legal question was not discussed in the export-rate case, which was treated 'as one of practical policy.' We are not disposed to pass authoritatively upon this question, except in a case which demands it, and in which the effect of this construction of the statute is naturally the subject of discussion." *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 20 U. S. App. 6-9, 4 Inters. Com. Rep. 410, 411.

Having thus intimated its dissent from, or at least its distrust of, the view of the Commission, the court proceeded to affirm the decree of the circuit court and the validity of the order of the Commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that, in the present case, the disparity of rates was too great to be justified by that condition.

238] *This course proceeded, we think, upon an erroneous view of the position of the case. That question was not presented to the consideration of the court. There was no allegation in the Commission's bill or petition that the inland rates charged by the defendant company were unreasonable. That issue was not presented. The defendant company was not called upon to make any allegation on the subject. No testimony was adduced by either party on such an issue. What the Commission complained of was that the defendant refused to recognize the lawfulness of its order, and what the defendant asserted, by way of defense, was that the order was invalid, because the Commission had avowedly declined to consider certain "circumstances and conditions" which, under a proper construction of the act, it ought to have considered.

If the circuit court of appeals were of opinion that the Commission in making its order had misconceived the extent of its powers, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered, in the first instance, at least, by the Commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true cheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.

We do not, of course, mean to imply that the Commission may not directly institute proceedings in a circuit court of the United States charging a common carrier with disregard of provisions of the act, and that thus it may become the duty *of the court to try the case[239 in the first instance. Nor can it be denied that, even when a petition is filed by the Commission for the purpose of enforcing an order of its own, the court is authorized to "hear and determine the matter as a court of equity," which necessarily implies that the court is not concluded by the findings or conclusions of the Commission; yet as the act provides that, on such hearing, the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated, we think it plain that if, in such a case, the Commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court ought not to accept the findings of the Commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the Commission to be lawfully proceeded in.

The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination—much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.

The decree of the circuit court of appeals is reversed; the decree of the circuit court is also reversed, and the cause is remanded to that court, with directions to dismiss the bill.

Mr. Justice **Harlan** dissenting:

The interstate commerce act, as amended March 2, 1889, requires every common carrier, subject to its provisions, to print and keep open to public inspection schedules showing its rates and charges for the transportation of passengers and property. It also requires that such schedules "shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force;" further, that any common carrier subject *to the[240 provisions of the act, "receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment."

The act contains no provision for printed schedules to be kept open to public inspection, of freight shipped from a foreign country, not adjacent to this country, on a through bill of lading, and to be carried, after it reaches an American port, to some place in the United States. I think the reason for this is that Congress did not intend that the rates to be charged for service by carriers subject to the provisions of the interstate commerce act should depend upon or be affected by rates established abroad for ocean transportation.

The Commission, thus interpreting the act of Congress, and in order that American interests

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might not be injuriously affected by freight arrangements made by railroad companies with companies engaged in ocean transportation and which were not subject to our laws, issued on the 23d day of March, 1889, the following general order: "Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff covering other freights."

Subsequently, November 29, 1889, proceedings were commenced before the commission by the petition of the New York Board of Trade & Transportation against the Pennsylvania Railroad Company, the Pittsburg, Fort Wayne, & Chicago Railroad Company, and the Pittsburg, Cincinnati, & St. Louis Railroad Company.

The petition charged that those companies violated the interstate commerce act and were guilty of unjust discriminations, in that they charged their regular tariff rates upon property delivered to them at New York and Philadelphia for transportation to Chicago and other [241] western points, while *charging rates much lower for a like contemporaneous service under substantially similiar circumstances and conditions when the property was or is delivered to them at New York or Philadelphia by vessels and steamship lines, under through bills of lading from foreign ports and foreign interior ports, issued under common arrangement between the defendants and such vessels and steamship lines and foreign railroads for continuous carriage at joint rates from the point or port of shipment to Chicago and other western points; the defendants' share of such through rate for the inland transportation being lower than its regular tariff rates, in some cases as low as 50 per cent thereof.

The petition further charged that the defendants failed to state in their published tariffs or in such through bills of lading the inland charge separately from the ocean and other charges in order to prevent ascertainment of the actual inland rates; that they made and gave undue and unreasonable preferences and advantages to persons, firms, companies, corporations, and localities interested in the transportation of imported traffic from the seaboard under such through bills of lading, and had subjected persons, companies, firms, and corporations, in and about some localities to undue and unreasonable prejudice and disadvantage by reason of the higher rates charged to them for like and contemporaneous service under substantially similar circumstances and conditions; that there are no conditions or circumstances relating to the transportation of imported traffic which justify any difference in rates between imported traffic transported to any place in the United States from a port of entry and other traffic from such ports, and that the inland published tariff must by law be the same for all such freights.

In the course of the proceedings different commercial exchanges and chambers of commerce became coplaintiffs, and other railroads were made defendants.

It appears from the opinion of the Interstate Commerce Commission that numerous roads conformed to the order of March 23, 1889, and insisted that their inland rates were the same for all traffic, whether domestic or imported.

*In the progress of the proceedings the [242] Texas & Pacific Railway Company was brought before that tribunal, and on the 29th day of January, 1891, an order was made that certain railroad companies, including the Texas & Pacific Railway Company, should wholly cease and desist from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, or at any other than the same rates established in said published inland tariff for the carriage of other like kind of traffic in the elements of bulk, weight, value, and expense of carriage.

The present case was commenced by the Interstate Commerce Commission by petition filed in the circuit court of the United States for the southern district of New York against the Texas & Pacific Railway Company.

A decree was entered by that court, enjoining the latter company, its board of directors, officers, agents, attorneys, clerks, servants, employees, and all persons claiming or holding under them, or either or any of them, from carrying any article of import traffic shipped from any foreign port through any port of entry in the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over its line from such port of entry to such place of destination; or at any other than the same rates established in said published tariff for the carriage of other like kinds of traffic in the elements of bulk, weight, value, and expense of carriage; or from carrying imported traffic at lower rates for like service than the defendant charges for like traffic originating in the United States; or from charging or accepting for its share of through rates upon imported traffic a lower sum than it *charges or [243] receives for domestic traffic of like kind to the same destination from the point at which the imported traffic enters the country; or for such share of through rates upon imported traffic any other than the rates established in the defendant's published tariff for the carriage of other like kind of traffic in the elements of bulk, weight, value, distances, and expense of carriage.

This decree was affirmed in the court of appeals for the second circuit.

The record shows that the rate in cents per 100 pounds charged for the transportation, on through bills of lading, of books, buttons, carpets, clothing, and hosiery, from Liverpool and London, *via* New Orleans, over the Texas & Pacific Railroad and the railroads of the Southern Pacific system to San Francisco, is 107, while upon the same kind of articles—carried, it may be, *on the same train*—the rate charged from New Orleans, *over the same rail-*

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roads, to San Francisco, is 288. The rate in cents per 100 pounds charged for the transportation on through bills of lading, of boots and shoes, cashmeres, cigars, confectionery, cutlery, gloves, hats, and caps, laces, linen, linen goods, saddlers' goods, and woolen goods, from Liverpool and London, *via* New Orleans, over the same railroad, to San Francisco, is 107, while upon like goods, starting from New Orleans and destined for San Francisco, over the same line —it may be, *on the same train*—the rate charged is 370. Discrimination in the matter of rates is also made by the railway company (though not to so great an extent) in favor of blacking, burlaps, candles, cement, chinaware, cordage, crockery, common drugs, earthenware, common glassware, glycerine, hardware, leather, nails, soap, caustic soda, tallow, tin plate, and wood pulp, manufactured abroad and shipped, on through bills of lading, from Liverpool and London, *via* New Orleans, to San Francisco, and against goods of like kind carried from New Orleans to San Francisco over the same railroads.

These rates have been established by agreement between the railway company whose line, with its connections, extends from New Orleans to San Francisco, and the companies whose 244]*vessels run from Liverpool to New Orleans. And the question is presented, whether the Texas & Pacific Railway Company can, consistently with the act of Congress, charge a higher rate for the transportation of goods starting from New Orleans and destined to San Francisco, than for the transportation between the same places, of goods of the same kind in all the elements of bulk, weight, value, and expense of carriage, brought to New Orleans from Liverpool on a through bill of lading, and to be carried to San Francisco. If this question be answered in the affirmative; if all the railroad companies whose lines extend inland from the Atlantic and Pacific seaboards indulge in like practices—and if one may do so, all may and will do so; if such discrimination by American railways, having arrangements with foreign companies, against goods, the product of American skill, enterprise, and labor, is consistent with the act of Congress, then the title of that act should have been one to regulate commerce to the injury of American interests and for the benefit of foreign manufacturers and dealers.

The railway company insists that the competition existing between it and the ocean lines running between Liverpool and San Francisco, *via* Cape Horn and the Pacific Ocean, and between Liverpool and San Francisco, *via* the Isthmus of Panama, compel it to charge a higher rate from New Orleans to San Francisco for the transportation of goods originating at New Orleans than on like goods originating at Liverpool and destined to San Francisco, *via* New Orleans; otherwise, it contends, goods that originate in Liverpool would fall into the hands of its competitors in the business of transportation. The Interstate Commerce Commission held that, in determining the question before it, no weight could be attached to the circumstances arising from the conduct of ocean lines by corporations or associations who were in no wise subject to the provisions of the act of Congress; and that the provision which expressly forbids common carriers from making or giving undue preferences or advantages in any respect whatsoever was intended to be so far rigid in its nature that it could not be relaxed by reason of circumstances or *con-[245 ditions arising out of or connected with foreign countries, or that were caused by agencies beyond the control or supervision of the Commission. The court now holds that the Commission erred in thus interpreting the act of Congress.

To what common carriers does the interstate commerce act of 1887 apply? 24 Stat. at L. 379, chap. 104; 25 Stat. at L. 855, chap. 382. This question is answered by the 1st section of that act.

By that section the provisions of the act are declared to "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement, for a continuous carriage or shipment, from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid." Again: "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

From this section it is clear that the Texas & Pacific Railway Company is, and that the ocean lines connected with that company are not, subject to the provisions of the act. *This[246 interpretation is supported by the declaration made on the floor of the Senate by the chairman of the select committee which reported the original bill. He said: "While the provisions of the bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, such as shipments between the United States and *adjocent* countries by railroad, and the transportation by railroad of shipments between points in the United States and ports of transhipment or of entry, when such shipments are destined to or re-

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ceived from a foreign country on through bills of lading. To avoid any uncertainty as to the meaning of these provisions in regard to what may be at the same time in some instances state and foreign commerce, it is expressly provided that the bill shall not apply to the transportation of property wholly within the state *and* not destined to *or received from* a foreign country."

We have, then, an explicit declaration by Congress that the act not only embraces common carriers of the class to which the Texas & Pacific Railway Company belongs, but that its provisions as to rates apply to the transportation of property "shipped from a foreign country to any place in the United States, *and* carried to such place *from a port of entry either in the United States or an adjacent foreign country.*"

What is the rule declared by Congress in respect to rates for the transportation of property or goods of the kind just described? It is clearly defined by the 2d, 3d, and 4th sections, which declare:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for 247] doing for him *or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which designated common carriers may be relieved from the operation of this section of this act."

I am unable to find in these sections any authority for the Commission, or for a carrier subject to the provisions of the act of Congress, to take into consideration the rates established by ocean lines as affecting the charges that an American carrier may make for the transportation of property over its routes. The transportation, for instance, by the Texas & *Pacific Railway Company of boots and [248 shoes from New Orleans to San Francisco for A, and the transportation of like goods over the same route for B, is "a like and contemporaneous service" by the carrier for each shipper, and is performed under precisely the same circumstances and conditions. A discrimination between A and B, in respect of charges for a like and contemporaneous service in transporting the same kind of property over the same route, is an unjust discrimination, because it necessarily operates to give that one to whom the most liberal rates are given an undue or unreasonable preference or advantage over the others.

I am unwilling to impute to Congress the purpose to permit a railroad company, because of arrangements it may make, for its benefit, with foreign companies engaged in ocean transportation, to charge for transporting from one point to another point in this country goods of a particular kind manufactured in this country three or four times more than it charges for carrying, over the same route and between the same points, goods of the same kind manufactured abroad and received by such railroad company at one of our ports of entry.

The 4th section of the statute relating to long and short distances, and which authorizes the Commission, in special cases, to allow less to be charged for longer than for shorter distances for the transportation of passengers or property over the same route, does not refer to distances covered and services performed on the ocean, between this country and foreign countries not adjacent to this country, nor to transportation between the same points in this country over the same road. When the question is as to rates for service by a carrier between two given points in this country, and in reference to the same kind of property, Congress, I think, intended that for such "like and contemporaneous services," performed, as they necessarily are, under the same circumstances and conditions, no preference or advantage should be given to any particular person, company, firm, corporation, or locality. Consequently, when goods are to be carried from one point in the United States to another, the rate to be *charged cannot properly be [249 affected by an inquiry as to where such goods originated or were manufactured.

Congress intended that all property transported by a carrier subject to the provisions of the act should be carried without any discrimination because of its origin. The rule intended to be established was one of equality in charges, as between a carrier and all shippers, in respect of like and contemporaneous service performed by the carrier over *its* line, between the same points, without discrimination based

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upon conditions and circumstances arising out of that carrier's relations with other carriers or companies,—especially those who cannot be controlled by the laws of the United States.

After referring to the fact that goods originating in a foreign country are carried upon rates that are practically fixed abroad, and are not published here, while carriers governed by the act of Congress are required to publish their rates for transportation in this country, the Commission, speaking by Commissioner Bragg, well said: "Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which it is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States, under the operation of the act to regulate commerce, must be under the inland tariff from such port of entry to such place of destination covering other like kind of traffic in the elements of bulk, weight, value, and of carriage, and no unjust preferences must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from a port of entry to the place of its destination in the United States the mere fact that it is foreign merchandise thus brought [250] from a foreign *port is not a circumstance or condition under the operation of the act to regulate commerce which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line." I concur entirely with the Commission when it further declared: "One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute. Such a deprivation would be so obviously unjust as to shock the general sense of justice of all the people of the country, except the few who would receive the immediate and direct benefit of it."

It seems to me that any other interpretation of the act of Congress puts it in the power of railroad companies which have established, or may establish, business arrangements with foreign companies engaged in ocean transportation, to do the grossest injustice to American interests. I find it impossible to believe that Congress intended that freight, originating in Europe or Asia and transported by an American railway from an American port to another part of the United States, could be given advantages in the matter of rates, for services performed in this country, which are denied to like freight originating in this country and passing over the same line of railroad between the same points. To say that *Congress [251] so intended is to say that its purpose was to subordinate American interests to the interests of foreign countries and foreign corporations. Such a result will necessarily follow from any interpretation of the act that enables a railroad company to exact greater compensation for the transportation from an American port of entry, of merchandise originating in this country, than is exacted for the transportation over the same route of exactly the same kind of merchandise brought to that port from Europe or Asia, on a through bill of lading, under an arrangement with an ocean transportation company. Under such an interpretation, the rule established by Congress to secure the public against unjust discrimination by carriers subject to the provisions of the interstate commerce act would be displaced by a rule practically established in foreign countries by foreign companies acting in combination with American railroad corporations seeking, as might well be expected, to increase their profits, regardless of the interests of the public or of individuals.

I am not much impressed by the anxiety which the railroad company professes to have for the interests of the consumers of foreign goods and products brought to this country under an arrangement as to rates made by it with ocean transportation lines. We are dealing in this case only with a question of rates for the transportation of goods from New Orleans to San Francisco over the defendant's railroad. The consumers at San Francisco, those who may be supplied from that city, have no concern whether the goods reached them by way of railroad from New Orleans, or by water around Cape Horn, or by the route across the Isthmus of Panama.

Nor is the question before the court controlled by considerations arising out of tariff enactments of Congress. The question is one of unjust discrimination by an American railway against shippers and owners of goods and merchandise originating in this country, and of favoritism to shippers and owners of goods and merchandise originating in foreign countries. If the position of the Texas & Pacific Railroad Company be sustained, then all the railroads of the country that extend inland from either the Atlantic or the Pacific ocean will *follow their example, with the inevita- [252] ble result that the goods and products of foreign countries, because alone of their foreign origin and the low rates of ocean transportation, will be transported inland from the points where they reach this country at rates so much lower

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than is accorded to American goods and products, that the owners of foreign goods and products may control the markets of this country to the serious detriment of vast interests that have grown up here, and in the protection of which, against unjust discrimination, all of our people are deeply concerned.

It is said that only boards of trade or commercial exchanges have complained of the favorable rates allowed by railroad companies for foreign freight. It seems to me that this is an immaterial circumstance. So long as the questions under consideration were properly raised by those boards and exchanges, it was unnecessary that individual shippers, producers, and dealers should intervene in the proceedings before the Commission. But I may ask whether the interests represented by these boards of trade and commercial exchanges are not entitled to as much consideration as the interests of railroad corporations? Are all the interests represented by those who handle, manufacture, and deal in American goods and merchandise that go into the markets of this country to be subordinated to the necessities or greed of railroad corporations? As I have already said, Congress, by enacting the interstate commerce act, did not seek to favor any special class of persons, nor any particular kind of goods because of their origin. It intended that all freight of like kind, wherever originating, should be carried between the same points, in this country, on terms of equality.

It is said that the Interstate Commerce Commission is entitled to take into consideration the interests of the carrier. My view is, that the act of Congress prescribes a rule which precludes the Commission or the courts from taking into consideration any facts outside of the inquiry whether the carrier, for like and contemporaneous services, performed in this country under substantially similar circumstances and conditions, may charge one shipper **253**] more or less than he charges *another shipper of like goods, over the same route, and between the same points. Undoubtedly, the carrier is entitled to reasonable compensation for the service it performs. But the necessity that a named carrier shall secure a particular kind of business is not a sufficient reason for permitting it to discriminate unjustly against American shippers, by denying to them advantages granted to foreign shippers. Congress has not legislated upon such a theory. It has not said that the inquiry whether the carrier has been guilty of unjust discrimination shall depend upon the financial necessities of the carrier. On the contrary, its purpose was to correct the evils that had arisen from unjust discrimination made by carriers engaged in interstate commerce. It has not, I think, declared, nor can I suppose it will ever distinctly declare, that an American railway company, in order to secure for itself a particular business and realize a profit therefrom, may burden interstate commerce in articles originating in this country, by imposing higher rates for the transportation of such articles from one point to another point in the United States, than it charges for the transportation between the same points, under the same circumstances and conditions, of like articles originating in Europe, and received by such company on a through bill of lading issued abroad. Does any one suppose that if the interstate commerce bill, as originally presented, had declared in express terms that an American railroad company might charge more for the transportation of American freight, between two given places in this country, than it charged for foreign freight, between the same points, that a single legislator would have sanctioned it by his vote? Does any one suppose that an American President would have approved such legislation?

Suppose the interstate commerce bill as originally reported, or when put upon its passage, had contained this clause: "Provided, however, the carrier may charge less for transporting from an American port to any place in the United States, freight received by it from Europe on a through bill of lading, than it charges for American freight carried from that port to the same place for which the foreign freight is *destined." No one would [**254** expect such a bill to pass an American Congress. If not, we should not declare that Congress ever intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted.

Let us suppose the case of two lots of freight being at New Orleans, both destined for San Francisco over the Texas & Pacific Railroad and its connecting lines. One lot consists of goods manufactured in this country; the other, of goods of like kind manufactured in Europe and which came from Europe on a through bill of lading. Let us suppose, also, the case of two passengers being at New Orleans—the act of Congress applies equally to passengers and freight—both destined for San Francisco over the same railroad and its connecting lines. One is an American; the other, a foreigner who came from Europe upon an ocean steamer belonging to a foreign company that had an arrangement with the Texas & Pacific Railroad Company by which a passenger with a through ticket from Liverpool would be charged less for transportation from New Orleans to San Francisco than it charged an American going from New Orleans to San Francisco. The contention of the railroad company is, that it may carry European freight and passengers between two given points in this country at lower rates than it exacts for carrying American freight and passengers between the same points, and yet not violate the statute, which declares it to be unjust discrimination for any carrier, directly or indirectly, by any device, to charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. And that discrimination is justified upon the ground that otherwise the railroad company will lose a particular traffic. Under existing legislation, such an interpretation of the act of Congress enables the great railroad corporations of this country to place American travelers, in their own *country, as well as American[**255**

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interests of incalculable value, at the mercy of foreign capital and foreign combinations—a result never contemplated by the legislative branch of the government.

I cannot accept this view, and therefore dissent from the opinion and judgment of the court.

I am authorized by *Mr. Justice* **Brown** to say that he concurs in this opinion.

Mr. Chief Justice **Fuller** dissenting:

In my judgment the 2d and 3d sections of the interstate commerce act are rigid rules of action, binding the Commission as well as the railway companies. The similar circumstances and conditions referred to in the act are those under which the traffic of the railways is conducted, and the competitive conditions which may be taken into consideration by the Commission are the competitive conditions within the field occupied by the carrier, and not competitive conditions arising wholly outside of it.

I am therefore constrained to dissent from the opinion and judgment of the court.

DAVID S. STANLEY ET AL., *Plffs. in Err.*,
v.
MARY U. SCHWALBY and J. A. SCHWALBY, Her Husband.

(See S. C. Reporter's ed. 255-283.)

Writ of error to state court—waiving exemption of the United States from suit—judgment against United States—costs—statute of limitations—suspension of—notice of title—consideration for deed—quitclaim deed—bona fide purchaser—immunity of United States—validity of authority set up under the United States—jurisdiction of this court—instruction to state court.

1. Where application has been duly made to the supreme court of Texas for a writ of error to review a judgment of the court of civil appeals of that state, and denied, a writ of error from this court is properly addressed to the court of civil appeals in which the record remains.
2. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, can waive the exemption of the United States from judicial process, or submit the United States or its property to the jurisdiction of a court in a suit brought against its officers; and an answer for it filed by the district attorney in pursuance of instructions to appear and defend its interests, given by the Attorney General, is not a voluntary submission by the United States to the jurisdiction of the court.
3. A judgment for plaintiffs for an undivided third part of land and for the possession of the whole jointly with the defendants, who claimed no title therein, but claimed possession as officers and agents of the United States, under its title, is a judgment directly against the United States and its property, and not merely against its officers, and is beyond the power of a state court to render where the United States has not voluntarily submitted to its jurisdiction.
4. A judgment for costs cannot be rendered against the United States.
5. The United States and its officers may avail themselves of the statute of limitations.
6. When a statute of limitations has begun to run it cannot be again suspended by a subsequent disability.
7. A vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser of land with knowledge of title in a third person.
8. An advantage inuring to a city from the establishment of military headquarters there by the United States is such a valuable consideration for a deed from the city as to make the United States a bona fide purchaser of the land.
9. Mere knowledge of a grantee in a warranty deed that his grantor held under a quitclaim does not prevent the former from holding as a bona fide purchaser.
10. Information to an attorney for a purchaser of land, that a sale had been made thereof many years before to a person who does not appear in the chain of title on the records, does not prevent the purchaser from holding as a bona fide purchaser on advice from the attorney, given in reliance upon the records, that the title was good. The mere description of the land as "known as the McMillan lot" raises no inference that it was ever owned by any one of that name."
11. The United States has and may assert a right, privilege, or immunity under the United States Constitution, which private parties could not have. The *dictum* to the contrary in United States v. Thompson, 93 U. S. 586,588 (23: 982, 983), is misleading.
12. A judgment of a state court against the validity of an authority set up under the United States by defendants in an action of trespass to try title, so far as it necessarily involves the decision of a question of law, presents a question for review by this court, whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.
13. A decision based on insufficient evidence of a state court in an action to recover land claimed by the United States in an action against its officers, that the United States had notice of a prior deed and therefore had no title, and that judgment should be rendered against its officers for both title and possession, is a decision in a matter of law against the validity of the authority set up by them under the United States, and is reviewable by this court.
14. On reversing the judgment of the highest court of a state, the Supreme Court of the United States has power to instruct the state court to enter a judgment finally disposing of the case, instead of remanding it generally for further proceedings not inconsistent with the opinion of the Federal court.

[No. 653.]

Submitted January 10, 1896. Decided March 23, 1896.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the state of Texas to review a judgment of that court affirming the judgment of the District Court of Bexar county in that state in favor of plaintiffs, Mary U. Schwalby *et al.*, against David S. Stanley *et al.*, defendants, for the recovery of one undivided third part of a parcel of land in the city of San Antonio and a certain sum for its use and occupation, etc. *Reversed, and case remanded with instructions to dismiss the action as against the United States, and to enter judgment for the individual defendants, with costs.*

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See same case below, 85 Tex. 348, 8 Tex. Civ. App. 679, 681, 682, 684. Also see same case, 147 U. S. 508 (37: 259).

Statement by *Mr. Justice* **Gray**:

This was an action of trespass to try title, brought in the district court of Bexar county in the state of Texas, by Mary U. Schwalby, joining her husband, J. A. Schwalby, against David S. Stanley, William R. Gibson, Samuel T. Cushing, and Joseph C. Bailey, to recover a parcel of land in the city of San Antonio.

The original petition was filed February 23, 1889; and, as amended by leave of court December 2, 1889, alleged that Mrs. Schwalby was seised and possessed in fee simple of an undivided third part of the land, and she and her husband were entitled to the possession of the whole, and that the defendants, without any right or title, ousted them from the possession thereof; and prayed "judgment for the recovery of the title to one third of said premises, and possession of the whole thereof, for costs of said suit, and for general relief."

The individual defendants, and "the United States, by their attorney, Andrew J. Evans, acting by and through instructions from the Attorney General of the United States, here exhibited to the court" (but not at that time made part of the record), filed an amended answer, in which they pleaded not guilty; and set up, among other defenses, that the title to the land was in the United States, and the individual defendants had and claimed no title therein, but were lawfully in possession thereof as officers and agents of the United States; and specially pleaded that the city of San Antonio in 1875 purchased the land, and on June, 16, 1875, conveyed it to the United States, with no notice of the plaintiff's claim, and the United States were innocent purchasers for valuable consideration; and that from June 16, 1875, to the bringing of this action the United States had been in the actual, peaceable, and adverse possession of the land, continuously enjoying and improving it, no taxes being due thereon, **258**] under deed duly *recorded and "under title and color of title, from and under the sovereignty of the soil, down to the defendant, the United States, duly registered;" and therefore pleaded the statutes of limitations of the state of Texas of three, five, and ten years; and also that the United States had made permanent and valuable improvements on the land.

The plaintiffs, by supplemental petition, excepted to the answer, so far as it was filed in behalf of the United States, upon the ground that the United States were not a party defendant, and that neither the district attorney nor the Attorney General of the United States had the authority to submit for adjudication, in the courts of the state of Texas, the rights of the United States of America, as well as upon the ground that the pleas of the statutes of limitations of the state of Texas constituted no defense to the action, because the United States were neither bound by nor protected by those statutes, and because the plaintiffs could not, in any court, bring suit against the United States; and to the pleas of the statutes of limitations replied that on January 18, 1871, and long before their adverse possession commenced, the plaintiff Mary U. Schwalby was lawfully married to her coplaintiff, and had ever since continued to be a married woman.

Joseph Spence, Jr., intervened by leave of court, and filed a petition similar to the principal one, likewise claiming an undivided third part of the land.

The parties submitted the case to the decision of the court without a jury. At the trial the following facts were approved or admitted:

The common source of title through whom all parties, the plaintiffs, the intervener, and the United States, claimed this land, was Anthony M. Dignowity.

*On September 13, 1858, he executed [**259** to Amanda J. Dignowity, his wife, a general power of attorney to sell and convey his real estate; and by virtue thereof she, on May 9, 1860, executed a warranty deed to Duncan B. McMillan of this parcel, reciting the payment by him of a consideration of $100. This deed was acknowledged on the same day before William H. Cleveland, notary public; but was not recorded until September 30, 1889. McMillan died in Louisiana in February, 1865, intestate, a widower, leaving three children; Mary, the female plaintiff, who was born September 11, 1848, was married to J. A. Schwalby, January 18, 1871, and was still his wife when this action was tried; Sarah, who was born August 3, 1854, married to one Neely, February 14, 1875, and died August 17, 1878, leaving two children, who were still living; and Duncan W. McMillan, born November 2, 1850, who by deed, dated and acknowledged March 26, 1889, and recorded March 29, 1889, conveyed his interest in this land to the intervener, Joseph Spence, Jr.

Dignowity died in April, 1875, and by his will, admitted to probate April 22, 1875, devised and bequeathed all his property to his wife, and made her independent executrix, with full power of sale and disposition of all his property, and requiring of her no bond or inventory. By deed of quitclaim and release, dated May 1, 1875, and recorded June 1, 1875, the widow, in her own right, and as independent executrix, for the consideration of $1,500, conveyed to the city of San Antonio four lots of land, one of which was that now in question, described as "lot number one in block number two, known as McMillan lot," with special warranty against all persons claiming by, under, or through Dignowity or his estate. By warranty deed in the statutory form, dated June 16, 1875, and recorded October 21, 1875, the city of San Antonio conveyed the four lots to the government of the United States of America for military purposes, "in consideration of $1 paid to the said city of San Antonio by the said government, the receipt whereof is hereby acknowledged, and for divers and other good and sufficient considerations thereunto moving."

The defendant Stanley, being called as a witness for the plaintiffs, testified as follows: "Myself and the other defendants were in possession of the lot when the suit was brought. I am a brigadier general in the United States Army; my codefendants are officers in the United States Army. We took, held, and hold such possession as such officers of the United States Army. The government of the United States took *actual possession of the land [**260**

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in controversy in the year 1882. The land sued for is part of the military reservation of the United States of America at San Antonio. We hold possession under the United States of America. According to my understanding, the United States first took possession of this lot in the year 1875 or 1876; it was then open prairie. We do not claim title to the land in our own right, but hold it for the United States. The United States have made the following improvements upon the lot in controversy before the institution of this suit" (stating them). "These improvements were made since the year 1881; before that, the lot was open prairie. I never heard of a claim against this land until the commencement of this suit."

Mrs. Dignowity, in a deposition taken by the plaintiffs July 23, 1889, before William H. Houston, notary public, but introduced in evidence by the defendants, after being shown her deed to the city of San Antonio, dated May 1, 1875, testified as follows: "Lot 1 in block 2, named in that deed, was called by me the McMillan lot, because it was the habit of my husband during his lifetime, whenever he sold a city lot, to mark the name of the purchaser in pencil on the map, and, when the lot was paid for, to write the name in ink. I presume I found this lot marked in the name of McMillan in pencil, and therefore called it the McMillan lot. This is the only explanation I am now able to give. . . . I must have known in some way that the lot had been sold and a payment made on it; and I know of no other way I should have known it, except as stated above. . . . I have no recollection of ever making a deed to Duncan B. McMillan of lot 1 in block 2, though I may have done so. If such a deed was made by me twenty-nine years ago, I do not see why it was not recorded, unless perhaps the full purchase money had not been paid. . . . I do not know who was in possession of the lot from 1860 until my husband's death in 1875, but believe it was unoccupied. I do not know that it was claimed by any one but him. I paid the taxes on it during that time. I never took actual possession of the lot, but continued to pay the taxes until it was sold **261**]to the city. I never had said lot in *actual possession, and never had a tenant on it. . . . Neither Duncan B. McMillan, nor any one for him, nor any of his heirs, ever claimed an interest in the lot in suit in this case, from 1860 to 1875, to my knowledge. When I sold the lot in controversy to the city of San Antonio, I acted in good faith. I believed for some reason that Duncan B. McMillan had some claim on the lot, or I should not have specially quitclaimed it to the city."

In a second deposition, taken by the defendants December 31, 1889, she testified: "I am in my seventieth year, and reside in San Antonio. . . . I have seen the original of the deed from me to Duncan B. McMillan, dated May 9, 1860. I was shown the deed by Captain William Houston. I have never seen it but that one time, since it was executed by me, until to day. I carefully examined it, and it is a genuine deed. I don't know why said deed was never recorded until a few months ago. I don't know whether I ever delivered possession of the lot in controversy to Duncan B. McMillan or his agent for him formally, or not. I paid taxes on the land until it was sold subsequently. I don't remember of receiving but $50 on the transaction, and think that was paid before the date of the deed. I don't recollect anything more than that I was paid $50 on the trade, and I executed the deed, and acknowledged it before Mr. Cleveland, and left it with him. . . . I have not seen Duncan B. McMillan since 1860. He was then on his way home to Louisiana. . . . I do remember W. H. Cleveland. He was a lawyer in good standing about the year 1860. He did at times attend to business both for myself and husband. I have owned and sold considerable real property in Texas, and still own property and have experience in dealing in lands and city lots. . . . The deed from me to McMillan recites a consideration of $100, but I do not recollect of receiving but $50. I received $50, as before stated; my husband never received a cent. I don't know anything about what other persons may have received. I know nothing of any note. I don't know anything about the money having been paid to Cleveland; if it was, I don't know anything about it."

*George C. Altgelt, being called as a [**262** witness for the defendants, testified: "I am plaintiff's attorney. I do not know Mrs. Mary U. Schwalby personally. I received the deed to Duncan B. McMillan from Amanda J. Dignowity, attorney in fact for Anthony M. Dignowity, by mail. It was sent to me by Joseph Spence, Jr., who is a lawyer and land agent of San Angelo, Tom Green county, Texas. I never saw Mrs. Schwalby."

James H. French, a witness for the defendants, testified: "I was mayor of the city of San Antonio in 1875, at the time the city purchased the property from Mrs. Dignowity. The city paid the consideration, $——, to Mrs. Dignowity in 1877. The government buildings, the officers' quarters, were placed upon the Dignowity property. The city had the title examined by A. J. Evans. When the city purchased from Mrs. Dignowity and paid the money, the city had notice of this claim,—that is, the claim of D. B. McMillan. We had this notice from Mrs. A. J. Dignowity. Mrs. Dignowity refused to give a warranty deed to the lot in controversy. I, as mayor of the city, had notice of the McMillan claim at the time the city purchased. There was no consideration paid direct from the government to the city for the property. It was a donation from the city to the government. The city never received any consideration from the government for the conveyance; but, by reason of the establishment of the military headquarters here, the city has received a thousand-fold benefit on the consideration paid by her to Mrs. Dignowity."

Andrew J. Evans, being called by the defendants, testified: "I, as United States district attorney for the western district of Texas, in 1875 made an examination of the title to the lot in controversy, and traced the title back to the case of *Lewis* v. *San Antonio*, 7 Tex. 288. I examined the records of deeds for Bexar county, Texas, and did not find any deed of record from Dignowity, and after I had made the examination I believed the title was good. I so advised the department at Washington, and upon my advice the government took the deed from the city in good faith."

Upon cross-examination, Evans testified: "I

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263]made the *examination of the title as United States attorney, and advised that the title was good. I saw the deed from Mrs. Dignowity as executrix, etc., to the city of San Antonio, read it, and had notice of all its recitals. I had information of the sale to Duncan B. McMillan, but I satisfied myself that he had never paid the purchase money." He was then asked, "When you read the deed from Mrs. Dignowity to the city of San Antonio, and saw there the lot in dispute was quitclaimed, and described as being 'known as the McMillan lot,' did not these facts create in your mind a suspicion that the title to this lot was not all right?" To this question the witness answered, "They did not."

There was no evidence, beyond that above stated, bearing upon the question whether the deed from Dignowity to McMillan was ever delivered; or upon the question whether the United States took the deed from the city of San Antonio with notice of a previous conveyance to McMillan.

The district court of Bexar county sustained the plaintiff's exceptions to the pleas of the statutes of limitations, and ordered those pleas to be struck out; overruled the other exceptions of the plaintiffs; and gave judgment for the plaintiffs and the intervenor against the individual defendants and the United States for two thirds of the title to the land, and for possession jointly with the defendants of the whole, and for costs, and allowed to the United States the value of their improvements. On March 24, 1890, the United States and the other defendants appealed to the supreme court of the state of Texas, which, on March 4, 1892, ordered the judgment to be set aside and the action dismissed as against the United States, and affirmed the judgment as against the individual defendants. *Stanley* v. *Schwalby*, 85 Tex. 348. Upon a writ of error sued out by the United States and the other defendants, the judgment of the supreme court of Texas was reversed by this court, at October term, 1892, and the case remanded for further proceedings not inconsistent with its opinion, reported 147 U. S. 508 [37: 260]. The supreme court of the state thereupon vacated its own judgment, reversed the judgment of the district court, 264] and *remanded the case to that court for such further proceedings.

In that court, leave to file an amended answer was then requested by the individual defendants, with whom, as the record stated, "come also the United States of America, by their attorney, Andrew J. Evans, who is United States attorney for the western district of Texas, duly appointed and commissioned as such, and who so appears for the said United States of America by direction of the Attorney General of the United States of America;" and who, as evidence of such direction, exhibited and filed a letter dated April 18, 1889, from the Secretary of War to the Attorney General, relating to this suit, and requesting that "the proper United States attorney be instructed to appear and defend the interests of the United States in this matter;" and a letter dated April 20, 1889, from the Attorney General, enclosing the letter of the Secretary of War, and "in compliance with his request" instructing the district attorney "to appear and defend the interests of the United States involved therein."

Leave being granted, the United States, by the district attorney, "by direction of the Attorney General, as heretofore exhibited to the court," together with the individual defendants, filed two pleas in bar: 1st, that this was an action, nominally against the individual defendants, "but in fact against the United States of America, a sovereign corporation not liable to suit in this court or any other, in the absence of an act of Congress;" 2d, that the action was against the property of the United States; and, in connection with each of these pleas, alleged that the individual defendants were officers in the military service of the United States, in possession as such of this land, under and by direction of the President of the United States of America, the Commander in Chief of the Army and Navy of the United States, and not of their own volition, will, or wish, and that neither of them ever pretended to hold or have possession or right of possession, or title or color of title, of the land, as individuals, and that this suit was but a palpable device to maintain an action at law against the United States and their *prop-[265 erty, and should not be further maintained; and also pleaded not guilty; and that the United States had held adverse possession in good faith, under a warranty deed made to them in 1875 by the city of San Antonio, and without knowledge or suspicion of any adverse title, and that the United States were innocent purchasers of the land for a valuable consideration, without notice of the plaintiff's unrecorded claim; and set up the statutes of limitations, and a claim for improvements, as in their former answer.

The case was again tried by the district court, without a jury, and the same evidence introduced as at the first trial. The court overruled the first and second pleas in bar; and adjudged that Spence, the intervener, take nothing by his petition; that the plaintiffs recover from the individual defendants one undivided third part of the lots in question, and the sum of $126.66 for their use and occupation of that part, and costs, and be put in joint possession with the defendants; and that the United States be allowed the sum of $333.33 for improvements.

Thereupon, as the record stated, "all parties, to wit, the plaintiff, the intervener, the defendants, and the United States of America, in open court excepted to the judgment of the court, and gave due notice of appeal." And a report or statement of the case, called in the Texas practice "a statement of facts, or agreed statement of the pleadings and proof" (the material parts of which are given above), was made up by the parties and certified by the judge. Tex. Rev. Stat. 1879, §§ 1377, 1414; Tex. Stat. April 13, 1892, chap. 15, § 24.

Upon a writ of error sued out by the United States, and an assignment of errors by the defendants, and upon cross-assignments of errors by the plaintiffs and by the intervener, the case was taken to the court of civil appeals for the fourth supreme judicial district of the state of Texas, which affirmed the judgment, except as to the allowance for improvements; and thereupon, "proceeding to render such judg-

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ment as should have been rendered by the court below," adjudged that the plaintiffs recover of the individual defendants one undivided third part of the land (describing it), and 266]the sum of $126.66 for the use and *occupation of that part, with interest thereon from the date of the judgment below, and costs, and "have their writ of possession against said defendants and all other persons who have entered said premises since the filing of this suit on the 23d day of February, 1889, placing them in joint possession with the defendants;" that Spence, the intervener, take nothing by his suit; and "that the plaintiff in error, the United States of America, who voluntarily made itself a party in the court below, take nothing by its plea, and pay all costs of this court and of the court below." The opinions on rendering that judgment and on denying a motion for a rehearing are reported, under the name of *United States* v. *Schwalby*, in 8 Tex. Civ. App. 679, 685.

The supreme court of the state of Texas denied a petition of the United States for a writ of error from that court to the court of civil appeals. The chief justice of the court of civil appeals refused to allow to the United States a writ of error to bring up the case to this court. The present writ of error was thereupon sued out by the individual defendants and the United States, and was allowed by a justice of this court.

Mr. **Holmes Conrad,** Solicitor General, for plaintiffs in error.

Messrs. **A. H. Garland** and **R. C. Garland** for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This action was brought in a district court of the state of Texas, by Mary A. Schwalby and her husband against General Stanley and other officers of the Army, to try the title to a parcel of land, part of the military reservation of the United States at San Antonio. The plaintiffs claimed title in one third of the land, and possession of the whole; and Joseph Spence, Jr., intervening, also claimed title in one third. The district attorney, professing to act in behalf of the United States under instructions from the Attorney General, joined with the defendants in an answer setting up 267]these *defenses: 1st. That the action was really against the United States, who were not liable to be sued. 2d. Not guilty. 3d. Title in the United States. 4th. The statutes of limitations of Texas. 5th. Permanent and valuable improvements by the United States.

At the first trial, the inferior court gave judgment for the plaintiffs and the intervener, against the United States, as well as against the original defendants, for two thirds of the title in the land, and for joint possession with the defendants of the whole, and allowed the United States for their improvements. On appeal from that judgment, the supreme court of the state, on March 4, 1892, held that the district attorney could not submit the rights of the United States to the jurisdiction of the court; that the plaintiffs and the intervener had made out their title; that the United States were not innocent purchasers, and had no title to the land; and that the statutes of limitations, as they did not bind the United States, could not be pleaded by the United States, or by their officers acting under them; and therefore disallowed the claim for improvements, set aside the judgment, and dismissed the action as against the United States, and affirmed the judgment against the other defendants. 85 Tex. 348. But this court, at October term, 1892, upon writ of error, held that the United States and their agents were entitled to the benefit of the statutes of limitations; and therefore, without any consideration of the case upon its merits, reversed the judgment, and remanded the case for further proceedings not inconsistent with its opinion. 147 U. S. 508, 519, 520 [37: 260, 264].

The case having been remanded accordingly to the supreme court of the state, and by that court to the district court, an amended answer, setting up substantially the same defenses as before, was filed by the individual defendants, and by the district attorney, purporting to act in behalf of the United States under the instructions of the Attorney General. Those instructions (then first filed in the case) appear to have been given by the Attorney General at the request of the Secretary of War, and to have been only "to appear and defend the interests of the United States involved" in this suit. The *district court, upon the same[268 evidence as at the first trial, adjudged that the plaintiffs recover from the individual defendants one undivided third part of the land, and costs, and be put in joint possession with them; and that the United States be allowed for their improvements.

The case was taken by writ of error to the court of civil appeals, which had been vested, by the statutes of Texas of April 13, 1892, with appellate jurisdiction from the district courts, with a provision for the review of its decisions by the supreme court of the state upon petition for a writ of error. Tex. Rev. Stat. §§ 1011*a*-1011*c*; Tex. Stat. 1892, chap. 14, § 1; chap. 15, § 5; Gen. Laws 1st Sess. 22d Leg. pp. 19, 20, 26.

The court of civil appeals affirmed the judgment of the district court, except as to the allowance for improvements; and, "proceeding to render such judgment as should have been rendered by the court below," adjudged that the plaintiffs recover judgment against the individual defendants for one undivided third part of the land, and for costs, and "have their writ of possession against said defendants and all other persons who have entered said premises since the filing of this suit, placing them in joint possession with the defendants," and that the United States pay all the costs in the case. The views of that court are shown by the following extracts from its opinion: "In 1881 or 1882 the United States went into possession of the lot by virtue of the deed [from the city of San Antonio] and were occupying, using, and enjoying the same up to the time the suit was instituted on February 23, 1889. The United States had actual notice that the land had been conveyed by Mrs. Dignowity to Duncan B. McMillan, at the time the deed was made to them by the city of San Antonio, and did not make the improvements in good faith. The claim of Joseph Spence was barred by five

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years' limitation; but Mrs. Schwalby being under the disability of coverture, the statute did not run as to her. . . . The United States were not sued, and neither was it attempted to subject the property of the United States to suit; and neither of these propositions was advanced or held by the district court. Stanley and others were sued individually as trespassers, **269**] not as *officers of the United States; and the United States voluntarily made themselves parties to the suit. That this suit was properly brought has been decided in a number of cases, and has been reaffirmed in this identical case by the Supreme Court of the United States. The jurisdiction of the court is not ousted because the individuals sued assert authority to hold possession of the property as officers of the United States government. They must show sufficient authority in law to protect them. The mere fact that individuals have been placed in possession by the government would not be a valid defense, unless the government had the lawful authority to so place them. . . . If McMillan had not paid the purchase money, that did not place appellants in any better position as to notice. They had actual notice of his claim, and took the risk in making the improvements." 8 Tex. Civ. App. 679, 681, 682, 684.

A petition for a writ of error to the court of civil appeals having been presented to the supreme court of the state, and denied, the present writ of error from this court was properly addressed to the court of civil appeals, in which the record remained. U. S. Rev. Stat. § 709; *Gregory* v. *McVeigh*, 90 U. S. 23 Wall. 294 [23: 156]; *Polleys* v. *Black River Imp. Co.* 113 U. S. 81 [28: 938]; *Fisher* v. *Carrico* ("*Fisher* v. *Perkins*") 122 U. S. 522 [30: 1192].

It is contended by the Solicitor General in behalf of the United States that, upon the facts shown by the record, the judgment should be reversed, for several reasons, all of which are worthy of consideration, and may conveniently be considered in the following order:

First. That the suit is against the United States and against property of the United States.

Second. That the claim of the plaintiffs was barred by the statute of limitations.

Third. That the deed from Dignowity to McMillan, under whom the plaintiffs claim, was never delivered.

Fourth. That the United States, when they took their deed from the city of San Antonio, had no notice of a previous conveyance to McMillan.

It is a fundamental principle of public law, **270**]affirmed by a *long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States or against their property, in any court, without express authority of Congress. 147 U. S. 512 [37: 261]. See also *Belknap* v. *Schild*, 161 U. S. 10 [*ante*, 599]. The United States by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a state in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the court in a suit brought against their officers. *Case* v. *Terrell*, 78 U. S. 11 Wall. 199, 202 [20: 134, 135]; *Carr* v. *United States*, 98 U. S. 433, 433 [25:209, 211]; *United States* v. *Lee*, 106 U. S. 196, 205 [27: 171, 176]. The original instructions from the Attorney General to the district attorney, having now been filed and made part of the record, are shown to have been, as they were at the former stage of this case supposed by the supreme court of Texas and by this court to be, no more than "to appear and defend the interests of the United States involved" in this suit,—that is to say, by appearing and taking part in the defense of the officers, and, if deemed advisable, by bringing the rights of the United States more distinctly to the notice of the court by formal suggestion in their name. 85 Tex. 354: 147 U. S. 513 [37: 262]. As the present Chief Justice then remarked, repeating the words of *Chief Justice* Marshall in the leading case of *The Exchange* v. *McFadden*, 11 U. S. 7 Cranch, 116, 147 [3: 287, 297]: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States." The answer actually filed by the district attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instructions of the Attorney General, and of any power vested by law in him or in the district attorney, and could not constitute a voluntary submission by the United States to the jurisdiction of the court.

*The judgments of the courts of the [**271** state of Texas appear to have been largely based on *United States* v. *Lee*, 106 U. S. 196 [27: 171]. In that case an action of ejectment was brought in the circuit court of the United States against officers occupying in behalf of the United States lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession; and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action; and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers. 106 U. S. 199, 206, 222 [27:174, 177, 182].

In an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to the possession, but may be (as it was in this case) for title also. By Tex. Rev. Stat. § 4784, "the method of trying title to lands, tenements, or other real property

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shall be by action of trespass to try title." By § 4808 "upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title, or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession." By § 4811 the judgment "shall be conclusive, as to the title or right of possession established in such action, upon the party against whom it is recovered, and upon all persons claiming from, through, or under such party, by title arising after the commencement of such action."

272] *And it has been declared by the supreme court of the state that, by the statutory action of trespass to try title, "it was unquestionably the legislative intention to provide a simple and effectual remedy for determining every character of conflicting titles and disputed claims to land, irrespective of the fact of its actual occupancy or mere pedal possession;" and "a method of vesting and devesting the title to real estate, in all cases where the right or title, or interest and possession, of land may be involved," by partition or otherwise. *Bridges* v. *Cundiff*, 45 Tex. 440; *Titus* v. *Johnson*, 50 Tex. 224, 238; *Hardy* v. *Beaty*, 84 Tex. 562, 568.

In the case at bar the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervener for another third part of the land. It was thus adjudged that the United States. had the title in that part, if not also in the remaining third, to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

The judgment for costs against the United States was clearly erroneous in any aspect of the case. *United States* v. *Hooe*, 7 U. S. 3 Cranch, 73, 91, 92 [2: 370, 375, 376]; *United States* v. *Barker*, 15 U. S. 2 Wheat. 395 [4: 271]; *The Antelope*, 25 U. S. 12 Wheat. 546, 550, [6:723, 725]; *United States* v. *Ringgold*, 33 U. S. 8 Pet. 150, 163 [8: 899, 903]; *United States* v. *Boyd*, 46 U. S. 5 How. 29, 51 [12: 36, 46].

But, with a view to the ultimate determination of the case, it is fit to proceed to a consideration of the other questions arising therein.

That the United States and their officers were entitled to avail themselves of the statutes of limitations, was adjudged when this case was first brought before this court. 147 U. S. 508 [37: 260]. The court of civil appeals of the state has now held that those statutes did not run against Mrs. Schwalby, because she was under the disability of coverture.

The principal grounds upon which the Solici-

273] tor General *contends that this conclusion was unwarranted by the facts of the case are as follows: Dignowity, under whom all parties claimed title, had the title and the consequent right of possession of the land, at the time of his supposed deed to McMillan in 1860. The possession is to be presumed to have continued in him, and in those claiming under the subsequent deed of his widow to the city of San Antonio in May, 1875, and the city's deed to the United States in June, 1875. There was no evidence that McMillan, or any one claiming under him, was ever in actual possession of the land. If the title and the right of possession were ever in McMillan, they descended to his daughter Mary and her coheirs upon his death in 1865. She was then under the disability of infancy, having been born September 11, 1848. On September 11, 1869, she became of age, and the statutes of limitations began to run against her, and could not, by a general rule of law recognized alike by this court and by the supreme court of Texas, be again suspended by the new disability created by her subsequent marriage to Schwalby on January 18, 1871. *McDonald* v. *Hovey*, 110 U. S. 619 [28:269]; *White* v. *Latimer*, 12 Tex. 61. See also *McMasters* v. *Mills*, 30 Tex. 591; *Jackson* v. *Houston*, 84 Tex. 622.

But the statutes of limitations of Texas do not appear to run against a suit to recover real estate, except in favor of one in "adverse possession," which is defined to be "an actual and visible appropriation of land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." Paschal, Dig. arts. 4621-4624; Tex. Rev. Stat. §§ 3191-3199. There was no affirmative evidence showing that such adverse possession of the United States, or of their predecessors in title, the city of San Antonio and Dignowity, began before 1882, at which time Mrs. Schwalby was under the disability of coverture; or who, if any one, before that time, was in actual possession of the land; although Mrs. Dignowity testified that she paid the taxes upon it from 1860 until she conveyed it to the city in May, 1875. The conclusion that the plaintiff's claim was not barred may therefore have rested upon a possible inference of fact, rather than upon a determination of law.

*Upon the question whether the deed [274 from Dignowity to McMillan was ever delivered to the grantee, or to any one in his behalf or claiming under him, the evidence was in substance as follows: The deed was executed May 9, 1860, by Mrs. Dignowity, under a power of attorney from her husband; was acknowledged by her on the same day before William H. Cleveland, who was a notary public, and was a lawyer who had sometimes done business for her husband and herself; and was left by her with Cleveland. The consideration named in the deed was $100, only $50 of which was paid; and that was received by her about the time of executing the deed. She testified that she did not know whether or not she ever formally delivered possession of the land to McMillan or his agent: but that she continued to pay the taxes on the land until she sold and conveyed it to the city of San Antonio in May, 1875. The deed to McMillan was not recorded until September 30, 1889, more than twenty-nine years after its execution. There was no evidence where the deed was during that time, or by whom it was left for record; nor was there any explanation of

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the delay in recording it. Mrs. Schwalby's attorney testified that he never saw her, and did not know her personally; and that he received the deed by mail from Spence, a lawyer and land agent. Spence was the intervener in this case, claiming title in one third of the land under a deed from McMillan's son, executed, acknowledged, and recorded in March, 1889.

This evidence is far from satisfactory as proof of an actual delivery of the deed. But, considering that the deed to McMillan may possibly have come from him into the hands of his son, and thence into those of Spence, and that some presumption of delivery may arise from the plaintiffs' possession of the deed, we are not prepared to say that the evidence was insufficient, as matter of law, to warrant the conclusion that the deed was in fact delivered. See *Sicard* v. *Davis*, 31 U. S. 6 Pet. 124, 137 [8: 342, 347]; *Games* v. *Stiles*, 39 U. S. 14 Pet. 322, 327 [10: 476, 479].

The more serious question is whether there was any evidence that the United States took the deed from the city of San Antonio in June, 275]1875, with notice of a previous *conveyance to McMillan. All the evidence which can be supposed to have any bearing upon this point was as follows:

The deed from Mrs. Dignowity to the city of San Antonio was a quitclaim deed; and the mayor testified that, at the time of the purchase by the city, he had notice from Mrs. Dignowity of McMillan's claim. But the deed from the city to the United States was a deed of warranty, conveying this and other lands to the United States for military purposes; the consideration recited therein was not merely the payment of the nominal sum of $1, but "divers and other good and sufficient considerations thereunto moving;" and the conveyance was in fact, as appears by the uncontradicted testimony of the mayor, for the very valuable consideration inuring to the city from the establishment of the military headquarters there.

The district attorney who made the examination of the title for the United States testified that he examined the records of the county; that he read the quitclaim deed from Dignowity to the city, and had notice of all its contents; that he found no record of any other deed from Dignowity; and that, after making the examination, he believed the title was good, and so advised the department at Washington, and upon his advice the government took the deed from the city in good faith. Upon cross-examination, he testified that he "had information of the sale to McMillan," but satisfied himself that he had never paid the purchase money; and that the facts that the deed from Dignowity to the city was a quitclaim deed, and described the land as "known as the McMillan lot," created no suspicion in his mind that the title was not all right.

By the statutes of Texas, lands cannot be conveyed from one to another except by instrument in writing; and unrecorded conveyances of lands are void as against subsequent purchasers for valuable consideration without notice, but are valid as between the parties and their heirs, and as to all subsequent purchasers with notice thereof or without valuable consideration. Paschal, Dig. arts. 997, 4988; Tex. Rev. Stat. §§ 548, 549, 4332. These provisions have not been regarded *as in-[276 troducing a new rule; but only as declaratory of the law, as recognized in the chancery jurisprudence of England and of the United States. *Parks* v. *Willard*, 1 Tex. 350.

A purchaser of land for valuable consideration may doubtless be affected by knowledge which an attorney, solicitor, or conveyancer, employed by him in the purchase, acquires or has while so employed, because it is the duty of the agent to communicate such knowledge to his principal, and there is a presumption that he will perform that duty. *Harrington* v. *United States* ("*The Distilled Spirits*") 78 U. S. 11 Wall. 356, 367 [20: 167, 171]; *Rolland* v. *Hart*, L. R. 6 Ch. 678, 682; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Kauffman* v. *Robey*, 60 Tex. 308. But in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or, at least of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. *Wilson* v. *Wall*, 73 U. S. 6 Wall. 83 [18: 727]; *Flagg* v. *Mann*, 2 Sumn. 486, 551; *Montefiore* v. *Browne*, 7 H. L. Cas. 241, 262, 269; *Bailey* v. *Barnes* [1894] 1 Ch. Div. 25; *Wethered* v. *Boon*, 17 Tex. 143. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance. *Mills* v. *Smith*, 75 U. S. 8 Wall. 27 [19: 346]; *Holmes* v. *Stout*, 10 N. J. Eq. 419; *Lamb* v. *Pierce*, 113 Mass. 72.

A valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance. *Prewit* v. *Wilson*, 103 U. S. 22 [26: 360]; *Hitz* v. *National Metropolitan Bank*, 111 U. S. 722, 727 [28: 577, 759]; 4 Kent, Com. 463; Dart, Vendors (6th ed.) 1018, 1019. The advantage inuring to the city of San Antonio from the establishment of the military headquarters there was clearly a valuable consideration for the deed of the city to the United States.

A purchaser of land for value and without notice of a prior deed holds and can convey an indefeasible title; and therefore the title, either of one who, without notice, purchases from one who purchased with notice, or of a purchaser with notice from a purchaser without notice, is good. *Harrison v. *Forth*, [277 before Lord Somers, Prec. Ch. 51; *Boone* v. *Chiles*, 35 U. S. 10 Pet. 177, 209 [9: 388, 399]; *Flynt* v. *Arnold*, 2 Met. 619, 623; 4 Kent, Com. 179. While it is held, in Texas, that a purchaser who takes a quitclaim deed of his grantor's interest only is affected with notice of all defects in the title, yet mere knowledge that the deed is in that form cannot affect the title of one claiming under a subsequent deed of warranty from the grantee. *United States* v. *California & O. Land Co.* 148 U. S. 31, 46, 47 [37: 354, 361, 362]; *Moore* v. *Curry*, 36 Tex. 668; *Graham* v. *Hawkins*, 38 Tex. 628. Still less could oral notice to the mayor of McMillan's claim, not shown to have been communicated to the United States or their attorney, affect their title under the subsequent deed of warranty from the city.

The attorney's "information of the sale to

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McMillan," with the purchase money unpaid, was evidently no more than of a bargain between Mrs. Dignowity and McMillan, and not of any deed of conveyance. He searched the records, and found no such deed, and advised the United States that the title was good. The deed from Mrs. Dignowity to McMillan, now produced, had then already remained unrecorded for fifteen years; and there is no evidence in whose custody it was, or that the attorney had any reason to suppose that it existed, or could have learned anything about it from Mrs. Dignowity, or knew, or had the means of ascertaining, where McMillan lived, or whether he was living or dead. The mere description of the land as "known as the McMillan lot" raised no inference that it was still owned, if it ever had been, by any one of that name.

The evidence appears to us wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan, or any knowledge of such circumstances tending to prove the existence of such a deed, that he should have considered or treated them as of any weight, or have reported them to the authorities at Washington. The inevitable conclusion, as matter of law, is that the United States acquired a good and valid title, as innocent purchasers, for valuable consideration, and without notice of a previous conveyance to McMillan.

278]*As was said by this court, when this case was brought here before: "The validity of an authority exercised under the United States is drawn in question; and where the final judgment or decree in the highest court of a state in which a decision could be had is against its validity, jurisdiction exists in this court to review that decision on writ of error." 147 U. S. 519 [37: 264]; U. S. Rev. Stat. § 709.

The validity of the authority exercised by the defendants as officers of the United States depends, according to the decision in *United States* v. *Lee*, 106 U. S. 196, 205 [27: 171, 176], upon the question whether the United States had or had not a good title in the land.

In *United States* v. *Thompson*, 98 U. S. 586, 588 [28: 982, 983], *Chief Justice* Waite said: "Judgments in the state courts against the United States cannot be brought here for re-examination upon a writ of error, except in cases where the same relief would be afforded to private parties." This *dictum*, in so general a form, is in danger of misleading; and it went beyond anything required by the decision of that case, in which the only issue understood to have been decided in the state courts was one of payment, and no authority under the Constitution, laws, or treaties of the United States was set up and decided against. The United States are in the same condition as other litigants, in the sense that neither can invoke the jurisdiction of this court by writ of error to a state court, unless that court has decided against a right claimed under the Constitution, laws, or treaties of the United States. But surely the United States have, and may assert, a right, privilege, or immunity under the Constitution of the United States, which private parties could not have.

We do not undertake to review the conclusions of the state court as to the effect of Mrs. Schwalby's disability under the statutes of limitations, or as to the delivery of the deed to McMillan, both perhaps depending, as has been seen, upon questions of fact. *Dower* v. *Richards*, 151 U. S. 658 [38: 305]; *Israel* v. *Arthur*, 152 U. S. 355 [38: 474]; *Re Buchanan*, 158 U. S. 31, 36 [39: 885, 887].

But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the *United States[279 necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a state court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the state, he may bring the case by writ of error to this court; and, as his justification depends upon the question whether the title to the property was in the defendant in attachment, or in the plaintiff in the action of trespass, this court, upon the writ of error, has the power to decide that question, so far as it is one of law, even if it depends upon local law or upon general principles. *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 [18: 257]; *Etheridge* v. *Sperry*, 139 U. S. 266 [35: 171]; *Bock* v. *Perkins*, 139 U. S. 628 [35: 314]. And see *McNulta* v. *Lochridge*, 141 U. S. 327, 331 [35: 796, 800]; *Dushane* v. *Beall*, 161 U. S. 513 [*ante*, 791].

The decision of the court of civil appeals that the United States had notice of the deed to McMillan, and therefore had no title in the land, and judgment should be rendered against their officers for both title and possession, was a decision in matter of law against the validity of the authority set up by those officers under the United States; and as such was reviewable by this court, and, being erroneous, must be reversed.

The proper form of the judgment to be entered by this court remains to be considered; and, in order to ascertain this, it will be convenient to trace the history of the statutes and decisions upon that subject.

Under the judiciary act of September 24, 1789, chap. 20, § 25, a final judgment or decree in the highest court of a state in which a decision could be had might "be re-examined and reversed or affirmed" in this court upon a writ of error, "in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained *of had been rendered or passed[280 in a circuit court; and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution." 1 Stat. at L. 86.

The qualification, "if the cause shall have been once remanded before," restricted only the power to proceed to a final decision and award execution in this court, and did not re-

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strict the power of this court to reverse or affirm the judgment of the state court, as justice might require. Accordingly, in the leading case upon the subject of the appellate jurisdiction of this court from the courts of a state, this court, upon the first writ of error to the court of appeals of Virginia, not only reversed the judgment of that court, but affirmed the judgment of the inferior court of the state, which had been reversed by the court of appeals, and issued its mandate to the court of appeals accordingly; and, upon that court declining to obey the mandate, this court, upon a second writ of error, rendered judgment in the same terms as before. *Fairfax* v. *Hunter*, 11 U. S. 7 Cranch, 603, 628 [3: 453, 461]; *Martin* v. *Hunter*, 14 U. S. 1 Wheat, 304, 323, 362 [4: 97, 102, 111].

The act of February 15, 1867, chap. 28, § 2, revising the subject, omitted the qualification "if the cause shall have been once remanded before," and put the last clause of the section in this form: "and the proceeding upon the reversal shall also be the same, except that the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to an inferior court." 14 Stat. at L. 386. The sections of the acts of 1789 and 1867 are printed side by side in 84 U. S. 17 Wall. 681, 682.

In *Magwire* v. *Tyler* this court, at December term, 1869, adjudged that a decree in equity of the supreme court of Missouri be reversed, and the case remanded with directions to enter a decree affirming the decree of an inferior court of the state; but, upon motion of counsel, modified its judgment so as to remand the cause for further proceedings in conformity to the opinion of this court, and declared this **281**]to "be more *in accordance with the usual practice of the court in such cases." 75 U. S. 8 Wall. 650, 658, 662 [19: 320, 323, 324]. The supreme court of Missouri, after receiving the mandate of this court, entered a decree dismissing the suit because there was an adequate remedy at law; and thereupon this court, at December term, 1872, upon a second writ of error, entered judgment here, reversing that decree, with costs, and ordering a writ of possession to issue from this court; and, speaking by *Mr. Justice* Clifford, after referring to the difference between the provisions of the acts of 1789 and 1867, said: "Much discussion of those provisions is unnecessary, as it is clear that the court, under either, possesses the power to remand the cause or to proceed to a final decision. Judging from the proceedings of the state court under the former mandate, and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time, as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate. Such being the fact, the duty of this court is plain, and not without an established precedent." 84 U. S. 17 Wall. 253, 289, 290, 293 [21: 576, 585-587]. The precedent referred to was *Martin* v. *Hunter*, above cited.

Section 2 of the act of 1867 was substantially re-enacted in U. S. Rev. Stat. § 709. By the act of February 18, 1875, chap. 80, entitled "An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States," U. S. Rev. Stat. § 709, was amended by striking out this provision: "And the proceeding upon the reversal shall be the same, except that the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed." 18 Stat. at L. 318; U. S. Rev. Stat. (2d ed.) p. 133.

The repeal of this provision may not have revived that provision of the act of 1789 which had been superseded by the act of 1867. U. S. Rev. Stat. § 12. But it did not affect the general power, conferred by U. S. Rev. Stat. § 709, as by all former acts, by which the judgment of the state court may be "re examined and reversed or affirmed" by this court, *and in the exercise of which this court, [**282** in *Fairfax* v. *Hunter*, 11 U. S. 7 Cranch, 603, 628 [3: 453, 461], and *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 304, 323, 362 [4: 97, 102, 111], ordered the proper judgment to be entered in the state court.

Under the statutes and practice of the state of Texas, the appellate court, upon a statement of the case certified by the judge, may, as the supreme court and the court of civil appeals did in this case, and as this court does upon a finding of facts by the circuit court of the United States in cases tried by the court upon a jury being duly waived, render such judgment as should have been rendered by the court below. Tex. Rev. Stat. § 1048; Tex. Stat. April 13, 1892, chap. 14, § 1; Tex. Stat. April 13, 1892, chap. 15, § 36; *McIntosh* v. *Greenwood*, 15 Tex. 116; *Creager* v. *Douglass*, 77 Tex. 484; *Fort Scott* v. *Hickman*, 112 U. S. 150, 165 [28: 636, 641]; *Cleveland Rolling Mill Co.* v. *Rhodes*, 121 U. S. 255, 264 [30: 920, 923].

In the present case, the previous course of the proceedings has been such as to make it proper that the usual practice, by which, upon reversing a judgment of the highest court of a state, the case is remanded generally for further proceedings not inconsistent with the opinion of this court, should be departed from, and that this court should instruct the state court to enter a judgment finally disposing of the case.

The supreme court of Texas, after the first trial, held that the United States were not a party to the action, and dismissed it as to the United States; but held that the United States were not innocent purchasers for value, and denied to the United States and their officers the benefit of the statutes of limitations, and therefore gave judgment for the plaintiffs against those officers. This court, upon the first writ of error, reversed that judgment, and, assuming the statutes of limitations to afford a conclusive defense, refrained from considering the case upon its merits, and remanded it for further proceedings in the courts of the state. The case was then submitted to the inferior court of the state of Texas, and to the court of civil appeals, upon the same facts as before; and the court of civil appeals held that the United States were a party to the action, thereby in effect overruling the former judgment of the supreme court of the state; and decided, upon evidence wholly insufficient

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283]in law, that the *United States had no valid title to the land, because they took with notice of a prior conveyance to McMillan; and gave judgment for the plaintiffs against the individual defendants, acting under lawful authority of the United States, for the title in an undivided third part of the land demanded, and for joint possession of the whole; and also gave judgment against the United States for costs, to which the United States are never liable. The supreme court of the state denied a petition for a writ of error to review that judgment; the Chief Justice of the court of civil appeals refused to allow a writ of error from this court to review it; and the allowance of the present writ of error was obtained from a justice of this court.

Judgment of the court of civil appeals reversed, and case remanded to that court, with instructions to dismiss the action as against the United States, and to enter judgment for the individual defendants, with costs.

SENECA NATION OF INDIANS, *Plff. in Err.*, *v.* HARRISON B. CHRISTY.

(See S. C. Reporter's ed. 283-290.)

Federal question—independent ground.

1. A decision by a state court that an Indian nation bringing an action under a state statute is subject to the bar of the statute of limitations, under a provision of the statute that such actions may be brought in the same manner and in the same time as if brought by citizens of the state in relation to private individual matters, is not the decision of a Federal question subject to review by the Supreme Court of the United States.
2. Where the decision of the state court was rested, in addition to other grounds, upon a distinct and independent ground not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well-settled rule on that subject, and cannot be maintained.

[No. 180.]

Argued and Submitted March 26, 1896. Decided April 13, 1896.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court affirming the judgment of the general term of that court which affirmed the judgment of the circuit court of that state in favor of defendant, Harrison B. Christy, in an action brought by the Seneca Nation of Indians, plaintiff, to recover possession of land in the town of Brant, county of Erie, and state of New York, part of an Indian reservation. *Dismissed.*

See same case below, 49 Hun, 524, 126 N. Y. 127.

The facts are stated in the opinion.

Mr. **James C. Strong** for plaintiff in error.

Mr. **Norris Morey** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action of ejectment brought by the Seneca Nation of Indians against Harrison B. Christy in the supreme court, Erie county, New York, to recover possession of "all that certain piece or parcel of land situate, lying, and being in the town of Brant, county of Erie and state of New York, and known and distinguished as being lot number twenty-five (25) in the tract of land known as being the 3,840-acre tract taken from the Cattaraugus Indian reservation, as surveyed by James Read, surveyor, and commonly known as the mile strip in the said town of Brant, and containing 100 acres;" and for damages.

The complaint was verified December 1, 1885, and the answer January 11, 1886. The answer consisted of a general denial; the plea of the statute of limitations of twenty years; and that the plaintiff had not the legal right, title, capacity, or authority to maintain the action. The case was tried upon facts stipulated and documentary evidence.

The premises in question were part of a large tract of land in the western part of the state of New York, the title to which was in controversy between the states of New York and Massachusetts prior to the adoption of the Federal Constitution, which controversy was settled by a compact between those states, December 16, 1786. By that compact the state of New York ceded, granted, released, and confirmed to *the state of Massachusetts [285 and its grantees, their heirs and assigns forever, the right of pre-emption of the soil from the native Indians and all other estate, right, title, and property therein belonging to the state of New York, but New York retained the right of government, sovereignty, and jurisdiction. Massachusetts was empowered to hold treaties and conferences with the native Indians to extinguish the Indian title; and it was provided that that Commonwealth might grant the right of pre-emption of the whole or any part of said lands and territories to any person or persons, who, by virtue of such grant, should have a good right to extinguish by purchase the claims of the native Indians, provided that such purchase should be made in the presence of a superintendent appointed by Massachusetts and be approved by the Commonwealth. This compact was duly ratified by the United States after the adoption of the Federal Constitution.

By a treaty between the Six Nations of Indians, which included the Senecas, and the United States, dated November 11, 1794, at Canandaigua, New York, Timothy Pickering acting as commissioner on behalf of the United States, (7 Stat. at L. 44), it was agreed that the lands of the Senecas situated in the western part of the state of New York, described in the treaty (embracing the land in controversy), "shall remain theirs until they choose to sell to the people of the United States who have the right to purchase."

Prior to August 31, 1826, all the right of pre-emption and title of Massachusetts in a

NOTE.—*As to jurisdiction in the United States Supreme Court over state court because of Federal question,*—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571; Commercial Bank v. Buckingham, 12: 169; Hamblin v. Western Land Co. 37: 267.

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large part of these lands had been conveyed by sundry mesne conveyances to Robert Troup, Thomas L. Ogden, and Benjamin W. Rogers. By a treaty and conveyance on that day the Seneca Nation, by its sachems, chiefs, and warriors, in the presence of a superintendent on behalf of the state of Massachusetts and a commissioner appointed by the United States, conveyed a tract of 87,000 acres of the lands, including that in suit, to Troup, Ogden, and Rogers, for the consideration of $48,216, acknowledged by the deed to have been in hand and paid. This conveyance was approved and confirmed by the state of Massachusetts, but 286] the treaty was not ratified by the *Senate of the United States or proclaimed by the President.

Soon after the making of said treaty or conveyance, Troup, Ogden, and Rogers entered into full and exclusive possession of the lands described therein; they were divided into parcels, sold and conveyed; extensive and valuable improvements were made thereon; and for more than fifty years they have been in the possession of the grantees and purchasers under them, claiming title under the grant, and without protest on the part of the United States, the state, or the Seneca Nation. Defendant held title from Troup, Ogden, and Rogers and their grantees, and at the beginning of this action was in possession, claiming under and by virtue thereof.

In 1827 the sum of $43,050 of the consideration set forth in the conveyance of August 31, 1826, was deposited in the Ontario Bank at Canandaigua, New York, and afterwards, and in the year 1855, that sum was, pursuant to § 3 of an act of Congress of June 27, 1846 (9 Stat. at L. 20, 35, chap. 34), paid into the Treasury of the United States. The interest thereon from 1827 has been annually paid to and received by plaintiff in error.

Plaintiff in error contended that no valid purchase was made by the treaty of August 31, 1826, because that treaty was not formally ratified by the Senate of the United States and proclaimed as such by the President of the United States; and, further, that the purchase was invalid because in contravention of the 12th section of the act of Congress of March 30, 1802, "to regulate trade and intercourse with the Indian tribes." 2 Stat. at L. 139, chap. 13.

This action was brought by the Seneca Nation under an act of the state of New York of May 8, 1845, entitled "An Act for the Protection and Improvement of the Seneca Indians Residing on the Cattaraugus and Allegany Reservations in This State." N. Y. Laws 1845, p. 146, chap. 150; N. Y. Rev. Stat. (7th ed.) 295. The 1st section of this act reads as follows:

"Sec. 1. The Seneca Indians residing on the Allegany and Cattaraugus reservations in this 287] state shall be deemed to *hold and possess the said reservations as a distinct community, and in and by the name of 'The Seneca Nation of Indians,' may prosecute and maintain in all courts of law and equity in this state, any action, suit, or proceeding which may be necessary or proper to protect the rights and interests of the said Indians and of the said nation, in and to the said reservations, and in and to the reservation called the 'oil spring reservation,' and every part thereof, and especially may maintain any action of ejectment to recover the possession of any part of the said reservations unlawfully withheld from them, and any action of trespass or on the case, for any injury to the soil of the said reservations, or for cutting down or removing, or converting any timber or wood growing or being thereon, or any action of replevin for any timber or wood removed therefrom, and may maintain any action or suit as aforesaid, for the recovery of any damage for any injury to the common property or rights of the said Indians, or for the recovery of any sum of money, property, or effects, due or to become due, or belonging, or in any way appertaining to the said Indians in common, or to the said Seneca Nation; and where such injury has been heretofore sustained, or any such damages have heretofore been suffered by the said Indians in common or as a nation, actions therefor, and to recover damages for such wrongs, may likewise be brought and maintained as herein provided, in the same manner and in the same time, as if brought by citizens of this state in relation to their private individual property and rights; and in every such suit, action, or proceeding in relation to lands or real estate, situated within the said reservations, the said Seneca Nation may allege a seisin in fee, and every recovery in such action shall be as and for and in reference to a fee; but neither such recovery nor anything herein contained shall enlarge or in any way affect the right, title, or interest of the said Seneca Nation, or of the said Indians, in and to the said reservations, as between them and the grantees or assignees of the pre-emption right of the said reservations under the grants of the state of Massachusetts."

The trial court directed a verdict for defendant and *rendered judgment thereon, and 288] this judgment was affirmed by the general term on appeal. 49 Hun, 524. The case was carried to the court of appeals of New York and the judgment affirmed. 126 N. Y. 127. This writ of error was then brought.

The court of appeals considered the case fully on the merits and was of opinion "that the grant of August 31, 1826, was a valid transaction and was not in contravention of the provisions of the Federal Constitution or of the Indian intercourse act of 1802, and vested in the purchasers a good title in fee simple absolute to the lands granted, free from any claim of the Seneca Nation;" and also that conceding "the invalidity of the grant of August 31, 1826, under the Indian intercourse act of 1802, nevertheless the title was subsequently confirmed and made good by the act of Congress of 1846, authorizing the President to receive from the Ontario Bank, and deposit in the Treasury of the United States, the money and securities representing the purchase money of the lands, followed by the transfer of the fund to the United States in 1855." The court further held: "We are also of opinion that as the right of the plaintiff to sue was given by and is dependent upon the statute, chapter 150 of the Laws of 1845 (see *Strong* v. *Waterman*, 11 Paige, 607), the statute of limitations is a bar to the action. By the act of 1845 the actions thereby authorized are to be brought and maintained 'in the same time' as if brought by

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citizens of the state. The question is not whether an Indian title can be barred by adverse possession or by state statutes of limitation. The point is that the plaintiff cannot invoke a special remedy given by the statute without being bound by the conditions on which it is given."

In *Strong* v. *Waterman, supra*, it was held by Chancellor Walworth that the Indians in New York had "an unquestionable right to the use, possession, and occupancy of the lands of their respective reservations, which they have not voluntarily ceded to the state, nor granted to individuals by its permission; and the ultimate fee of such reservations is vested in the state, or in its grantees, subject to such right of use and occupancy, by the Indians, until they shall vol-**289**] untarily *relinquish the same;" that the sion of the Seneca Nation to the use and possesright of the Cattaraugus reservation was in all the individuals composing the nation, residing on such reservation in their collective capacity, and that, they having no corporate name, no provision was made by law for bringing an ejectment suit to recover the possession of such lands for their benefit, nor could they maintain an action at law in the name of their tribe to recover damages sustained by them by reason of trespasses committed on their reservations, or to recover compensation for the use of their lands when unlawfully intruded upon, although a bill might be filed by one or more of them in behalf of themselves and other Indians interested to protect their rights and to obtain compensation. And see *Johnson* v. *McIntosh*, 21 U. S. 8 Wheat. 543 [5: 681]; *Mitchel* v. *United States*, 34 U. S. 9 Pet. 711, 745 [9: 283, 295]; *Cayuga Nation of Indians* v. *New York*, 99 N. Y. 235.

This decision appears to have been rendered May 6, 1845, and on the 8th of May the act was passed, the 1st section of which has been quoted above.

The proper construction of this enabling act, and the time within which an action might be brought and maintained thereunder, it was the province of the state courts to determine. *DeSaussure* v. *Gaillard*, 127 U. S. 216 [32: 125]; *Bauserman* v. *Blunt*, 147 U. S. 647 [37: 316].

The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the court of appeals, that it could only be brought and maintained "in the same manner and within the same time as if brought by citizens of this state in relation to their private individual property and rights." Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make Federal questions of the correct construction of the act and the bar of the statute of limitations.

As it appears that the decision of the court of appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well-settled rule on that subject and cannot be **290**] *maintained. *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *Gillis* v. *Stinchfield*, 159 U. S. 658 [*ante*, 295].

Writ of error dismissed.

Mr. Justice **Harlan** and *Mr. Justice* **Brewer** did not hear the argument and took no part in the consideration and decision of this case.

DANIEL J. DAVIS and THOMAS RANKIN, Partners, Doing Business as DAVIS & RANKIN, *Plfs. in Err.*,

v.

H. F. GEISSLER ET AL.

(See S. C. Reporter's ed. 290, 291.)

Certificate of jurisdiction.

In the absence of any certificate of the question of jurisdiction of the circuit court, its order entered November 28, 1891, dismissing a case for lack of jurisdiction, is not subject to review on writ of error from the Supreme Court of the United States.

[No. 185.]

Argued and Submitted March 27, 1896. Decided April 13, 1896.

IN ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment dismissing for want of jurisdiction an action brought by Daniel J. Davis *et al.*, plaintiffs, against H. F. Geissler *et al.*, defendants, for moneys alleged to be due upon a contract. On motion to dismiss. *Dismissed.*

The facts are stated in the opinion.

Messrs. **E. A. McMath** and *W. C. Oliver* for defendants in error, in favor of motion to dismiss.

Messrs. **D. P. Stubbs** and *W. F. Rightmire* for plaintiffs in error, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action brought by plaintiffs in error, citizens of the state of Illinois, against more than thirty defendants, alleged to be citizens of the state of Kansas, in the circuit court of the United States for the district of Kansas. The petition averred the execution by defendants of a certain contract annexed for the payment to plaintiffs of $5,000 for the construction, erection, and putting in operation of a creamery at or near Oakley, Kansas, the contract being signed by defendants in the form of subscriptions to stock; performance by plaintiffs; and that they had received on *account the sum of $100; and demanded [**291** judgment against defendants jointly and severally, for $4,900 and interest. Some of the defendants did not appear, but defendants in error did, and pleaded a modified general denial, and twelve other defenses, setting up fraud in respect of the contract, nonperformance, want of jurisdiction in that one of the defendants, B. Mahanna, was a co-citizen of Illinois with plaintiffs, and that Mahanna's subscription to the contract was really a sub-

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence,*—see note to Emory v. Greenough, 1: 640.

As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,—see note to Schunk v. Moline, M. & S. Co. 37: 256.

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scription by plaintiffs, made by him as their agent. Defendants claimed that the contract was several, and not joint, and that each was bound only for the amount of his own subscription, which in no instance exceeded $850. The case was tried by a jury, but after the evidence was closed the court declined to submit it, and entered an order, November 28, 1891, that "it appearing to the court that this court has not jurisdiction of the subject-matter of this action, it is ordered that this case be and the same is hereby dismissed at the costs of plaintiffs." To review this judgment the pending writ of error was sued out October 13, 1892.

The circuit court made no certificate of the question of its jurisdiction to this court, and the case comes within *Maynard* v. *Hecht*, 151 U. S. 324 [38:179]; *Colvin* v. *Jacksonville*, 157 U. S. 368 [39:736]; *Van Wagenen* v. *Sewall*, 160 U. S. 369 [*ante*, 460]; *Chappell* v. *United States*, 160 U. S. 499, 507 [*ante*, 510, 512].

Writ of error dismissed.

AMOS WOODRUFF, Trustee, and GERMAN BANK OF MEMPHIS, *Plffs. in Err.*,

v.

STATE OF MISSISSIPPI ET AL.

(See S. C. Reporter's ed. 291-313.)

Federal question—power of corporation to borrow gold coin—bond, when payable in currency.

1. A decision by a state court that levee bonds for a loan of gold coin without specifying the kind of money to be repaid were payable in such coin, and were therefore invalid because the statute did not give express authority to make them thus payable, involves the decision of a Federal question.

2. The power to borrow gold coin and make bonds payable in the same medium is included in the power conferred by statute upon a public corporation to borrow money and issue negotiable bonds therefor.

3. A bond reciting an indebtedness for a specified number of dollars in gold coin, "which said sum" it promises to pay, while an interest coupon attached is declared payable in currency, is legally solvable in money of the United States whatever its description, and not merely in gold coin.

FIELD, J., concurring: No transaction of commerce or business, or obligation for the payment of money that is not immoral in its character and which is not, in its manifest purpose, detrimental to the peace, good order, and general interest of society, can be declared or held to be invalid because enforced or made payable in gold coin or currency, when that is established or recognized by the government. And any acts by state authority impairing or lessening the validity or negotiability of obligations thus made payable in gold coin are violative of the laws and Constitution of the United States.

[No. 13.]

Argued March 9, 10, 1896. Decided April 13, 1896.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree of that court affirming the decree of the Chancery Court of Hinds County in that State, dismissing a suit in equity brought by Amos Woodruff, trustee, *et al.*, plaintiffs, against the State of Mississippi *et al.*, defendants, to enforce a trust and lien upon certain lands in favor of plaintiffs as holders of bonds of the levee board of the State of Mississippi, district No. 1. *Reversed*, and cause remanded for further proceeding.

See same case below, 66 Miss. 298.

Statement by *Mr. Chief Justice* **Fuller:**

Plaintiffs filed their bill in the chancery court of Hinds county, Mississippi, to enforce a trust and lien upon certain lands created in their favor as holders of bonds of the levee board of the state of Mississippi, district No. 1, by an act of the general assembly of Mississippi, approved March 17, 1871, under which the bonds were issued. The bill alleged that the obligation of the bonds and the security provided for their payment by the act of 1871 had been impaired in contravention of the Constitution of the United States by several subsequent acts of the legislature of Mississippi, which were set forth in the bill.

Defendants demurred to the bill upon the ground, among *others, that the bonds [293 were invalid because the levee board had made them payable in gold coin, and that there was therefore no contract to be impaired. The demurrers were sustained by the chancery court on that ground solely and the bill was thereupon dismissed, and that decree was affirmed by the supreme court of the state on the same ground. 66 Miss. 298.

Thereupon, a writ of error was taken out from this court.

Section 1 of the act of Mississippi of March 17, 1871 (Miss. Laws 1871, p. 37, chap. 1), created a body corporate, to be known as the levee board of the state of Mississippi, district No. 1, to consist of five members, to reside one each in the counties of Tunica, Coahoma, Tallahatchie, Panola, and De Soto, to be elected by the board of supervisors of their respective counties, with power to sue and be sued, to have a corporate seal and perpetual succession, to make such by-laws and regulations and alter and change the same as they might deem proper, and to do all acts and things, not inconsistent with the act and the laws of the state, that might be proper to effect the purposes and objects of the act.

Section 3 gave the board power and required them "to construct, repair, and maintain a levee on or near the east bank of the Mississippi river, extending from the base of the hills on or next said bank of said river in the state of Tennessee . . . to the southern boundary of Coahoma county, . . . in order effectually to protect and reclaim the lands in the district hereinafter designated from overflow by the waters of the Mississippi river," etc.

Section 7 declared that all the bottom lands, designating the boundaries, in the counties of De Soto, Tunica, Coahoma, Tallahatchie, and Pontotoc, and six townships in the county of Sunflower, "shall be, and constitute, as aforesaid, Mississippi levee district No. 1, which it is the purpose of this act to protect and reclaim as aforesaid, by the agency of said board of

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commissioners, and the lands embraced and included in said levee district shall be and are hereby declared to be and are made chargeable and liable as hereinafter declared for all the costs, outlays, charges, and expenses to be 294]incurred or made *for the levees, works, and improvements provided for and contemplated by this act, or in maintaining the same."

By § 8, for the purpose of building and maintaining levees and works and carrying the act into effect, a uniform charge and assessment of 2 per cent per annum on the value of every acre of the land in the district was levied, which it was provided should continue and be collected in each and every year for twelve successive years from the date of the act, and should be due and payable annually on or before the 1st day of September in each year for said period, and the value of every acre of unimproved land and of every acre of improved and cultivated land, and every acre of land improved and fenced, but not cultivated, was fixed, except the lands in Sunflower and Tallahatchie counties.

Section 9 read as follows:

"That for the purposes aforesaid, and to enable them to carry out the purposes of this act, the said board of levee commissioners shall have power to borrow money, and to that end may issue the bonds of said board to the amount of $1,000,000, in such sums and denomination, not less than $100 each, as the said board may prescribe; which bonds shall be signed by the president, and countersigned by the treasurer of said board, and be made payable, to order or bearer, in not less than two nor more than ten years after the 1st day of January, 1871, and shall bear a rate of interest not exceeding 8 per cent per annum, for which interest coupons may be attached, payable at such time and place as the board may contract. Said bonds shall be negotiable as promissory notes or bills of exchange, and may be sold and negotiated in any market in or out of the state, on the best terms that can be obtained for the same; but in no case shall any of them be negotiated or sold at a greater discount than 10 per cent. Said board shall fix a place or places for the payment of the principal and interest of said bonds and coupons, and said bonds or coupons shall be receivable after maturity, at par, in payment of any charge or assessment fixed, levied, or made by this act. . . . All moneys borrowed by said board, or arising from negotiations or sale of 295]*any of said bonds, shall be promptly paid into the treasury of said board, and shall constitute a levee fund, and be used and applied to carry into effect the objects and purposes of this act."

By § 10 it was provided that the charges and assessments levied by the act should constitute, as they were from time to time collected, a special fund and trust, to be used by the board, Firstly, in payment of any bonds that might have been sold or used under the act, and of any money that might be borrowed under its provisions; and, secondly, in payment of any other debts or liabilities of said board; and that the "charges and assessments by this act fixed, levied, and made as aforesaid on said lands shall not be subject to repeal, alteration, or suspension during the time for which they are fixed and levied, as aforesaid, until all the bonds, obligations, and liabilities of said board shall be first paid and discharged." Provision was also made in case of noncollection for application by the holders of any bond or obligation overdue to the circuit or chancery court of any district included for a mandamus to compel the board to collect and pay over, or for the appointment of commissioners to do so.

Subsequent sections provided for a tax collector of the board and for sale on delinquency, bidding in by the board, etc.

By § 20 it was made the duty of the board "to invest and keep invested in public securities of the United States until required to pay any of the bonds or liabilities of said board, [and] all such part of the funds and moneys of said board as may not at any time be required for present use in paying the matured debts and liabilities of said board, or in carrying into effect the purposes of this act."

It was further provided that, in case the charges and assessments made by the act should be adjudged and held inoperative, the board should have power to proceed through commissioners to have just and legal rates, charges, and assessments made on any lands in the levee district, sufficient in amount when collected year by year to pay all such bonds, loans, debts, and liabilities, and enable the board to carry the act *into effect; and[296 also that the collection of state and county taxes assessed upon any lands that might be purchased by or be vested in the levee board should be suspended so long as the lands were held as assets of the board.

Section 29 provided that all taxes levied and assessed under the act be and the same were declared to be a tax *in rem* against the lands embraced therein, which lands should be subject to sale without further assessment in each and every year, and that such sale should vest in the purchaser a good and valid title to the lands, against the claims of every person having claims or title thereto subject to redemption as provided.

The bill averred that the bonds and coupons held by complainants "were negotiated by said district No. 1, and in course of trade came into the hands of these complainants by delivery," and a list of the bonds and coupons held by each of complainants was filed with and made part of the bill. These bonds were in the following form, all being the same with the exception of the dates, numbers, and amounts:

No. 309. $1,000.

Mississippi Levee District No. 1.

UNITED STATES OF AMERICA, State of Mississippi.

Eight Per Cent Bond.

One of a series of five hundred bonds of one thousand dollars each, numbered from one to five hundred consecutively, issued by the levee board of the state of Mississippi, district No. 1, in pursuance of and by the authority granted in an act of the legislature of the state of Mississippi, approved March 17, 1871, entitled "An Act to Redeem and Protect from Overflow from the River Mississippi Certain Bottom Lands herein Described."

Know all men by these presents that the levee

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board of the state of Mississippi, district No. 1, under and by authority of the law mentioned in the caption hereof, hereby acknowledge themselves, for value received, indebted to the bearer in the sum of one thousand dollars in gold coin of the United States of America, which 297]said sum the said levee board of the *state of Mississippi, district No. 1, for themselves and their successors, do hereby bind themselves and engage well and truly to pay to the bearer on the 1st day of January, A. D. 1878, at the banking house of the National Park Bank, in the city of New York; and the said levee board of the state of Mississippi, district No. 1, for themselves and their successors, do hereby engage to pay an interest thereon of 8 per cent per annum, payable semi-annually on the 1st days of January and July in each and every year ensuing the date hereof until the maturity and payment of this bond, at the place of payment mentioned in the coupons hereto annexed, upon the delivery of said coupons as they severally become due.

In testimony whereof the president of the levee board of the state of Mississippi, [SEAL.] district No. 1, has signed and the treasurer of said board has countersigned these presents, and the president has caused the seal of the said board to be affixed hereto the first of January, in the year of our Lord one thousand eight hundred and seventy-two.

(Signed) M. S. ALCORN, President.
(Signed) A. R. HOWE, Treasurer.

Upon each bond was printed as an indorsement §§ 7, 8, 9, 10, 20, and 29 of the act of 1871.

Attached to the bonds were coupons, of which the following was the form, all being alike except in amounts, numbers, and dates of maturity:

The levee board of the state of Mississippi, district No. 1, will pay to the bearer on the 1st day of January, 1879, at the National Park Bank of New York, twenty ($20) dollars in currency of the United States, being the semi-annual interest on bond No. 52.

(Signed) A. R. HOWE, Treas.

Messrs. **Lawrence Maxwell, Jr., Calderon Carlisle,** *Marcellus Green,* and *S. S. Calhoun* for plaintiffs in error.

Messrs. **Frank Johnston,** Attorney General of Mississippi, **J. Hubley Ashton,** *Wm. G. Yerger,* and *W. P. Harris* for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The supreme court of Mississippi construed these bonds as obligations payable in gold coin, and held that the power to borrow money conferred on the levee board of Mississippi, district No. 1, did not authorize that corporation to borrow gold coin or issue bonds acknowledging the receipt thereof and agreeing to pay therefor in the same medium, and that the bonds were void for want of power in that particular. If by this adjudication a right possessed by plaintiffs in error, as holders of bonds, under the Constitution and laws of the United States was necessarily denied, then this court has jurisdiction to revise the judgment on writ of error. A definite and distinct issue was raised by the ground of demurrer, on which the decision of the court proceeded, and if that issue was an issue as to the possession of a right under the Constitution and laws of the United States, then the denial of that right gives jurisdiction. And it appears to us that such an issue was presented. Plaintiffs in error claimed that the bonds were payable in money of the United States. Defendants claimed they were payable in a particular kind of such money, and, because so payable, were invalid. The issue in either aspect involved the determination of rights of plaintiffs in error under the Constitution and laws of the United States, and was disposed of adversely to them.

In *Trebilcock* v. *Wilson*, 79 U. S. 12 Wall. 687 [20: 460], where a note held by plaintiff in error was payable by its terms in specie, and he claimed that he was entitled to have it paid in gold or silver dollars of the United States, which the state court decided he was not, the writ of error was maintained on the ground of the denial of a right under the Constitution.

*In *Maryland* v. *Baltimore & O. R. Co.* [299 89 U. S. 22 Wall. 105 [22:713], in which the state had made certain advances for the railroad company in gold, and sought judgment accordingly, and the state court held that it was only entitled to recovery in currency, no objection was raised to the jurisdiction of this court to review the judgment.

In the case at bar the inquiry as to the medium in which the bonds were payable, and, if in gold coin, the effect thereof, involved the right to enforce a contract according to the meaning of its terms as determined by the Constitution and laws of the United States, interpreted by the tribunal of last resort, and therefore raised questions of Federal right which justified the issue of the writ.

The levee board was created a body corporate and expressly authorized to borrow money and to issue negotiable instruments therefor. It was thus endowed in order to enable it to effectuate the objects and purposes of its creation. It issued bonds whereby it acknowledged that it was indebted in so many dollars in gold coin and promised to pay the specified sums at a designated date, with interest.

The general rule is that those powers which are within the intent and purposes of the creation of a corporation, and essential to give effect to the powers expressly granted, may be exercised as necessarily incident thereto, and that a discretion exists in the choice of the means to accomplish the required result, unless restricted by the terms of the grant. The power to borrow money was expressly granted, unaccompanied by any definition of the word "money," which might operate as a restriction on the power, and according to the general rule, if there were more than one kind of money, a discretion as to the particular kind would be necessarily incident to the execution of the power granted and might be exercised by the corporation. At the time these bonds were issued the money of the United States consisted, under the decisions of this court, of gold and silver coin and United States notes. Gold coin was in every respect unlimited in its

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legal tender capacity, but all were equally valid as money of the United States.

300] *Although the supreme court of Mississippi conceded that gold coin was "money," it insisted that when the bonds were issued such coin was "of much greater value than the circulating medium, consisting of United States treasury notes and national bank notes," as the court judicially knew; that "all debts payable in 'dollars' generally were, as now, solvable in legal tenders, but an obligation payable in gold coin can be discharged only according to its terms;" that in authorizing the issue of these bonds, "and in the use of the term 'money,' the legislature must be supposed to have meant in the act cited that money which constituted the basis of the general business of the country and was a legal tender for the payment of debts;" and that, consequently, the bonds were void for want of power. Notwithstanding the disclaimer, this conclusion denied the exercise of any discretion by the corporation to borrow one kind of money of the United States on the ground that that particular kind had ceased in fact to be money and had become a commodity.

Doubtless the word "money" is often used as applicable to other media of exchange than coin. Bank notes lawfully issued and actually current at par in lieu of coin are treated as money, because flowing as such through the channels of trade and commerce without question. *Bank of United States* v. *Bank of Georgia*, 23 U. S. 10 Wheat. 333 [6: 335]; *Miller* v. *Race*, 1 Burr. 452. And it would seem that it was in this sense that the supreme court regarded the use of the word, for though it assumed that the property of being legal tender was an essential attribute of money, yet it included national bank notes, which, though receivable at par in payment of government dues except duties, and payable by the government at par except for interest on the public debt and in redemption of the national currency, and also payable and receivable as between national banks themselves (U. S. Rev. Stat. §§ 5182, 5196), had not been declared legal tender "in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt," as United States treasury notes had been (U. S. Rev. Stat. § 3588).

These bonds were contracts for the payment

301] of dollars, and *not for the delivery of bullion; nor were they made expressly payable in coin.

If the legislature had in terms authorized the corporation to borrow currency only, and to issue bonds payable in currency only, that would have presented a different question, but the language used embodied no such express limitation, and there could be no implication that the power was other than the power to borrow money of the United States. But it is said that, as it was held in *Judson* v. *Bessemer*, 87 Ala. 241 [4 L. R. A. 742], that "express and general power to issue negotiable bonds, in the absence of legislative restriction, carries the implied or incidental power to make them payable generally, that is, in currency, which is constitutionally a legal tender, or payable in the particular coin which constitutes the legal and commercial standard by which the value of other kinds of currency is measured," and that although the act authorizing the city of Bessemer to issue bonds was silent on the subject, the city had power to make them payable in gold; and by the court of appeals of Kentucky, in *Farson* v. *Louisville Sinking Fund Comrs.* 16 Ky. L. Rep. 856, that municipal bonds were not void, because the principal and interest was made payable in gold coin of the United States, when the act authorizing their issue and sale did not specify the medium in which they were to be made payable; so the supreme court of Mississippi was at liberty to hold the contrary in placing a construction on the law of that state. Conceding this to be so, the question of jurisdiction remains unaffected, for in the former cases the right of the holders of municipal obligations to demand under the Constitution and laws of the United States payment thereof in money of the United States was recognized, while in this case that right was in effect denied.

The supreme court of Mississippi was of opinion that the bonds evidenced an indebtedness created in gold coin, and that they were solvable in the same medium, and held that the legislature intended to limit the power to borrow and to promise to pay, to another kind of money of the United States. But this was to impose a limitation on the power, not expressed, but by implication, and that implication involved a Federal *question. For[302 the power to borrow money simply meant the power to borrow whatever was money according to the Constitution of the United States and the laws passed in pursuance thereof, and the power to issue negotiable bonds therefor included the power to make them payable in such money. This the law presumed and to proceed on an implication to the contrary was to deny to the holders of these bonds, subsequent to their purchase, a right arising under the Constitution and laws of the United States.

But it was only by deciding that these bonds were payable in a particular kind of money of the United States, and that this kind, though money in law, had ceased, as the court assumed, to be money in fact, that the state court was enabled to hold them void for want of power, and if that premise were incorrect, the conclusion, whether in itself right or wrong, would not follow.

Now, these bonds were not expressly payable in gold coin. It is true that as they acknowledged an indebtedness in gold coin, and as the coupons were payable specifically "in currency," the argument is not unreasonable that the corporation intended the purchasers to expect payment in the money in which the indebtedness was stated to have been contracted; but the agreement to pay the designated sums did not specify any particular kind of money, and the obligation was to pay what the law recognized as money when the payment was to be made. The bonds were therefore legally solvable in the money of the United States, whatever its description, and not in any particular kind of that money, and it is impossible to hold that they were void because of want of power.

In *Bull* v. *First Nat. Bank of Kasson*, 129 U. S. 105, 112 [31: 98, 100], the question was raised whether certain bank checks for the payment of "$500 in current funds," were ne

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gotiable, and *Mr. Justice* Field, delivering the opinion of the court, said: "Undoubtedly it is the law that to be negotiable a bill, promissory note, or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in **303**] *notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. *Irvine* v. *Lowry*, 39 U. S. 14 Pet. 293 [10:462]; *Miller* v. *Austen*, 54 U. S. 13 How. 218, 228 [14:119, 123]. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words."

In *Maryland* v. *Baltimore & O. R. Co.* 89 U. S. 22 Wall. 105 [22:713], it was held that although since the legal tender acts an undertaking to pay in gold might be implied under special circumstances and be as obligatory as if made in express words, yet that the implication must be found in the language of the contract, and could not be gathered from the mere expectations of the parties.

In this case the language of the contract as to payment created no such obligation, and no doubt as to its meaning was raised by the extraneous fact that gold was not everywhere in circulation when the bonds were issued.

Without pursuing the subject further it is enough that by their terms these bonds were payable generally in money of the United States, and that, this being so, the conclusion of the supreme court of Mississippi, that they were otherwise payable, was erroneous. The bonds, therefore, were not void on the ground stated, even assuming that ground to be tenable; and we think the decision as to the medium of payment re-examinable here because amounting to a denial of the right of plaintiffs in error to be paid in money of the United States, by implying a limitation contrary to the controlling presumption arising under the Federal laws and decisions. Under those laws and decisions there was more than **304**] one description *of money of the United States, and hence the presumption was that where no one kind of money was specified the bonds were payable in any kind; but this, and the claim based thereon, was denied.

As the case was determined by the state supreme court on the single ground to which we have referred, we shall not discuss the effect and validity of the subsequent legislation brought under review by the bill, or any of the other questions suggested by counsel.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Field** concurring:

I have also some observations to make upon this litigation. The case comes before us on error to the supreme court of the state of Mississippi. The complainants below, the plaintiffs in error here, commenced a suit in the chancery court of Hinds county, in that state, to enforce a trust and a lien upon certain lands therein, as holders of bonds of the levee board of the state, district No. 1, by an act of the legislature of March 17, 1871, under which the bonds were issued. The bill of complaint alleged that Amos Woodruff, trustee, the German Bank of Memphis, Tennessee, and B. Richmond, were owners and holders of a large number of bonds issued by the levee board of the state of Mississippi, district No. 1, and that the bonds were issued and negotiated by the board under the act entitled "An Act to Redeem and Protect from Overflow from the River Mississippi Certain Lands Described, Approved March 17, 1871." The language of the statute authorizing the issue of the bonds is as follows:

"Sec. 9. *Be it further enacted*, That for the purposes aforesaid, and to enable them to carry out the purposes of this act, the said board of levee commissioners shall have power to borrow money, and to that end may issue the bonds of said board to the amount of $1,000,000, in such sums and denominations, not less than $100 each, as the said board may prescribe; which bonds shall be signed by the *president and [**305** countersigned by the treasurer of said board, and be made payable to order or bearer, in not less than two nor more than ten years after the first day of January, 1871, and shall bear a rate of interest not exceeding 8 per cent per annum, for which interest coupons may be attached, payable at such time and place as the board may contract. Said bonds shall be negotiated as promissory notes or bills of exchange, and may be sold and negotiated in any market in or out of the state, on the best terms that can be obtained for the same; but in no case shall any of them be negotiated or sold at a greater discount than 10 per cent."

By the act, as stated in the bill, a special tax was levied upon all the lands in said district protected by the levees to be built by the board, and provision was made for its collection.

By § 10 of the act, as also stated in the bill, it was provided "that the charges and assessments, fixed, levied, and make as aforesaid, by the act, should be as they were from time to time collected, and they were thereby constituted a special fund and trust, to be used by said board, first, in the payment of any bonds that might be sold or used as before provided under the act, and of money that might be borrowed under its provisions; secondly, for the payment of any other debts or liabilities of said board, and when collected the same should be paid into the treasury of said board for the purposes aforesaid."

Under this statute the board of levee commissioners, as stated in the bill, was organized, and issued a large number of bonds, aggregating in amount $600,000 and payable to bearer. The bonds recited the act under which they were issued, and expressly stipulated that the interest coupons attached were payable in the currency of the United States, but the

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principal of the bonds was payable in gold coin.

The bill was exhibited by complainants as owners and holders of a large number of bonds thus issued and negotiated. It alleged that the act of the legislature referred to imposed a specific tax *in rem* on each acre of land (with few exceptions) lying in the levee district No. 1, 306] in order to pay the *bonds and coupons; that a large amount of the lands were sold under the act for the delinquent taxes in the year 1872 and the succeeding years, until 1876, and in default of buyers, were struck off to the treasurer of the levee board and duly conveyed to him as such. That from 1876 to 1883 there were no sales to the treasurer, but all lands sold as delinquent were struck off for the state, county and district No. 1, levee taxes to the state of Mississippi, and conveyed to it by one deed. That the state of Mississippi, in 1876, abolished the levee board of district No. 1 as constituted, and made the state auditor and treasurer *ex officio* levee commissioners, its successors, and vested the titles of all lands held by the levee board in them to be administered by them. The bill alleged further that all such lands were held by the state *in trust* for the bondholders under the act of March 17, 1871.

The bill asked that the trustees, who administered the trust and who had not yet accounted, should be required to discover the status of the trust estate, and how it was administered by them, and that upon such discovery relief be granted by enforcing the trust; that the sales and conveyances made by the trustees in violation of the trust be declared void, and that such purchasers be held to an account of the trust estate so far as it had come into their hands, and that the lands be subjected to the tax chargeable against them under the act of 1871, and the tax be held as a special fund to pay the bonds held by the complainants and others.

The defendants demurred to the bill upon the ground, among other reasons assigned, that the act of the levee board in making the bonds payable "in gold coin" was *ultra vires*, and the bonds therefor invalid.

The demurrer was sustained, and the complainants appealed.

I cannot concur in the decision of that court. In my judgment no transaction of commerce or business, or obligation for the payment of money that is not immoral in its character and which is not, in its manifest purpose, detrimental to the peace, good order, and general interest of society, can be declared or held to be invalid because enforced or made payable in gold coin or currency when that is estab- 307] lished or recognized *by the government. And any acts by state authority impairing or lessening the validity or negotiability of obligations thus made payable in gold coin are violative of the laws and Constitution of the United States.

Upon this subject I will presume to cite some of the expressions of justices of this court as to the effect of such obligations, used when questions respecting the currency of the country were under consideration in what are known as the *Legal Tender Cases*.

In speaking of the views of the framers of the Constitution, on the subject of money, it was said that "at that time gold and silver molded into forms convenient for use, and stamped with their value by public authority, constituted, with the exception of pieces of copper for small values, the money of the entire civilized world. It was added that these metals divided up and thus stamped always have constituted money with all people having any civilization, from the earliest periods in the history of the world down to the present time. It was with 'four hundred shekels of silver, current money with the merchant,' that Abraham bought the field of Machpelah, nearly four thousand years ago. This adoption of the precious metals as the subject of coinage, the material of money by all peoples in all ages of the world, as further stated, had not been the result of any vagaries of fancy, but was attributable to the fact that they of all metals alone possessed the properties which are essential to a circulating medium of uniform value."

"The circulating medium of a commercial community," said Mr. Webster, "must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that medium without loss. It must also be able, not only to pass in payments and receipts among individuals of the same society and nation, but to adjust and discharge the balance of exchanges between different nations. It must be something which has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money, and whatever else is to perform the functions of money must be their representative and *capable of being [308 turned into them at will. So long as bank paper retains this quality it is a substitute for money. Devested of this nothing can give it that character." 3 Webster's Works, p. 41.

In accordance with the doctrine thus expressed, I am of opinion, as stated, that no commercial or money transaction, not immoral in its character or detrimental to the general interests of society, can be held or declared to be invalid because it is enforced or made payable in gold coin or currency established or recognized by the government; and, therefore, that the judgment of the supreme court of Mississippi, declaring that the bonds of the levee board made payable in gold coin were for that reason invalid, cannot be sustained, and that its judgment to that effect should be reversed.

Mr. Justice **Peckham** dissenting:

I find myself unable to concur in the opinion of the court herein as to our power to review the judgment of the state court, and I must therefore dissent from the conclusion arrived at in this case.

The legislature of Mississippi gave certain authority to the levee commissioners to borrow money and to issue bonds therefor. They issued bonds by virtue and solely by virtue of that act. They so worded the bonds as to render it a matter of controversy whether the principal was, on the face of the bonds, payable only in gold coin or in any lawful money of the United States The state court held that the legislature did not, in the statute

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passed by it, authorize the levee commissioners to issue bonds payable in gold coin, and that these bonds were so payable and were therefore void as unauthorized by the legislative enactment. This seems to me a matter of local law only, and I cannot see that its decision involves any Federal question. This court has held that parties may contract for the payment of an obligation in gold or in any other money or commodity, and it must then be paid in the medium contracted for. *Bronson* v. *Rodes*, 74 U. S. 7 Wall. 229 [19: 141]; **309**] **Trebilcock* v. *Wilson*, 79 U. S. 12 Wall. 687 [20: 460]. This right applies to a state or municipality as well as to an individual.

If the legislature had in terms provided that the bonds should only be issued payable in legal tenders, there could, as it seems to me, be no pretense that such a provision would be illegal or involve a violation of any Federal right.

The corporation was the creature of the state and had only such functions as the state chose to confer on it. Although it be true that the state is absolutely without power to control the right of individuals to contract for such lawful money of the United States as may seem to them best, certainly no such want of authority obtained with reference to the right of a state in granting a charter to a corporation to affix such restrictions as it deemed best. As the individual could exercise his right to contract for any lawful money of the United States free from state control, so the state had the like freedom of action in making her own contracts. It follows that in delegating to one of its creatures the power to contract, the state could limit that power to such kind of lawful money as was considered wise. The exercise by the state of this unquestioned authority in creating her own corporation deprived no one of an existing right and interfered with no Federal authority. The mere decision of the state court that the corporation had misused or exceeded its powers under its charter was a purely state question. Had the state court given force to any subsequent law, which it was claimed impaired the obligations of the contract, a different view would control. But as it did not, as it solely held that the corporation had exceeded its authority under the state law, I am at a loss to see the slightest Federal question.

The Mississippi court construed the bonds as obligations payable in gold coin, and it also held that the levee commissioners were not authorized to issue bonds so payable. Whether the meaning of the contract was arrived at from the plain language of the bonds, or was an inference or implication to be drawn from all the language used therein, the decision was, in either case, nothing but a decision of a question of contract in regard to which the **310**] state court *had the right to finally decide, and we are bound by that decision.

It is said that if by this adjudication a right possessed by plaintiffs in error as holders of bonds, under the Constitution and laws of the United States, was necessarily denied, then this court has jurisdiction to review the judgment on writ of error. This may be admitted, but I deny that the case at bar presents any such feature. The argument that plaintiffs in error make is that they claimed the bonds were payable in money of the United States, while defendants claimed they were payable in a particular kind of money, and because so payable, were invalid. The grounds of demurrer to the bill of plaintiffs in error were that the bonds were void as calling for payment in gold coin, and that the levee board had no power to issue them in that form. The question was as to the power of the board to issue bonds payable in gold coin, which depended upon the statute of the state, and the question whether the bonds were so payable was one of construction of the language used in the bonds. Simply to claim that money due under a contract is payable in money of the United States, does not make a claim under the Constitution or laws of Congress. What kind of money the contract is payable in depends upon its language, and that raises no Federal question.

The case of *Trebilcock* v. *Wilson*, 79 U. S. 12 Wall. 687 [20: 460], does not aid the plaintiffs in error. In that case the defendant claimed a right under the Constitution to demand and receive payment of his note in specie according to the contract, and this was denied him, and a decree entered canceling the mortgage given as collateral security for the note. This court reviewed the decision on the ground that a right claimed by the defendant under the Constitution was decided against him by the state court.

In *Maryland* v. *Baltimore & O. R. Co* 89 U. S. 22 Wall. 105 [22: 713], the question of jurisdiction was not raised or noticed. The opinion puts the rights of the parties entirely upon the language of the contract, and there was no claim that the meaning of the contract was governed by any law of Congress or by any provision of the Constitution.

*All the arguments as to the powers of **[311** corporations to borrow money or to give bonds, or as to the meaning of the state statute and the extent of the power it granted by the authority to borrow money, are arguments as to the construction of the state statute and the authority of this corporation, and are not in any particular, as it seems to me, of a Federal nature.

Again, it is said that the power to borrow money simply means the power to borrow whatever is money according to the Constitution of the United States and the laws passed in pursuance thereof; and the power to issue negotiable bonds therefor includes the power to make them payable in such money. This, it is urged, the law presumed, and to proceed on an implication to the contrary founded upon language contained in the bonds themselves, which it is said was indefinite, was to deny to the holders of these bonds, subsequent to their purchase, a right arising under the Constitution and laws of the United States. Whatever presumption the law may make based upon the grant of a power to borrow money, as to the right to make the obligation given therefor payable in lawful money generally, the presumption is of no force in the face of a contract to pay only in some particular medium, and whether that contract is to be found expressed in so many words and in plain and perfectly unambiguous language, or is to be in-

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ferred or implied from all the language which is used in the contract, is unimportant and immaterial. That it may be implied has been held in *Maryland* v. *Baltimore & O. R. Co.* 89 U. S. 22 Wall. 105 [22:713]. Whether the implication does arise from the language used is not a Federal question, and the decision of the state court is final.

We may think the power given by the state of Mississippi to its corporation by the language it used was of a general nature, authorizing the corporation to make a payment in any money, yet the state court decides that the language employed gave no authority to issue bonds payable in gold coin. There is no claim under an act of Congress or of the Constitution in such case and no claim under either was in any way denied.

We come back to the proposition, therefore, **312**] that when *parties make a contract on that subject it is for the court to say what the contract means, and it seems to me that is not a Federal question, although the court is only able to arrive at a conclusion as to what the contract means by an examination of its whole language, and by drawing inferences or implications therefrom as to what its true meaning is. The nature of the question does not change according as the contract upon which the right rests is plainly or ambiguously stated. Nor does the right to construe the state statute depend upon the condition that the state court shall construe it as we think, correctly. It is the same kind of a question at all times, and that is, What do the statute and contract mean? What they mean is a question for the state court alone.

While under the laws of Congress there are several kinds of money, gold and silver coin and legal-tender notes, yet the decision of the state court does not deny this or refuse to give effect to those laws. The decision is in entire harmony with them, and proceeds upon the assumption of their validity.

When it is said that the power to borrow money was expressly granted, unaccompanied by any definition of the word "money" which might operate as a restriction on the power, such statement is of course based upon the language used in the statute. It is not necessary that the definition of the word "money" need be given in so many words. Whether upon the whole language of the statute (if there were more than one kind of money) there was a discretion given to the commissioners to say as to which particular kind of money the bonds should be payable in, is a question as to what power the commissioners were granted by that statute, and that question is to be determined by the state court, which decides as to the meaning of the state law, and there is no question of any right dependent upon the Federal Constitution or upon any of the laws of Congress. The state court has denied no right derived from either. It has simply construed a statute of its own state. In holding that the implication to be derived from the act of the state was that the power was to borrow money of the United States, is it not plain that this court assumes to construe the meaning of the state **313**] statute and *in a manner differing from that given it by the state court? How would it be a different question if the legislature had in terms authorized the corporation to borrow currency only? In either case the question would simply be a construction of the state statute, in the one case from plain language used therein, and in the other from a reading of the whole act and a decision derived therefrom as to the actual meaning of the state law. In both cases the decision is entirely the same in its nature, and in both it is a decision of a local question into which there does not enter any feature of a Federal question. The decision of this court that the bonds were on their face solvable in money of the United States whatever its description, and were therefore valid, seems to me so plainly a decision as to the meaning of a contract in opposition to that taken by the state court, where the decision of the latter tribunal is conclusive upon us, that I cannot give assent to it.

I think the writ should be dismissed.

I am authorized to say that *Mr. Justice* **Brewer** and *Mr. Justice* **White** concur in this opinion.

JOHN STEVENSON, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 313-323.)

Manslaughter—question for jury.

1. The issue of manslaughter, as well as those of murder and of self-defense, should be submitted to the jury, where a homicide was committed by shooting immediately after the victim had entered the room and at once fired at and missed the accused, while the latter was laboring under great excitement resulting from an altercation just before in which each had threatened the life of the other.
2. An issue as to manslaughter raised by evidence cannot be taken from the jury because of other evidence of a different kind.

[No. 681.]

Argued March 9, 1896. Decided April 13, 1896.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas to review a judgment of that court convicting John Stevenson of murder. *Reversed, and cause remanded, with instructions for a new trial.*

The facts are stated in the opinion.

Messrs. **Fred Beall** and *Joseph P. Mullen* for plaintiff in error.

Mr. **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiff in error was indicted in the United States circuit court for the eastern dis-

NOTE.—*As to threats by deceased in cases of homicide, when admissible in evidence,*—see note to Wiggins v. Utah, 23: 941.

As to questions of law and fact for court or jury, see note to King v. Delaware Ins. Co. 3: 155.

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trict of Texas, at the term commencing on the 20th of November, 1893. The indictment charged the defendant with the crime of murder in killing one Joe Gaines on the 22d of August, 1893, in Pickens county, in the Chickasaw Nation, in the Indian territory, the same being annexed to and constituting a part of the fifth circuit, and annexed to and constituting a part of the eastern district of Texas for judicial purposes. The defendant was tried at the circuit court held for the eastern district of Texas in April, 1895, and was convicted by the jury of murder, as charged in the indictment, and sentenced to be hanged. He then sued out a writ of error from this court. It will be necessary to notice but one exception taken by counsel for the plaintiff in error upon the trial. After the evidence was in, he requested the court to submit to the jury a charge upon manslaughter "but the court refused to submit that issue to the jury, to which action of the court in failing and refusing to submit to the jury such charge, the defendant at the time excepted."

The question is whether the court erred in refusing this request. The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder. It is difficult to think of a case of killing by shooting, where both men were armed and both in readiness to shoot, and when both did shoot, that the question would not arise for the jury to answer, 315] whether *the killing was murder or manslaughter, or a pure act of self-defense. The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder and not manslaughter, or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.

By U. S. Rev. Stat. § 1035, it is enacted that "in all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, That each attempt be itself a separate offense." Under this statute the defendant charged in the indictment with the crime of murder may be found guilty of the lower grade of crime, *viz.*, manslaughter. There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect. *Sparf* v. *United States*, 156 U. S. 51 [39: 343].

The ruling of the learned judge was to the effect that, in this case, the killing was either murder or else it was done in the course of self-defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility, and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact, *viz.*, whether under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased, not in self-defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self-defense, and yet this question of fact *is, under the evidence in the case, [316 determined by the trial court as one of law and against the defendant.

A review of some of the evidence stated in the bill of exceptions is necessary in order to discover whether there was justification for this holding by the learned judge. It may be premised that we do not give very much of the evidence tending to show malice in the defendant and that which tended to show an intentional and deliberate murder of the deceased by him. We give only so much of the evidence as is necessary to permit an intelligent view of the transaction and of that portion of the evidence in addition which might be regarded as tending to show that the defendant was only guilty of manslaughter and not of murder. If there were some appreciable evidence upon that subject, its proper weight and credibility were for the jury.

There was evidence tending to show the following facts: The deceased was a deputy United States marshal. One B. D. Davidson was a lawyer by profession and a commissioner of the United States for one of the territorial courts. On the 22d of August, 1893, Davidson was at Paul's Valley in the Indian territory. He knew the defendant, and he was also acquainted with Joe Gaines, the deceased. Davidson saw the defendant in the evening of that day at his (Davidson's) hotel. A man named George Mitchell had been bound over by Davidson, and had failed to give a proper bond, and Mitchell came to him and asked if he would take John Stevenson, the plaintiff in error, on the bond. Davidson told him he would if Stevenson could justify. Mitchell left, and soon thereafter brought Stevenson around, who told Davidson he had some personal property,—he didn't know what it was exactly,—but it did not amount to $500 above exemptions and liabilities. Davidson told him he would have to schedule other property, and plaintiff in error thought he ought to take a farm he had, and did not like Davidson's refusal, and went off. That same night, after supper and about 9 o'clock, while Davidson was talking with other persons, plaintiff in error came to the door and commenced cursing and abusing Davidson, saying, as Davidson testified, "everything he could put *his tongue [317 to." Stevenson left, still cursing, and went south, and he could be heard as he went away cursing and swearing. Gaines, the deceased,

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soon thereafter came in the room in the hotel where Davidson was, and asked what all "this racket or fuss was about." Davidson told him, and Gaines said, "I will go and arrest him and stop him;" he said he "would arrest him and hold him until morning," and went out for that purpose. Davidson heard some loud talking on the street soon after, and went out of his house and saw Gaines and Stevenson and a lady, whom he was told was Stevenson's wife, standing on the platform in front of the hotel talking, and Davidson passed by them and went on; he returned to the hotel soon after this, and in about a half hour he heard two shots fired, and Gaines, the deceased, got up and walked across to the north side of the room where he and Davidson were sitting, and picked up his pistol from a sewing-machine, where he always kept it, and said he would go and "get him and fasten him, and keep him in charge and not release him any more." He then walked out of the house, and in about two minutes two shots were heard. Davidson then started to go, and some one prevented him; he soon afterwards saw Gaines, the deceased, when brought to the hotel dead; he had two wounds, one in his arm, the other in the breast; his coat sleeve had the appearance of being powder burned. This is the substance of Davidson's evidence.

Another witness says that soon after Gaines left Davidson's room for the purpose of arresting Stevenson, he (Gaines) and the plaintiff in error were seen together; it was about 9 o'clock, after dark; they were standing on the sidewalk back of Underwood's drug store; when the witness first heard Stevenson speak the latter said: "Don't draw that pistol; if you do I will cut you." Stevenson and the deceased were standing on the sidewalk then; the witness walked into the middle of the street and said to Stevenson, "John, put up your knife and go home and behave yourself." They then walked over to where the witness was, Stevenson holding with his left hand to Gaines's right arm; Stevenson was holding a knife in his right hand; after they came over **318**]to* where witness was, "Stevenson turned the officer loose, and as soon as he turned loose of Mr. Gaines and started off Gaines drew his pistol on him, and told Stevenson to drop his knife or he would kill him; he walked a step or two towards Gaines." Witness said: "John, for God's sake throw your knife down or he will kill you. Stevenson dropped his knife and Gaines told me (the witness) to take hold of him; I picked up the knife, and then took hold of him; Gaines and defendant kept quarreling; Gaines said, 'John, I am determined to take you;' and Stevenson said, 'All right, I will go with you.' They went along quietly, and witness went back to the drug store; he was there some ten or fifteen minutes, and saw Stevenson and his wife go back down the street from the direction of the hotel, and heard defendant say, "Smith, give me your gun." Smith told him he did not have any. Stevenson said, "I will go home and get my Winchester and come back and I will make the son of a bitch hide out." In about thirty minutes after this the witness heard two shots in quick succession at the billiard hall; he opened the barber shop door and saw Gaines lying in the street flat on his back; he gasped once after witness got to him and died. This witness says that at the time "Gaines threw his pistol down on Stevenson," at the interview had just before they separated, and shortly before the killing, "Stevenson had turned and was walking off from Gaines, and while Stevenson had hold of the officer I heard him say to the officer, 'Don't draw that gun, or I will cut you.'"

Immediately after the first altercation had taken place between the parties, and they had separated, the plaintiff in error went into a saloon and called for cider, and wanted everybody to come up and drink; he made a general invitation. At that time he seemed, as the witness described it, "to be excited and mad." He had his gun in several positions, and just before the killing had it in his right hand. This was within a very few minutes after the first altercation took place. While the plaintiff in error was still in the saloon, and after he had given a general invitation to come up and *drink the cider, and while [**319** standing near the counter, the deceased, in the language of one witness, "approached the cider joint; he was coming very rapidly; as he ran up to the light he had his six shooter in both hands in shooting position; he ran right up to the door without saying a word, pushed the six shootor in, and fired; he fired instantly; he did not halt a moment; he did not say a word. Immediately after this I heard a report from the inside of the house; the two shots were far enough apart that I could distinguish between them; Gaines fired the first shot; I think the wound in Gaines' arm was made when he had the pistol in both hands; don't see how it could have been done otherwise."

Another witness testified: "The ball from Gaines's pistol imbedded in the counter, missing Stevenson 5 or 6 inches."

The testimony of another witness was as follows: "I was in Paul's Valley the night of the shooting; I saw the deceased at the Underwood drug store about half an hour before the killing; deceased said, 'I thought I would stay a few minutes and maybe Stevenson will come back;' he says, 'I ought to have killed the son of a bitch when he was here awhile ago, and if he comes back I am going to kill him.' I was at Bandy's saloon, saw the deceased as he approached; saw one shot fired; deceased came not in a run, but in a kind of trot, with his pistol in both hands; as he approached the door in a trot he threw his pistol in and fired; he said nothing; I did not see where the defendant was standing at the time of the shooting; he had ordered cider just a moment before; I heard two shots close together; the first came from the pistol; after that another shot from the inside."

This is a portion of, but not all, the evidence given upon the trial, tending to show the circumstances under which the killing was done. Was there enough, in any view that could be taken of such evidence, to require the submission of the question of manslaughter to a jury? We think there was, and the request of counsel for plaintiff in error to submit that issue to the jury should have been granted. We do not mean to intimate an opinion as to what the jury ought to find upon *such [**320**

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evidence, taken in connection with all the other evidence in the case, but it seems to us entirely clear that there was enough to ask the jury to decide whether the killing was, upon all the evidence in the case, murder or manslaughter. The jury should have been permitted to determine the credibility of the evidence, as above detailed, and, if true, whether the effect of the conduct of the deceased in shooting, as he did, into the saloon, and considering all the circumstances of the case, was such as naturally tended to and did excite in the mind of the plaintiff in error a sudden passion, either of rage or fear, and under the influence of which he fired the shot and killed the deceased wilfully and unlawfully, but at the same time without malice. If he thus fired the pistol, would not a jury have the right to say that the consequent killing was manslaughter instead of murder? Is it not clearly a question of fact for a jury to determine just what the mental condition of plaintiff in error was in regard to malice?

Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied. Whart. Am. Crim. Law (8th ed.) § 304. Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, *viz.*, the circumstances leading up to and surrounding the killing. The definition of the crime given by U. S. Rev. Stat. § 5341, is substantially the same. The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter. As we have already said, there may be a case of killing by 321] shooting where the *facts necessarily show malice, but, taking all the evidence in this case, we think it was one for the jury to determine upon the issue of manslaughter.

In *Brown* v. *United States*, 159 U. S. 100 [*ante*, 90], *Mr. Justice* Harlan, when speaking of an affray in which the plaintiff in error was charged with having murdered a man, stated that "the verdict of guilty of manslaughter or murder should not have turned alone upon an inquiry as to the day in which the killing was done. The inquiry rather should have been, whether at the moment the defendant shot there were present such circumstances, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder." Who is to make the inquiry, the court or the jury under proper instructions from the court? There might be cases where the uncontradicted evidence was so clear and overwhelming of a deliberate purpose, involving malice, that a court might be justified in stating to the jury if they found the evidence to be true, they ought to infer malice; but this is not such a case.

In this case, the plaintiff in error was fresh from an altercation with the deceased, the one having a knife and the other a pistol, and each had threatened to use his weapon upon the other. The plaintiff in error by reason of the previous circumstances, was laboring under great excitement at the saloon, and, as one of the witnesses says, "seemed to be mad." The deceased came up to the saloon door and at once shot his pistol into the room, and the bullet came within a few inches of the head of the plaintiff in error, who immediately fired his rifle in the direction of the deceased. The ruling of the trial judge in effect was to say that as matter of law there was nothing in all this evidence, if true, which would permit the jury to find that the plaintiff in error when he fired his rifle was so much under the influence of sudden passion, caused by these circumstances and by this assault upon him, as not to have been actuated by that malice which the law defines as a necessary ingredient in the crime of murder. Is it perfectly plain and clear, *as a conclusion of law*, that shooting at another under circumstances such as were detailed by *some of the witnesses in this 322] case can have no tendency to raise within the mind of the person thus assaulted such a sudden passion of anger or terror as to deprive his subsequent act of malice which is necessary to make it murder? If it is not to be so asserted as matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury. Whether the witnesses told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury.

It is objected that while the evidence above set forth was proper to be submitted to the jury upon the issue of self-defense, it was not of that character to even raise an issue as to the grade of the crime, if the theory of self-defense were not sustained. We do not see the force of the objection. The fact that the evidence might raise an issue as to whether any crime at all was committed is not in the least inconsistent with a claim that it also raised an issue as to whether or not the plaintiff in error was guilty of manslaughter instead of murder. It might be argued to the jury, under both aspects, as an act of self-defense and also as one resulting from a sudden passion and without malice. The jury might reject the theory of self-defense, as they might say the shot from the pistol of the deceased had already been fired and the plaintiff in error had not been harmed, and, therefore, firing back was unnecessary and was not an act of self-defense. But why should the other issue be taken from the jury and they not be permitted to pass upon it as upon a question of fact?

It seems to us quite plain that an assault upon another by means of firing a pistol at him is naturally calculated to excite some kind of passion in the one upon whom such an assault is made. It might be one of anger or it might be terror. If either existed to a sufficient extent to render the mind of a person of

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ordinary temper incapable of cool reflection, it might be plausibly claimed that the act which followed such an assault was not accompanied by the malice necessary to constitute the killing murder. Whether such a state of mind existed in this case, and whether the 323]plaintiff in error fired the *shot under the influence of passion and without malice, cannot be properly regarded as a question of law.

A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.

It is also objected that as all the testimony is not set forth in the bill of exceptions, it must be assumed there was some which was given on the trial that would show there was no issue of manslaughter in the case. The evidence which has been returned does, in our opinion, show the existence of such an issue, and if there were other and further evidence of a different nature, which is not in the bill of exceptions, the question as to which should be credited was for the jury, and should not have been taken from it by the court. The plaintiff in error may have been guilty of murder, there was certainly sufficient evidence on that issue to render it necessary to submit it to the jury. We have no power and no inclination to pass upon that question of fact. We only decide that the question as to the grade of the crime, whether murder or manslaughter, should have been submitted to the jury as well as the question of self-defense.

For the error in refusing to do so, *the judgment of conviction must be reversed*, and the cause remanded to the court below, with instructions to grant a new trial.

324] UNITED STATES, *Appt.*, *v.* MADISON J. JULIAN.

(See S. C. Reporter's ed. 324, 325.)

Fees of commissioner.

A jurat or certificate appended to depositions taken by a commissioner of the circuit court, stating the fact that the witness appeared before him and was sworn to the truth of what he had stated, is a certificate within the meaning of U. S. Rev. Stat. § 828, for which 15 cents may be charged by the commissioner by virtue of § 847, allowing him the same compensation as a clerk for such services.

[No. 925.]

Submitted March 16, 1896. Decided April 13, 1896.

APPEAL from a judgment of the Court of Claims in favor of Madison J. Julian, claimant, against the United States for fees as commissioner of the Circuit Court. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a petition for fees, as commissioner of the circuit court for the middle district of Tennessee.

The claim included a large number of items, but the only point in controversy before this court is, whether petitioner was entitled to 15 cents for each jurat or certificate, appended to depositions taken by him as such commissioner. The total number of jurats so appended was 238, and the total charge therefor was $35.70.

The court of claims allowed this item, and the government appealed.

Mr. **J. E. Dodge**, Assistant Attorney General, for appellant.

Mr. **George A. King** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the construction of that paragraph of U. S. Rev. Stat. § 847, which allows to commissioners "for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services;" and the paragraphs of § 828, which allow to clerks "for taking and certifying depositions to file, 25 cents for each folio of 100 words;" and "for making any record, *certificate*, return, or report, for each folio, 15 cents."

In the case of *United States* v. *Ewing*, 140 U. S. 142, 146, ¶ 4 [35: 388, 390], and in *United States* v. *Barber*, 140 U. S. 164, 165, ¶ 1 [35: 396, 397], we held a commissioner to be entitled to 25 cents per *folio for drawing[325 complaints in criminal cases, as for "taking and certifying depositions to file," where the local practice required a magistrate to reduce the examination of the camplaining witnesses to writing. In the latter case (p. 166 [397]) we also held that the petitioner should be allowed a fee of 10 cents for each oath administered in connection with these complaints, and 15 cents for each jurat, as for a certificate; and also (p. 168, ¶ 7 [398]) that the charge per folio for depositions taken on examinations of prisoners was allowable, upon the same principle upon which we allowed it for preparing complaints. It follows from this that the commissioner is also entitled to 15 cents per folio for the jurat to each deposition.

The certificate referred to in the words "taking and *certifying* depositions to file," is that required by §§ 863–866 and 873, to be appended to depositions taken *de bene esse* in civil cases depending in the district or circuit court, which includes the circumstances with reference to the witness authorizing his deposition to be taken; the official character of the person taking it; the proof of reasonable notice to the opposite party; the fact that the witness was cautioned and sworn to testify to the whole truth, and other similar requirements. It was probably more particularly with reference to this class of depositions that the fee

NOTE.—*As to extra pay or compensation to officers* see note to United States v. Macdaniel, 8: 587.

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"for taking and certifying depositions" was inserted. The certificate referred to is always appended to depositions or a series of depositions taken *de bene esse*, is often of considerable length, and is required by repeated rulings of this and the circuit courts. *Bell* v. *Morrison*, 26 U. S. 1 Pet. 351 [7: 174]; *Cook* v. *Burnley*, 78 U. S. 11 Wall. 659 [20: 29]; *Harris* v. *Wall*, 48 U. S. 7 How. 693 [12: 875]; *Whitford* v. *Clark County*, 119 U. S. 522 [30: 500]; *Tooker* v. *Thompson*, 3 McLean, 92; *Voce* v. *Lawrence*, 4 McLean, 203.

The jurat is not a certificate to a deposition in the ordinary sense of the term, but a certificate of the fact that the witness appeared before the commissioner, and was sworn to the truth of what he had stated. We think the design of the statute was to allow a separate fee therefor.

The judgment of the court of claims is therefore affirmed.

326] JUSTUS HOLLANDER ET AL., *Appts.*, *v.* MARTIN S. FECHHEIMER.

(See S. C. Reporter's ed. 326-329.)

Jurisdictional amount.

An appeal to the Supreme Court of the United States from a decree of the supreme court of the District of Columbia setting aside a fraudulent and void assignment for creditors, and ordering payment of a judgment held by the plaintiff, and also remanding the case for further proceedings, must be dismissed where such judgment is for $1,000 only, besides interest and costs, although plaintiff sought payment of other claims making an aggregate of more than $5,000, which he might be allowed to prove in the subsequent proceedings, the amount of which claims could not be fixed until those proceedings were had.

[No. 146.]

Argued March 13, 16, 1896. Decided April 13, 1896.

APPEAL from a decree of the Supreme Court of the District of Columbia reversing the decree of the Special Term of that court, and declaring an assignment fraudulent and void, and decreeing that the complainants, Martin S. Fechheimer *et al.*, recover from the defendant Samuel Bieber the amount of a judgment of complainants rendered against Justus Hollander, the assignor of Bieber, both of whom were defendants, together with the complainants' costs. *Dismissed.*

See same case below, 6 Mackey, 512, 21 D.C. 76.

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,*—see note to Schunk v. Moline, M. & S. Co. 37: 256.

Statement by *Mr. Justice* **Brown:**

This was a bill in equity filed by the firm of Fechheimer, Goodkind, & Co., against Justus Hollander, a judgment debtor, Samuel Bieber, his assignee, and a number of preferred creditors under such assignment, alleging that the assignment was fraudulent and void, and praying that Hollander might be required to disclose the amount of his indebtedness to each of his preferred creditors; the amount of goods purchased by him immediately prior to his failure, and the names of the persons from whom he purchased; the amount of his indebtedness to each of his creditors before making such purchases; the amount and character of goods he had in stock prior to his last purchases, and sundry other particulars; the amount of property turned over to Bieber under the assignment; and also praying for the appointment of a receiver; the setting aside of the assignment; the payment of the plaintiffs' claim, and an injunction against the defendant Bieber from further proceeding under the assignment.

The bill set forth, as the basis of plaintiffs' right to sue, an indebtedness in the sum of $1,000, by judgment recovered in the supreme court of the District of Columbia, upon which execution had been issued and returned *nulla bona*, a note for $1,000, and goods purchased to the amount of $1,846.50.

Demurrers were filed to this bill by Bieber and certain of the preferred creditors, which were sustained, and the bill *dismissed. **[327** Upon appeal to the general term the decree of the special term dismissing the bill was reversed, and the case remanded for further proceedings. Answers were subsequently filed by the several defendants, and testimony taken; and upon a hearing upon pleadings and proofs the bill was again dismissed, and an appeal taken to the general term, which again reversed the decree of the special term, declared the assignment to be fraudulent and void, and decreed that the complainants recover from the defendant Bieber the amount of their judgment set out in the bill of complaint, together with their costs, to be taxed by the clerk, and that the case be remanded to the special term for further proceedings. From this decree defendant appealed to this court.

Messrs. **Leon Tobriner** and *A. S. Worthington* for appellants.

Messrs. **James Francis Smith** and **Henry E. Davis** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

It is clear that this appeal must be dismissed for the want of jurisdiction. The decree from which the appeal was taken declares the assignment from Hollander to the defendant Bieber to be fraudulent and void as against the complainants, and "that said complainants do have and recover from the said defendant Bieber the amount of their judgment set out in the bill of complaint, together with their costs in this cause, to be taxed by the clerk; and it is further ordered that this cause be remanded

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to the special term for further proceedings." The amount of the judgment referred to in the decree was $1,000, with interest at 7 per cent from February 15, 1886, and costs, and the total amount due thereon at the time the decree was rendered was but $1,454.11.

It is true that the bill alleged a further indebtedness upon a note for $1,000 and an open account of $1,846.50; and it is claimed that at the time the decree was rendered there was due 328] *upon these two items the sum of $3,778.16, which, added to the amount due upon the judgment, made the total amount due at the time of the decree $5,232.27.

The whole basis of the decree, however, was the judgment for $1,000, which was the amount for which the general term directed a recovery. It is true that it also decreed the assignment to be void and remanded the case for further proceedings, that upon such further proceedings the court might direct an account to be taken and the property to be divided generally among the creditors, and that upon such accounting the plaintiffs might be admitted to prove the full amount of their claim. This amount, however, is not one directly involved in the decree, and the law is well settled that the jurisdiction is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained by either one of the parties through the probative effect of the decree, however direct its bearing upon such contingency. *New England Mortg. Secur. Co.* v. *Gay*, 145 U. S. 123 [36: 646]. In that case, which was an action in assumpsit upon promissory notes, there had been a finding by a jury that the transaction was usurious. The amount involved in the particular suit was less than $5,000, but the effect of the judgment under the laws of Georgia was to invalidate a mortgage given as security upon property worth over $20,000. It was held that, notwithstanding such indirect effect, this court had no jurisdiction, the amount directly in dispute being only the usurious sum. All the prior authorities upon the point are cited in this case.

But again: If the decree appealed from be a final decree at all, it is final only for the amount of the judgment. If it be regarded as a decree for the whole amount of the plaintiffs' claim against Hollander, then it is clearly not a final decree, since the case was remanded for further proceedings, and until those proceedings were had, the amount of such indebtedness could not be fixed in such manner as to give this court jurisdiction of an appeal, and was purely conjectural upon the court finding that amount to be due. *Union M. L. Ins. Co.* v. *Kirchoff*, 160 U. S. 374 [*ante*, 461]. This con-
329] clusion is not the less *irresistible from the fact that the note and open account were reduced to judgment after the bill was filed, since this judgment was not made the basis of the bill, and the finding in the decree is restricted to the amount of the first judgment of $1,000.

The appeal must therefore be dismissed.

GREAT WESTERN TELEGRAPH COMPANY, *Plff. in Err.*, *v.* HIRAM PURDY.

(See S. C. Reporter's ed. 329-339.)

Federal question—parties bound by decree—denying full faith and credit to judgment of another state—statute of limitations—governed by lex fori—time when cause of action accrues.

1. The denial by a state court of conclusive effect to an order of assessment on shareholders made by a court in another state presents a Federal question for review by the Supreme Court of the United States; such Federal question being whether the state court thereby declined to give full faith and credit to a judicial proceeding of a court of another state.

2. After full relief has been given in a suit by shareholders to set aside a contract with a corporation and compel the issue of shares, and new directors have been elected in accordance with the decree, a bill filed by other shareholders for a receiver, charging fraud upon such officers, although called a supplemental bill, begins a new litigation in which the decree will not be binding upon parties to the original suit unless they have notice of the latter proceeding.

3. Sustaining a defense of the statute of limitations to an action for assessments upon stock ordered by a court in another state does not deny to the judicial proceeding in the other state the full faith and credit to which it was entitled, as such order for assessments does not constitute a judgment against the shareholders.

4. The running of the statute of limitations against an action to enforce an assessment on a subscription to stock of a corporation is not in Iowa suspended by delay in making the assessment, when a right to recover would arise by making a demand or giving a notice.

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*,—see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37: 267.

As to what statute of limitations governs; effect of new statutes; lex fori, and not lex loci, governs,—see note to Townsend v. Jemison, 13: 194.

As to when taxation of stock or shares in corporation impairs obligation of contracts,—see note to Providence Bank v. Billings, 7: 939.

As to fiduciary position of directors; their contracts and dealings with corporation,—see note Koehler v. Black River F. I. Co. 17: 339.

As to individual liability of stockholders for corporate debts, see note to Hatch v. Dana, 25: 885.

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5. Limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the state in which action is brought as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.

6. The time when a cause of action accrues under a state statute is not a Federal question, but is a local question, on which the decisions of state courts cannot be reviewed by the Supreme Court of the United States.

[No. 105.]

Argued December 6, 9, 1895. Decided April 13, 1896.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that court affirming the judgment of the District Court of Des Moines County in that State in favor of the defendant, Hiram Purdy, in an action brought by the Great Western Telegraph Company to recover an assessment upon certain shares of plaintiff's stock. *Affirmed.*

See same case below, 83 Iowa, 430.

Statement by *Mr. Justice* **Gray:**

This was an action brought August 30, 1888, in the district court of Des Moines county in **330**]the state of Iowa, by the *Great Western Telegraph Company, a corporation of Illinois, by its receiver, Elias R. Bowen, against Hiram Purdy, a citizen of Iowa, to recover the sum of $437.50, with interest from July 10, 1886, alleged to be due from him to the company under his subscription to its stock, and under a decree of the circuit court of Cook county in the state of Illinois of that date, which ordered an assessment upon the stockholders of the company, and which was alleged to have been made in a suit to which he was a party and to be binding upon him. Trial by jury was waived, and the case tried by the court. The material facts appeared by the record to have been as follows:

The company was incorporated under the laws of the state of Illinois in 1867. On February 16, 1869, Purdy subscribed for 50 shares of the par value of $25 each, by signing and delivering to the company's agent at Burlington, in the state of Iowa, the following writing:

Capital, $3,000,000; shares, $25; assessments not to exceed $10 on a share.

Subscription List for the Capital Stock of the Great Western Telegraph Company.

We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of the Great Western Telegraph Company placed opposite our respective names, and pay for the same in instalments, to wit, 5 per cent on amount paid in, and the balance as the directors from time to time may order; in consideration thereof the Great Western Telegraph Company agree that when 40 per cent of the par value of the shares shall have been paid under such orders, and the instalment receipts therefor surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full-paid stock by the said company.

T. C. Snow is appointed agent to solicit stock and receive only the first instalment of 5 per cent (50 cents on a share) at the time of subscription. J. SNOW, Secretary.

*Upon this subscription Purdy paid [**331** $275 before November, 1869.

On November 19, 1869, Jeremiah Terwilliger and others, including Purdy, subscribers to stock in the company, and who had paid money on their subscriptions, filed a bill in equity in the circuit court of Cook county, Illinois, against the company, its president and secretary, and Selah Reeve, to compel the issue of certificates of stock to the plaintiffs and other subscribers, and to set aside as fraudulent a contract between the company and Reeve, by which Reeve agreed to build its telegraph lines, and the company agreed to transfer to him its entire capital stock. On November 16, 1872, a decree was entered in that suit, setting aside the contract between Reeve and the company; ordering an accounting between them; ordering the company to issue to the subscribers certificates for as many shares as they were entitled to by the money paid; directing the president and secretary to call a meeting of the company to choose a new board of directors; reserving leave to the plaintiffs at any time to apply for such further order or decree as should be necessary to carry out this decree or be necessary in the cause; and ordering the individual defendants to pay the costs of the suit.

On January 7, 1873, those costs were paid; and on January 29, 1873, a meeting of the company was held and a new board of directors chosen, and a certificate for twenty-seven and a half shares was issued to Purdy.

The following proceedings were afterwards had in that cause: On September 19, 1874, other stockholders, by leave of the court, intervened, and filed a "supplemental bill" against the company and its officers, alleging mismanagement and fraud on the part of the new officers, and the insolvency of the company, and praying for the appointment of a receiver. On October 7, 1874, upon motion of the plaintiffs in the supplemental bill, and after notice to and with the consent of all the parties to that bill, the court appointed Oliver H. Horton receiver of the property of the company. Bowen was afterwards appointed receiver in place of Horton; and upon his petition, and upon the report of a *master appointed to inquire into the [**332** amount of the debts and assets of the company, and the percentage of the par value of the shares necessary to be paid by the stockholders to satisfy those debts, the court, on July 10, 1886, adjudged that the company was insolvent, and had no means for paying its debts, except the sums remaining unpaid upon subscriptions for stock, and that there were more than two thousand stockholders widely scattered through twelve states and territories, and it was impracticable to make all of them parties to the suit; and entered an order and decree "that a call or assessment be, and the same is hereby, made upon the stock and stockholders of the said company (excepting those who have paid

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in full), their legal heirs, representatives, and assigns, of 35 per cent of the par value of the shares of said stock subscribed for or held by them, being $8.75 on each and every share thereof; and that the stockholders of said company and each and every one of them (excepting those who have paid $25 on each and every share subscribed for or held by them) and their heirs, legal representatives, and assigns, be, and they hereby are, severally ordered and required to pay to the receiver of said company, the said Elias R. Bowen, the several amounts by this decree called for and assessed and required to be paid, namely $8.75 on each and every share subscribed for or held by them respectively, and that the same be paid upon the demand of said receiver or his agent;" and "that said receiver shall at once proceed to collect the said sums so ordered to be paid by this decree, and shall make all necessary demands for such payments, shall employ such assistance and counsel, take such action, and institute such suits and proceedings, in the name of the said company, and in such jurisdictions as he shall be advised or deem expedient and proper, and for the purpose of enforcing the payment of the sums hereby ordered paid."

On August 29, 1888, the receiver accordingly demanded of Purdy the payment of the sum of $8.75 upon each share of his stock, amounting to $437.50; and on the next day brought this action.

333] *The inferior court of Iowa, in which this action was brought, gave judgment for the defendant. The plaintiff appealed to the supreme court of Iowa, which affirmed the judgment, upon the ground that the action was barred by the statute of limitations. 83 Iowa, 430.

The plaintiff sued out this writ of error, and assigned for error that the supreme court of Iowa did not give full faith and credit to the decree of assessment of the court of Illinois, as required by art. 4, § 1, of the Constitution, and U. S. Rev. Stat. § 709.

Messrs. **Thomas J. Sutherland** and *William P. Black*, for plaintiff in error:

The question of full faith and credit was fairly set out, and involved in the pleadings and decision of the supreme court, as well as in the district court of Iowa.

Chicago L. Ins. Co. v. *Needles*, 113 U. S. 579 (28: 1087); *Powell* v. *Brunswick County Supers.* 150 U. S. 440 (37: 1136); *Sayward* v. *Denny*, 158 U. S. 184 (39: 943); *Maxwell* v. *Newbold*, 59 U. S. 18 How. 516 (15: 509); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22: 429); *Bolling* v. *Lersner*, 91 U. S. 594 (23: 367); *Crowell* v. *Randell*, 35 U. S. 10 Pet. 398 (9: 470); *Armstrong* v. *Athens County*, 41 U. S. 16 Pet. 285 (10: 967); *Texas & P. R. Co.* v. *Southern Pac. Co.* 137 U. S. 48 (34: 614); *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7: 412); *Armstrong* v. *Athens County*, 41 U. S. 16 Pet. 281 (10: 965); *Eureka Lake & Y. Canal Co.* v. *Yuba County Sup. Ct.* 116 U. S. 410 (29: 671); *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254 (35: 1004).

The Federal question was erroneously decided, and the decision of the supreme court of Iowa rests upon no ground broad enough to sustain its judgment independent of its decision of the Federal question.

Garretsville First Nat. Bank v. *Greene*, 64 Iowa, 445; *Chandler* v. *Keith*, 42 Iowa, 99; *Warner* v. *Beem*, 36 Iowa, 385; *American Ins. Co.* v. *Schmidt*, 19 Iowa, 502.

The decree of the Illinois court which had jurisdiction of the subject-matter and of the parties was and is conclusive upon the merits of the controversies, determined by that judgment between the parties and their privies in every court in the United States, and cannot be collaterally questioned.

Christmas v. *Russell*, 72 U. S. 5 Wall. 290 (18: 475); *Maxwell* v. *Stewart*, 89 U. S. 22 Wall. 77 (22: 564); *Anderson* v. *Anderson*, 8 Ohio, 108; *Mason* v. *Messenger*, 17 Iowa, 261; *Smith* v. *Smith*, 22 Iowa, 516; *Burlington & M. R. R. Co.* v. *Hall*, 37 Iowa, 620.

All the stockholders of the plaintiff company of Illinois are integral parts of it, whether they personally reside in Illinois or Iowa or in any other state.

Hawkins v. *Glenn*, 131 U. S. 329 (33: 191); *Sanger* v. *Upton*, 91 U. S. 58, 59 (23: 221, 222).

All of the subscriptions to the plaintiff's stock are presumably upon the same basis, and with equal liability. The decree of assessment of the Illinois court is conclusive in every court, in an action against a stockholder of every defense except the one that he has paid par value. In settling the question of the power of the court to make the decree involved in its rendering, that decree determines that there has been no previous laches on the part of the company or the court.

Lamb v. *Lamb*, 6 Biss. 424; *Glenn* v. *Springs*, 26 Fed. Rep. 494; *Lehman, Durr, & Co.* v. *Glenn*, 87 Ala. 626; *Great Western Teleg. Co.* v. *Gray*, 122 Ill. 630; *Glenn* v. *Williams*, 60 Md. 93; *Stewart* v. *Lay*, 45 Iowa, 612; *Schoonover* v. *Hinckley*, 48 Iowa, 85.

This decree of assessment was entitled to be enforced in the courts of Illinois. That it created a cause of action is adjudicated by the Illinois courts. It was therefore entitled to the same faith and credit in this case in the Iowa court.

U. S. Rev. Stat. § 905; *Caldwell* v. *Carrington*, 34 U. S. 9 Pet. 86 (9: 60); *Glenn* v. *Williams*, 60 Md. 112, 113; *Brown* v. *Parker*, 28 Wis. 24; *Mills* v. *Duryee*, 11 U. S. 7 Cranch, 481 (3: 411); *Green* v. *Van Buskirk*, 74 U. S. 7 Wall. 139 (19: 109); *Warner* v. *Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Ambler* v. *Whipple*, 139 Ill. 322; *Stark* v. *Ratcliff*, 111 Ill. 80, 81; *Kellam* v. *Toms*, 38 Wis. 595; *McMillan* v. *Lovejoy*, 115 Ill. 501; *Rendleman* v. *Rendleman*, 118 Ill. 265.

Mr. **S. L. Glasgow**, for defendant in error:

This court has no jurisdiction of this cause. The decree or order of assessment in question made by the circuit court of Cook county, Illinois, is neither a decree, judgment, nor a judicial proceeding against defendant within the meaning of the Constitution and law of Congress, above cited.

Ward v. *Farwell*, 97 Ill. 616.

To give this court jurisdiction of this case, there should exist a valid judgment or decree rendered against defendant personally, by a

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court having jurisdiction of the subject-matter of this action.

Board of Public Works v. *Columbia College*, 84 U. S. 17 Wall. 521 (21: 687); *Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130 (22: 588); *Pennoyer* v. *Neff*, 95 U. S. 714 (24: 565); *Embry* v. *Palmer*, 107 U. S. 8 (27: 346); *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141 (30: 614).

This action is not founded upon a judgment or decree by a court of a sister state, within the meaning of the Constitution and laws of the United States.

Glenn v. *Saxton*, 68 Cal. 353; *D'Arcy* v. *Ketcham*, 52 U. S. 11 How. 165 (13: 648); *Mutual L. Ins. Co.* v. *Harris*, 97 U. S. 331 (24: 959).

The decision of the supreme court of the State was upon a question not of a Federal character, and one broad enough to sustain the judgment.

Miller v. *Anderson* ("*Miller* v. *Swan*"), 150 U. S. 132 (37: 1028).

This court will regard and follow the decision of the supreme court of the state construing the statute of limitations of said state.

Balkam v. *Woodstock Iron Co.* 154 U. S. 177 (38: 953).

Section 2 of article 4 of the Constitution of the United States has no application to judgments of courts of sister states.

Dupasseur v. *Rochereau*, 88 U. S. 21 Wall. 134 (22: 590); *Embry* v. *Palmer*, 107 U. S. 9 (27: 349).

The question of the jurisdiction of the circuit court of Cook county, Illinois, is open to defendant in this action.

Board of Public Works v. *Columbia College*, 84 U. S. 17 Wall. 521 (21: 687); *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 (21: 897); *Knowles* v. *Logansport Gaslight & C. Co.* 86 U. S. 19 Wall. 58 (22: 70).

No persons are concluded by a judgment or decree, except those who are parties to it and have had an opportunity of presenting their right.

Pennoyer v. *Neff*, 95 U. S. 714 (24: 565); *St. Clair* v. *Cox*, 106 U. S. 350 (27: 222).

The liability of defendant, if any, in this action, is personal and has no relation to corporate matters or functions, and as to such liability he cannot be represented by the corporation.

Ward v. *Farwell*, 97 Ill. 616; *Bennett* v. *Great Western Teleg. Co.* 53 Ill. App. 276.

An order of assessment by the court is of no greater force than an assessment made by the officers of the company.

Great Western Teleg. Co. v. *Gray*, 122 Ill. 640.

These defenses can and ought to be heard when actions are brought for the recovery of the amount.

Lamb v. *Lamb*, 6 Biss. 424.

A cause can be finally determined as to some parties and remain open as to others.

Withenbury v. *United States*, 72 U. S. 5 Wall. 819 (18: 618); *Williams* v. *Morgan*, 111 U. S. 684 (28: 559); *Hill* v. *Chicago & E. R. Co.* 140 U. S. 52 (35: 331).

Under the statutes of Illinois, the circuit court of that state had no authority to make the order of assessment in question, unless the defendant was a party to the proceedings in which the order of assessment was made.

Lamar Ins. Co. v. *Hildreth*, 55 Iowa, 250; *Chandler* v. *Brown*, 77 Ill. 333; *Lamar Ins. Co.* v. *Gulick*, 102 Ill. 41.

The action of the Iowa court will be determined solely by the record.

Hanley v. *Donoghue*, 116 U. S. 1 (29: 535); *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 615 (30: 519); *Crafts* v. *Clark*, 31 Iowa, 77; *Sayer* v. *Wheeler*, 31 Iowa, 114.

In the absence of proof the law of Illinois is presumed to be the same as that of the state of Iowa.

Stephens v. *Williams*, 46 Iowa, 540; *Neese* v. *Farmers' Ins. Co.* 55 Iowa, 604; *Hadley* v. *Gregory*, 57 Iowa, 158.

The law of Iowa is to the effect that an order of assessment made by a court is not conclusive upon the stockholder in an action against him, to recover upon an alleged unpaid balance

Lamar Ins. Co. v. *Hildreth*, 55 Iowa, 251.

The time during which a defendant is a nonresident, shall not be included in computing the period of limitations. The burden of establishing this exception is upon the party who invoked its aid.

Evans v. *Montgomery*, 50 Iowa, 333.

The liability of a stockholder to a creditor of a corporation is upon an implied or unwritten contract and must be brought within five years from the time the cause of action accrued.

Garretsville First Nat. Bank v. *Greene*, 64 Iowa, 448.

The action would be barred by the statute in five years or if upon the contract of subscription, within ten years.

Baker v. *Johnson County*, 33 Iowa, 151; *Prescott* v. *Gonser*, 34 Iowa, 175; *Hintrager* v. *Hennessy*, 46 Iowa, 600; *Squier* v. *Parks*, 56 Iowa, 407.

This action involves the construction of the statute of limitations of the state of Iowa, and such construction by the supreme court of said state will be regarded and followed by this court. This statute, with the decisions of the state courts thereon, constitutes a rule of property within the state, including title to real estate.

Moores v. *Citizens' Nat. Bank*, 104 U. S. 625 (26: 870); *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 223 (34: 341); *Bauserman* v. *Blunt*, 147 U. S. 647 (37: 316); *Miller* v. *Anderson* ("*Miller* v. *Swan*") 150 U. S. 132 (37: 1028).

Neither the articles of incorporation nor the contract of subscription provides that notice that a call has been made shall be given. Notice, therefore, to the subscriber was not necessary.

Illinois River R. Co. v. *Zimmer*, 20 Ill. 658.

Neither the company nor its receiver can be heard, eighteen years later, to dispute the authority of the officers making the call.

Pittsburg, C. & St. L. R. Co. v. *Keokuk & H. Bridge Co.* 131 U. S. 381 (33: 160).

Mr. Justice **Gray** delivered the opinion of the court:

By art. 4, § 1, of the Constitution of the

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United States, "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." In the exercise of the power so conferred, Congress, besides providing the manner in which the records and judicial proceedings of the courts of any state shall be authenticated, has enacted that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States that they have by law or usage in the courts of the state from which they were taken." Act of May 26, 1790, chap. 11 (1 Stat. at L. 122; U. S. Rev. Stat. § 905).

The plaintiff relied on the order of assessment, made by a court of the state of Illinois, as a judgment of that court, entitled to the effect of being conclusive evidence of the plaintiff's right to maintain this action against the defendant. The supreme court of the state of **335**] Iowa denied it that effect. *The question whether that court thereby declined to give full faith and credit to a judicial proceeding of a court of another state, as required by the Constitution and laws of the United States, was necessarily involved in the decision.

This court therefore has jurisdiction of the case, but must judge for itself of the true nature and effect of the order relied on. *Armstrong* v. *Athens County*, 41 U. S. 16 Pet. 281, 285 [10: 965, 966]; *Texas & P. R. Co.* v. *Southern Pac. Co.* 137 U. S. 48 [34: 614]; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 137 U. S. 287 [34: 670]; *Carpenter* v. *Strange*, 141 U. S. 87 [35: 640]; *Huntington* v. *Attrill*, 146 U. S. 657: 666, 683-686 [36: 1123, 1127, 1133, 1134], and cases cited.

By the original contract between the parties, made in the state of Iowa on February 16, 1869, Purdy, the present defendant, agreed to take fifty shares, of the par value of $25, in the plaintiff company, and to pay 5 per cent (which he did) and "the balance as the directors from time to time may order;" and the company agreed to issue the shares to him as soon as 40 per cent had been paid.

On November 19, 1869, Purdy and other subscribers for shares filed in a court of the state of Illinois a bill in equity to compel the company to issue shares to them, and to set aside as fraudulent a contract by which the company had agreed to transfer all its capital stock to one Reeve; and upon that bill, on November 16, 1872, obtained a decree, setting aside that contract, and ordering shares to be issued to the subscribers as prayed for, and a new board of directors to be chosen. By that decree, all the objects of the suit were accomplished, so far as Purdy was concerned; and he does not appear to have had any notice of, or part in, any further proceedings. That bill did not ask for the appointment of a receiver, or for any order of assessment upon stockholders.

The subsequent proceeding, begun September 19, 1874, alleging mismanagement and fraud of the new officers and the insolvency of the company, was by other stockholders, and although entitled a "supplemental bill," and permitted by the court to be filed in the former cause, was a distinct proceeding, in which Purdy had and took no interest. The orders of the court upon this proceeding, appointing on October *7, 1874, a receiver, and [**336** on July 10, 1876, making a "call or assessment" upon the stockholders of the company, were entered into without any notice to him, or consent on his part. He was not personally a party to this proceeding, nor named therein. The receiver was appointed almost two years, and the assessment ordered more than thirteen years, after Purdy had ceased to have any connection with the litigation.

There can be no doubt that, as heretofore declared by this court, "after a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process, or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject-matter of the original litigation, by merely giving the new proceedings the title of the original cause. If his bill begins a new litigation, the parties against whom he seeks relief are entitled to notice thereof, and without it they will not be bound." *Smith* v. *Woolfolk*, 115 U. S. 143, 148 [29: 357, 360].

The question therefore is of the effect, as against Purdy, of the order for an assessment made by the Illinois court in a proceeding to which the corporation was a party, but to which he personally was not.

The order of that court was in effect, as it was in terms, simply a "call or assessment" upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed the charge of the assets and affairs of the corporation, took the place and exercised the office of the directors. *Scovill* v. *Thayer*, 105 U. S. 143, 155 [26: 963, 974]; *Hawkins* v. *Glenn*, 131 U. S. 319, 329 [33: 185, 191]; *Lamb* v. *Lamb*, 6 Biss. 420, 424; *Glenn* v. *Saxton*, 68 Cal. 353; *Great Western Teleg. Co.* v. *Gray*, 122 Ill. 630, 636, 640; *Great Western Teleg. Co.* v. *Loewenthal*, 154 Ill. 261.

The order of assessment, whether made by the directors as provided in the contract of subscription, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial *proceedings, conclusive [**337** evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him. *Hawkins* v. *Glenn*, 131 U. S. 319 [33: 185]; *Glenn* v. *Liggett*, 135 U. S. 533 [34: 264]; *Glenn* v. *Marbury*, 145 U. S. 499 [36: 790].

But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract.

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In this action, therefore, brought by the receiver, in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defense, going to show that he was not liable upon his contract of subscription.

In each of the three cases last cited above, the defense of the statute of limitations was entertained and passed upon. *Hawkins* v. *Glenn*, 131 U. S. 332 [33: 192]; *Glenn* v. *Liggett*, 135 U. S. 547 [34: 268]; *Glenn* v. *Marbury*, 145 U. S. 506 [36: 793].

The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder, was liable for anything, the Iowa court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled.

The statute of limitations of the state of Iowa provides that "the following actions may be brought within the times herein limited respectively after their causes accrue, and not afterwards, except when otherwise specially declared."

"4. Those founded on unwritten contracts, those brought for injuries to property, or for **338**] relief on the ground of fraud *in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.

"5. Those founded on written contracts, on judgments of any courts, except those courts provided for in the next subdivision, and those brought for the recovery of real property, within ten years.

"6. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the Federal courts of the United States, within twenty years." Iowa Code 1873, § 2529.

This action was not brought on a judgment, for there had been no judgment. But it was brought on the defendant's written contract of subscription and was therefore, by the terms of the Iowa statute, barred in ten years after the cause of action accrued. The action was brought more than ten years after the contract, but within ten years after the order of assessment.

In many jurisdictions, the cause of action, within the meaning of a statute of limitations, would be held to have accrued at the time of the order for an assessment, and not before. It has been so held by the supreme court of the state of Illinois, where this company was incorporated and the order of assessment made, as well as by this court in cases coming up from circuit courts of the United States and unaffected by decisions of the highest court of the state in which those courts were held. *Great Western Teleg. Co.* v. *Gray*, 122 Ill. 630, 636, 640; *Hawkins* v. *Glenn*, 131 U. S. 319, 329 [33: 185, 191]: *Glenn* v. *Liggett*, 135 U. S. 533 [34: 264], and *Glenn* v. *Marbury*, 145 U. S. 499 [36: 790].

But the supreme court of Iowa in the present case held that, as it rested with the directors of the corporation to make that order, the delay in making it could not suspend the operation of the statute of limitations; and that the case was within the rule, established by a series of decisions of that court, that when a plaintiff could at any time, by making a demand or giving a notice, acquire a right to recover against the defendant, the statute of limitations began to run when he might have done so. *Great Western Teleg. Co.* v. *Purdy*, 83 Iowa, 430, 433, and cases cited.

*The limitation of actions is governed [**339** by the *lex fori*, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. *McElmoyle* v. *Cohen*, 38 U. S. 13 Pet. 312 [10: 177]; *Bauserman* v. *Blunt*, 147 U. S. 647 [37: 316]; *Metcalf* v. *Watertown*, 153 U. S. 671 [38: 862]; *Balkam* v. *Woodstock Iron Co.* 154 U. S. 177 [38: 953].

Neither the statutes nor the decisions of the state of Iowa upon this subject have made any discrimination against the citizens, the contracts, or the judgments of other states, or against any right asserted under the Constitution or laws of the United States. The case is thus distinguished from *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290 [18: 475], cited at the bar.

The question at what time the cause of action accrued in this case, within the meaning of the statute of limitations of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the state cannot be reviewed by this court.

Judgment affirmed.

GREAT WESTERN TELEGRAPH COMPANY, *Plff. in Err.*,

v.

BARBARA BURNHAM ET AL., as EXRS. of the Last Will and Testament of GEORGE BURNHAM, Deceased.

(See S. C. Reporter's ed. 339-346.)

Final judgment—jurisdiction of this court.

1. A judgment of the supreme court of the state reversing an order overruling a demurrer, and

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NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see note to Miners' Bank of Dubuque v. Iowa, 13: 867.

As to what is "final decree" or judgment of state or other court from which appeal lies, see note to Gibbons v. Ogden, 5: 302.

As to jurisdiction of United States Supreme Court dependent on amount; interest added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,—see note to Gordon v. Ogden, 7: 502.

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remanding the case for further proceedings, is not a final judgment which can be reviewed on writ of error by the Supreme Court of the United States.

2. A final judgment for defendants on a demurrer to a complaint rendered by an inferior state court, and which might be appealed to the supreme court of the state, is not subject to a writ of error from the Supreme Court of the United States, although it was the necessary result of a previous decision by the supreme court of the state, reversing a decision which overruled the demurrer, and remanding the case.

[No. 159.]

Argued and Submitted March 19, 20, 1896. Decided April 13, 1896.

IN ERROR to the Circuit Court of Milwaukee County, State of Wisconsin, to review a judgment of that court entered in accordance with the decision of the Supreme Court of the State, which judgment sustained a demurrer and was a final judgment for the defendant in an action brought by the Great Western Telegraph Company against the defendant George Burnham (and prosecuted against the executors), to recover the amount of an assessment alleged to be due under a contract of subscription. *Dismissed for want of jurisdiction.*

See same case below, 79 Wis. 47, 52. 53.

Statement by *Mr. Justice* **Gray**:

This was an action similar to that of *Great Western Teleg. Co.* v. *Purdy*, 162 U.S. 329 [*ante*, 986], and was brought October 8, 1888, in the circuit court of Milwaukee county in the state of Wisconsin, by the same plaintiff against George Burnham, and prosecuted against his executors, to recover the amount of an assessment alleged to be due under a contract of subscription in the same form as in that case, and under the decree of the circuit court of Cook county in the state of Illinois, therein stated.

The complaint did not state the law of Illinois, or set forth the decree of assessment in full; but alleged, among other things, that by that decree an assessment of 35 per cent a share was laid upon all stockholders who had not paid in full; and that some stockholders, including the defendant, had paid $10.40 on each share, and many stockholders had never paid more than 50 cents or 2 per cent on a share.

A demurrer to the complaint, upon the ground, among others, that it did not state facts sufficient to constitute a cause of action, was filed by the defendant, and overruled by the court.

Upon appeal by the defendant from the order overruling the demurrer, the supreme court of the state, as the record shows, adjudged that the order be reversed and the cause "remanded to the said circuit court for such further proceedings therein as may be according to law;" and in its opinion after deciding that the assessment was unequal and unjust, added: "We do not intend to express any definite opinion as to the real effect of the decree of the Illinois court, or as to how far it concludes the rights of shareholders who were not parties to that proceeding. Those questions are not now necessarily before us, and may be postponed until they arise. We confine our decision to the objection that the complaint shows an unlawful and illegal call or assessment upon Mr. Burnham which should not be enforced." 79 Wis. 47, 52, 53.

The cause was accordingly remanded to the inferior court. The plaintiff refused to amend the complaint, and insisted *that it stated [341 a sufficient cause of action; and relied upon the decree of assessment as a judgment of a court of the state of Illinois, entitled, under the Constitution and laws of the United States, to full faith and credit in the state of Wisconsin. The inferior court sustained the demurrer, upon the ground "that the complaint does not state facts sufficient to constitute a cause of action, because it does not appear upon the face of the said complaint that a valid or legal assessment was made upon the stockholders, and that the said assessment appears by the said complaint to be unequal and unjust;" and entered final judgment for the defendant, with costs. The plaintiff thereupon sued out this writ of error.

Messrs. **Thomas J. Sutherland** and *Wm. P. Black* for plaintiff in error.

Messrs. **Reese H. Voorhees**, *Charles Quarles*, and *George Lines* for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This court has no jurisdiction, upon writ of error, to review a judgment of a state court, unless it was a final judgment, by the highest court of the state in which a decision in the suit could be had, and against a right set up under the Constitution or laws of the United States. U. S. Rev. Stat. § 709.

The order of the inferior court of Wisconsin, overruling the defendant's demurrer, with leave to answer over, was clearly not a final judgment, under the judiciary act of the United States, although it was reviewable on appeal in the supreme court of Wisconsin, under the statutes and practice of the state.

The judgment which was rendered by the supreme court of Wisconsin upon such an appeal cannot be reviewed by this court; because, although it was a judgment of the highest court of the state, and against the plaintiff in error, it was *not a final judgment, disposing of [342 the whole case, but only reversed the order of the inferior court overruling the demurrer, and remanded the case to that court for further proceedings.

The subsequent judgment of the inferior court, sustaining the demurrer and dismissing the action, cannot be reviewed by this court; because although that was a final judgment against the plaintiff in error, setting up a right under the Constitution and laws of the United States, it was not a final judgment in the highest court of the state in which a decision in the suit could be had.

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The case is singularly like *McComb* v. *Knox County Comrs.* 91 U.S. 1 [23: 185], in which an order of a court of common pleas, overruling a demurrer to an answer, was reversed by the supreme court of Ohio, and the case remanded for further proceedings according to law; the court of common pleas, in accordance with that decision, sustained the demurrer to the answer, and the defendant not moving to amend, but electing to stand by his answer, gave judgment against him; and a writ of error to review that judgment was dismissed by this court, *Chief Justice* Waite saying: "The court of common pleas is not the highest court of the state; but the judgment we are called upon to re-examine is the judgment of that court alone. The judgment of the supreme court is one of reversal only. As such, it was not a final judgment. *Parcels* v. *Johnson*, 87 U. S. 20 Wall. 653 [22: 410]; *Moore* v. *Robbins*, 85 U. S. 18 Wall. 588 [21: 758]; *St. Clair County* v. *Lovingston*, 85 U. S. 18 Wall. 628 [21: 813]. The common pleas was not directed to enter a judgment rendered by the supreme court and carry it into execution, but to proceed with the case according to law. The supreme court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the common pleas to permit the parties to make a new case by amendment. . . . The final judgment is therefore the judgment of the court of common pleas, and not of the supreme court. It may have been the necessary result of the decision by the supreme court of the questions presented for its determination; but it is none the less, **343**]*on that account, the act of the common pleas. As such it was, when rendered, open to review by the supreme court, and for that reason is not the final judgment of the highest court in the state in which a decision in the suit could be had. U. S. Rev. Stat. § 709. The writ is dismissed." See also *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 [27: 74]; *Rice* v. *Sanger*, 144 U. S. 197 [36: 403]; *Rutland R. Co.* v. *Central Vermont R. Co.* 159 U. S. 630, 638 [*ante*, 284, 288]; *Re Sanford Fork & Tool Co.* 160 U. S. 247 [*ante*, 414].

In the case at bar, it was argued in support of the jurisdiction of this court, that, if an appeal had been taken from the final judgment of the inferior court to the supreme court of Wisconsin, that court, according to its uniform course of decisions, would have affirmed the judgment upon the ground that its decision upon the first appeal was conclusive; that this court, according to the decision in *Northern P. R. Co.* v. *Ellis*, 144 U. S. 458 [36:504], would not take jurisdiction of a writ of error to review a judgment based upon that ground only; and consequently that a writ of error from this court to the inferior court was the only way in which the decision of that court, refusing full faith and credit to the judicial proceeding in Illinois, could be reviewed by this court.

If all this were so, there would be strong ground for sustaining the present writ of error. *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.* 138 U. S. 287, 290 [34: 967, 968]; *Luxton* v. *North River Bridge Co.* 147 U. S. 337, 342 [37:194, 196]. But the argument is based upon a misconception of the decisions supposed to support it.

It is true that the supreme court of Wisconsin, upon a second appeal from an inferior court, has always declined to reconsider any question of law decided upon the first appeal. *Downer* v. *Cross*, 2 Wis. 371, 381; *Noonan* v. *Orton*, 27 Wis. 300; *DuPont* v. *Davis*, 35 Wis. 631; *Lathrop* v. *Knapp*, 37 Wis. 307; *Oshkosh Fire Department* v. *Tuttle*, 50 Wis. 552. It does not, however, as appears by the two cases last cited, when that question is the only one presented by the second appeal, dismiss that appeal for want of jurisdiction; but it entertains jurisdiction, and affirms the judgment. In so doing, that court has done no more than this court has always done, or than is necessary to *enable an appellate court to perform[**344** its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal. *Washington Bridge Co.* v. *Stewart*, 44 U. S. 3 How. 413, 425 [11: 658 664]; *Roberts* v. *Cooper*, 61 U. S. 20 How. 467, 481 [15: 969, 974]; *Clark* v. *Keith*, 106 U. S. 464 [27: 302]; *Chaffin* v. *Taylor*, 116 U. S. 567 [29: 727]; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 259 [*ante*, 414, 417].

The case of *Northern P. R. Co.* v. *Ellis* was very peculiar in its circumstances, and was as follows: Ellis brought an action against the Northern Pacific Railroad Company, in an inferior court of the state of Wisconsin, to quiet title to land; and in his complaint set forth not only his own title, but also the title of the railroad company under a conveyance by way of donation from a county. The railroad company demurred to the complaint, the demurrer was overruled, and the company appealed to the supreme court of Wisconsin, which held the conveyance to be void for want of power in the county under the Constitution of the state, and therefore, without any Federal question being presented or considered, affirmed the order overruling the demurrer, and remanded the case to the inferior court for further proceedings. 77 Wis. 114. The railroad company then filed an answer, reasserting its title under the deed from the county; and afterwards applied for leave to file a supplemental answer, setting up a decree which, since the decision of the supreme court of the state, had been rendered by the circuit court of the United States in a suit commenced, after the former order of the inferior court, by the railroad company against Ellis and others, by which judgment the title of the railroad company in other lands held under the same conveyance was adjudged to be valid. The inferior court of the state denied leave to file the supplemental answer, and, upon a hearing, rendered final judgment against the railroad company. The company again appealed to the supreme court of the state, which affirmed the judgment, upon the ground that its own decision upon the demurrer as to the validity of the title of the railroad company was *res judicata*, and could not, *accord-[**345** ing to the settled law of the state, be reviewed by the inferior court, or even by the supreme

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court of the state, save upon motion for rehearing. 80 Wis. 459, 465. The only right under the laws of the United States, suggested or considered at any stage of the proceedings in the courts of the state, was the claim that the decree of the circuit court of the United States, rendered after the decision of the supreme court of the state upon the first appeal, estopped Ellis to deny the validity of the conveyance from the county to the railroad company. The only decision made by the supreme court of the state upon that claim was that the invalidity of that conveyance had been finally adjudged, for the purposes of the suit, by its former decision, and therefore the decree of the circuit court of the United States should not be permitted to be pleaded by supplemental answer, in the nature of a plea *puis darrein continuance*. This court, in dismissing the writ of error to the supreme court of the state, dealt with no other question (144 U. S. 458 [36:504]), and never considered the right of the railroad company, merely by virtue of its charter from the United States, to take land by such a conveyance, until that subject was brought into judgment upon the subsequent appeal from the decree of the circuit court of the United States. *Roberts* v. *Northern P. R. Co.* 158 U. S. 1, 25, 27 [39:873, 882].

There is nothing in the decisions above cited, or in any other decision of this court, which countenances the position that in Wisconsin, or in any other state, when the highest court of the state upon a first appeal decides a Federal question against the appellant, and remands the case to the inferior court, not merely to carry the judgment into execution, but for further proceedings according to law, and upon further hearing the inferior court renders final judgment against him, he can have that judgment reviewed by this court by writ of error, without first appealing from it to the highest court of the state, or at least, where such is the practice, presenting a petition to that court for leave to appeal. *Fisher* v. *Carrico* ("*Fisher* v. *Perkins*") 122 U. S. 522 [30: 1192].

In the case at bar, as in *McComb* v. *Knox* **346**]*County* **Comrs.* 91 U.S. 1 [23:185], above cited, the final judgment of the inferior court of the state may have been the necessary result of the previous decision by the supreme court of the questions presented for its determination; but it was none the less, on that account, a judgment of the inferior court. As such, it was, when rendered, open to review by the supreme court upon a new appeal, and for that reason was not the final judgment of the highest court of the state in which a decision in the suit could be had.

Writ of error dismissed for want of jurisdiction.

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, *v.* SAMUEL PETERSON.

(See S. C. Reporter's ed. 346-358.)

Fellow servant—liability of master.

1. The boss of a small gang of ten or fifteen men engaged in making repairs upon a railroad over a distance of three sections, aiding the regular gang upon each section as occasion demands, is a fellow servant of a member of the gang, and not a superintendent of a separate department, or in control of such a distinct branch of the work as will render the master liable for his neglect to such coemployee, even if the boss does not actually handle a shovel or a pick.
2. Injury to a member of a railroad gang while riding on a hand car, caused by neglect of a fellow servant, does not make the master liable to him in the absence of any contract to carry him safely on such car, further than it can be inferred from the use of the car in going to and from the place of labor.

[No. 153.]

Argued and Submitted March 18, 1896. Decided April 13, 1896.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the United States Circuit Court for the District of Minnesota, Fourth Division, in favor of the plaintiff, Samuel Peterson, against the Northern Pacific Railroad Company, defendant, for damages sustained on account of its negligence. *Reversed, and case remanded for a new trial.*

See same case below, 51 Fed. Rep. 182, 4 U. S. App. 574.

Statement by *Mr. Justice* **Peckham:**

This action was commenced by the plaintiff below (defendant in error) in the United States circuit court for the district of Minnesota, fourth division, to recover damages against the defendant alleged to have been sustained on account of its negligence. The plaintiff was in the service of the corporation when the injury was sustained.

The defendant denied any negligence, and set up that whatever injury plaintiff below sustained was caused by his own neglect and carelessness.

NOTE.—*As to master's duty to furnish suitable and safe machinery and appliances, and liability to servant for their being insufficient or out of repair*, see note to Richmond & D. R. Co. v. Elliott, 37: 728.

As to responsibility of master to servant for carefulness and competency of coservants, see note to Wabash R. Co. v. McDaniels, 27: 605.

As to who are coemployees or coservants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant, see note to Hough v. Texas & P. R. Co. 25: 612.

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The case came to trial and evidence tending to show the following facts was given: The plaintiff was a day laborer, and he and several others in July, 1890, were at a place called Old Superior, a station on the line of the defendant's road. They had been working on the road at that point, but work becoming scarce they had applied to one Mongavin, who was a roadmaster of the defendant and at that time stationed at Old Superior, for employment. Mongavin told them he had no more work for them there, but he would send them up to 348]* Poplar, and they could go to work there if they wanted to; that they could go up there and go on an extra gang that Holverson was running. He furnished them with passes to Poplar, and the men went up and were placed at work by Holverson on his extra gang. The work which was to be done was repairing the road and roadbed, putting in new ties where necessary, and work of that general nature.

After the plaintiff and his companions were employed by Holverson on the extra gang it then amounted in numbers to thirteen men, with Holverson as foreman. The extra gang had duties precisely of the same kind as those pertaining to the regular section gang, which was employed on each section of the road to keep the same in repair. The road was divided into sections of about 6 miles in length, and the purpose of the extra gang was to help out the other gangs when the work on their sections became too much for the regular gang to do. Each section had a section foreman or boss under whom the section gang worked. The extra gang over which Holverson had charge, and into which plaintiff and his associates entered, instead of confining its assistance to one section, worked, where necessary, over a distance of three sections. Holverson had power to employ men and also to discharge them. The tools used by the men in repairing the road were furnished by the company. They were sent to Holverson, who gave them to the men as they required them. The men were stationed at Poplar, and were taken each morning on hand cars to the place where they were to work during the day, and when the work was finished were brought back. The members of the gang themselves worked the hand cars, Holverson generally occupying a place on the front hand car and taking care of the brakes, and applying them when thought necessary. He always went with the gang, superintended their work, even if taking no part in the actual manual labor, and came home with them at the end of the day's labor.

About a month after plaintiff had been working in this extra gang, and on the 19th of August, 1890, while returning on the hand car with the rest of the gang from the day's work, 349]* the accident out of which this suit arises occurred. Holverson occupied his accustomed place on the front hand car at the brakes. The plaintiff and several of his associates were on the same car. The second car was occupied by the remainder of the gang. While proceeding around a curve on the track Holverson thought he saw some object in front of him, and he applied his brakes, as was said, very suddenly, in consequence of which the car was abruptly stopped. He gave no warning of his intention, and the rear car was following so closely that it had no chance to stop before running into the car ahead, the result of which was that the first car was thrown from the track, throwing plaintiff off the car, and injuring his leg by having the rear car run over it.

It was alleged that the brakes on the rear car were defective, and that on that account the rear car could not be stopped as readily as it would otherwise have been. This issue was not insisted upon, and was not in fact submitted to the jury. There is also evidence that the hand cars were being run at the unusual rate of speed of from 12 to 15 miles an hour. Other evidence was given in regard to the nature of the wound and the alleged neglect of Holverson, and the injuries sustained by plaintiff below.

The court, among other things, charged the jury as follows:

"The plaintiff claims his injuries resulted from the negligent act of Holverson, who was the defendant's foreman of an 'extra gang of laborers,' of whom the plaintiff was one, working on the defendant's road.

"The defendant claims they resulted from the negligence of the plaintiff's fellow servants, and also claims that Holverson was a fellow servant of plaintiff. Whether he was so or not depends on the relation he sustained to the defendant company, and the court instructs you that if you find from the evidence that Holverson was a 'foreman on entra gang' for the defendant company, and that as such foreman he had the charge and superintendency of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about thirteen in number, to do this work for the company, and had the exclusive charge, and *direction, and management of said gang of hands in all 350] matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman.

"If you find Holverson was not a fellow servant of the plaintiff, but representing the company, then, as was well observed by counsel for defendant, the question under the evidence in the case for your determination is, Was the injury the result of the negligent act of Holverson, the defendant's agent, who was riding on and had charge of the front hand car, or was it the negligence of the hands who were on and operating the hind car? If the negligence of the men on the hind car occasioned the accident the defendant is not liable; but if the accident resulted from the negligent act of Holverson the defendant is liable.

"You have heard the evidence relating to the functions and duty of Holverson and the hands at work under him, and upon a full and fair

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consideration of all that evidence, you will determine whose negligent act occasioned this accident."

Counsel for the defendant below asked the court to charge the jury on the question of defective brakes, but after some conversation between counsel and court, the court stated:

"You do not want a charge further than the issues in the case. There is nothing about the brake in the case; it all reduces itself to this: If you find under my charge that Holverson was not a fellow servant of the plaintiff, then the question is, Through whose negligent act did this injury occur? Was it the act of Holverson, the foreman, who was on the front car, or was it the negligent act of plaintiff's fellow servants on the hind car? If it was the act of Holverson, then the plaintiff is entitled to the [351] agreed amount; if it was the *act of the men on the hind car, then plaintiff cannot recover, and your verdict must be for the defendant."

Exceptions were duly taken to the refusal to charge as requested by counsel for the defendant below and to the charge as above given.

The jury returned a verdict in favor of plaintiff. Upon writ of error the United States circuit court of appeals for the eighth circuit affirmed the judgment, and the defendant below sued out this writ of error.

Messrs. **William J. Curtis** and **C. W. Bunn,** for plaintiff in error:

Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured.

Grand Trunk R. Co. v. *Ives*, 144 U. S. 408 (36: 485).

Where the evidence shows absolutely no negligence of defendant or of any one representing it, and does show affirmatively that plaintiff's injuries were due to his own disregard of the most ordinary precautions, and, as a next cause, to the gross negligence of men who were beyond dispute his fellow servants, it is the duty of the court to take the case from the jury.

Metropolitan R. Co. v. *Jackson*, L. R. 3 App. Cas. 193.

Holverson was a fellow servant of plaintiff.

Baltimore & O. R. Co. v. *Baugh*, 149 U. S. 368 (37: 772); *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 (38: 1009).

Mr. **Henry J. Gjertsen,** for defendant in error:

One to whom his employer commits the entire charge of the business, or a branch of it, with full power to choose his own assistants, and to control or discharge them as freely and as fully as the principal himself could, is not a fellow servant with those who are employed under him, and the master is answerable to all the underservants for the negligence of such managing assistant, or *alter ego* of the master, in his personal conduct within the scope of his employment, as such manager, or in his orders.

Kansas P. R. Co. v. *Little*, 19 Kan. 267; *Dobbin* v. *Richmond & D. R. Co.* 81 N. C. 446, 31 Am. Rep. 512; *Brown* v. *Sennett*, 68 Cal. 225, 58 Am. Rep. 8; *Galveston, H. & S. A. R. Co.* v. *Drew*, 59 Tex. 11, 46 Am. Rep. 261; *Smith* v. *Sioux City & P. R. Co.* 15 Neb. 583; *Douglas* v. *Texas Mexican R. Co.* 63 Tex. 564; *Brickner* v. *New York C. R. Co.* 2 Lans. 506; *Corcoran* v. *Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Pantzar* v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368; *Hussey* v. *Coger*, 39 Hun, 639; *Mullan* v. *Philadelphia & S. Mail S. S. Co.* 78 Pa. 25; *Ryan* v. *Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34; *Mitchell* v. *Robinson*, 80 Ind. 281, 41 Am. Rep. 812; *Henry* v. *Brady*, 9 Daly, 142; *Fort* v. *Whipple*, 11 Hun, 586; *Schultz* v. *Chicago, M. & St. P. R. Co.* 48 Wis. 379; *Hoth* v. *Peters*, 55 Wis. 413; *Chicago & A. R. Co.* v. *May*, 108 Ill. 288; *Murphy* v. *Smith*, 19 C. B. N. S. 361; *Petterson* v. *Wallace*, 1 Macq. H. L. Cas. 748; *Eagan* v. *Tucker*, 18 Hun, 347; *Gormly* v. *Vulcan Iron Works*, 61 Mo. 492; *Russ* v. *Wabash W. R. Co.* 112 Mo. 45, 18 L. R. A. 823.

Mr. Justice **Peckham** delivered the opinion of the court:

The sole question for our determination is whether Holverson occupied the position of fellow servant with the plaintiff below. If he did, then this judgment is wrong and must be reversed.

By the verdict of the jury, under the charge of the court, we must take the fact to be that Holverson was foreman of the extra gang for the defendant company, and that he had charge of and superintended the gang in the putting in of the ties and assisting in keeping in repair the portion of the road included within the three sections; that he had power to hire (and discharge) the hands in his gang, then amounting to thirteen in number, and had exclusive charge of the direction and management of the gang in all matters connected with their employment; that the plaintiff below was one of the gang of hands so hired by Holverson and was subject to the authority of Holverson in all matters relating to his duties as laborer. Upon these facts the courts below have held that the plaintiff and Holverson were not fellow servants in such a sense as to preclude plaintiff recovering from the railroad company damages for the injuries he sustained through the negligence of *Holverson, acting in the course [352] of his employment as such foreman.

In the course of the review of the judgment by the United States circuit court of appeals, that court held that the distinction applicable to the determination of the question of a coemployee was not "whether the person has charge of an important department of the master's service, but whether his duties are exclusively those of supervision, direction, and control over a work undertaken by the master, and over subordinate employees engaged in such work, whose duty it is to obey, and whether he has been vested by the common master with such power of supervision and management." Continuing, the court said that "the other view that has been taken is that whether a person is a vice principal is to be determined solely by the magnitude or importance of the work that may have been committed to his charge, and that view is open to the objection that it furnishes no practical or certain test by which to determine in a given case whether an employee

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has been vested with such departmental control, or has been 'so lifted up in the grade and extent of his duties' as to constitute him the personal representative of the master. That this would frequently be a difficult and embarrassing question to decide, and that courts would differ widely in their views, if the doctrine of departmental control was adopted, is well illustrated by the case of *Borgman* v. *Omaha & St. L. R. Co.* 41 Fed. Rep. 667, 669. We are of the opinion, therefore, that the nature and character of the respective duties devolved upon and performed by persons in the same common employment should in each instance determine whether they are or are not fellow servants, and that such relation should not be deemed to exist between two employees where the function of one is to exercise supervision and control over some work undertaken by the master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." 4 U. S. App. 574, 578. The court thereupon affirmed the judgment.

It seems quite plain that Holverson was not [353] the chief or *superintendent of a separate and distinct department or branch of the business of the company, as such term is used in those cases where a liability is placed upon the company for the negligence of such an officer. We also think that the ground of liability laid down by the courts below is untenable.

The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow servants, and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employee, and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such.

In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some courts a further liability for the negligence of one of his servants in charge of a separate department or branch of business whereby another of his employees has been injured, even though the neglect was not of that character which the master owed in *his capacity as master to the [354] servant who was injured. In such case it has been held that the neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the coemployee, and hence, that the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances. It has been already said that Holverson sustained no such relation to the company in this case as would uphold a liability for his acts based upon the ground that he was a superintendent of a separate and distinct branch or department of the master's business. It is proper, therefore, to inquire what is meant to be included by the use of such a phrase.

A leading case on this subject in this court is that of *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 [28: 787]. In that case a railroad corporation was held responsible to a locomotive engineer in the employment of the company for damages received in a collision which was caused by the negligence of the conductor of the train drawn by the engine upon which plaintiff was engineer. This court held the action was maintainable on the ground that the conductor upon the occasion in question was an agent of the corporation, clothed with the control and management of a distinct department, in which his duty was entirely that of direction and superintendence; that he had the entire control and management of the train, and that he occupied a very different position from the brakemen, porters, and other subordinates employed on it; that he was in fact and should be treated as a personal representative of the corporation for whose negligence the corporation was responsible to subordinate servants. The engineer was permitted to recover on that theory. These facts give some indication of the meaning of the phrase.

In the above case the instruction given by the court at the trial, to which exception was taken, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow servants, engaged in the same common employment within the meaning of the rule of law of which I am speaking." That instruction thus broadly *given was not, however, [355] approved by this court in the *Ross Case*. Such ground of liability, mere superiority in position and the power to give orders to subordinates, was denied. What was approved in that case, and the foundation upon which the approval was given, are very clearly stated by *Mr. Justice* Brewer in the course of the opinion delivered in the case of *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368 [37: 772], at 380 [779], and the following pages. In the *Baugh Case* it is also made plain that the master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over and a superior position to that occupied by the servant who was injured by his negligence. The rule is that in order to form an exception to the gen-

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eral law of nonliability the person whose neglect caused the injury must be "one who was clothed with the control and management of a distinct department, *and not a mere separate piece of work in one of the branches of service in a department.*" This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employees under them, vice principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent. Thus *Mr. Justice* Brewer, in the *Baugh Case*, illustrates the meaning of the phrase "different branches or departments of service" by suggesting that "between the law department of a railway corporation and the operating department there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating 356]*department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master."

The subject is further elaborated in the case of *Howard* v. *Denver & R. G. R. Co.* 26 Fed. Rep. 837, in an opinion by *Mr. Justice* Brewer, then circuit judge of the eighth circuit. The other view is stated very distinctly in the cases of *Borgman* v. *Omaha & St. L. R. Co.* 41 Fed. Rep. 667, and *Woods* v. *Lindvall*, 4 U. S. App. 49, 48 Fed. Rep. 62. This last case is much stronger for the plaintiff than the one at bar. The foreman in this case bore no resemblance in the importance and scope of his authority to that possessed by Murdock in the *Woods Case*, *supra*. These cases which have been cited serve to illustrate what was in the minds of the courts when the various distinctions as to departments and separate branches of service were suggested. In the *Baugh Case*, the engineer and fireman of a locomotive engine, running alone on the railroad and without any train attached, were held to be fellow servants of the company so as to preclude the fireman from recovering from the company for injuries caused by the negligence of the engineer.

The meaning of the expression "departmental control" was again and very lately discussed in *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 [38: 1009]. where it was held, as stated in the headnote, that a common day laborer in the employ of a railroad company, who, while working for the company under the orders and direction of a section boss or foreman on a culvert on the line of the company's road, receives an injury through the neglect of a conductor and an engineer in moving a particular passenger train upon a company's road, is a fellow servant of such engineer and of such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted.

The subject is again treated in *Central R. Co.* v. *Keegan*, 160 U. S. 259 [*ante*, 418], decided at this term, where the men engaged in *the service of the railroad company were[357 employed in uncoupling from the rear of trains cars which were to be sent elsewhere and in attaching other cars in their place, and they were held to be fellow servants, although the force, consisting of five men, was under the orders of a "boss" who directed the men which cars to uncouple and what cars to couple, and the neglect was alleged to have been the neglect of the "boss" by which the injury resulted to one of the men. This court held that they were fellow servants, and the mere fact that one was under the orders of the other constituted no distinction, and that the general rule of nonliability applied.

These last cases exclude by their facts and reasoning the case of a section foreman from the position of a superintendent of a separate and distinct department. They also prove that mere superiority of position is no ground for liability.

This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master as would be necessary to render the master liable to a coemployee for his neglect. He was in fact, as well as in law, a fellow workman; he went with the gang to the place of work in the morning, stayed with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow workmen.

If in approaching the line of separation between a fellow workman and a superintendent of a particular and separate department there may be embarrassment in determining the question, this case presents no such difficulty. It is clearly *one of fellow servants. The[358 neglect for which the plaintiff has recovered in this case was the neglect of Holverson in not taking proper care at the time when he applied the brake to the front car. It was not a neglect of that character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes as master to his servant when he enters his employment.

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It is urged, however, in this case, that this judgment may be sustained upon another and distinct proposition. The counsel for the defendant in error says that it is alleged in the amended complaint, "that as a part of the contract of hiring, the defendant engaged to carry the plaintiff to and from his work upon the defendant's road as occasion should require, in a safe and proper manner." He then argues that the defendant having as a part of its contract of hiring assumed the obligation to carry safely, it was bound to exercise the same degree of care in its discharge as in any positive duty recognized or imposed by law, and that, therefore, the negligence of Holverson in the performance of his duty, whether it be from the relation of master and servant or one specially assumed under the contract of hiring, was a neglect of the master.

Although this allegation is contained in the complaint, it is denied in the answer, and there is no proof of any contract on the part of the defendant below to carry the plaintiff safely, further than is to be inferred from the fact that the company furnished hand cars which were worked by the gang and upon which they rode to and from the place of labor. If, under these circumstances, the servant be injured through the neglect of a fellow servant, such as appears in this case, the master is not liable.

The charge of the court to the jury in the matter complained of was erroneous, and *the judgment must therefore be reversed* and the case remanded, with directions to grant a new trial.

The *Chief Justice* and *Mr. Justice* **Field** and *Mr. Justice* **Harlan** dissent.

359] NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, *v.* HUGH CHARLESS.

(See S. C. Reporter's ed. 359-365.)

Negligence of coservants—of a section boss—liability of master.

1. The negligence of employees on a train in failing to give a signal of its approach, whereby a track laborer on a hand car is injured, is the negligence of his coservants, for which the master is not liable.
2. The negligence of a section boss or foreman in running a hand car at too high a rate of speed while carrying his gang of men is not the neglect of any duty which the master is bound to perform, but is that of a fellow servant of the members of his gang.
3. For using in a negligent manner a defective appliance furnished by the master, the master may be liable if a coemployee is thereby and in consequence thereof injured; but the master is not responsible for the negligent use by an employee of a proper appliance whereby a coemployee is injured.

[No. 184.]

Argued March 26, 27, 1896. Decided April 13, 1896.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Eastern Division of the District of Washington in favor of the plaintiff, Hugh Charless, against the Northern Pacific Railroad Company, defendant, for damages on account of the negligence of the agents and servants of the defendant. *Reversed* and cause remanded for new trial.

See same case below, 51 Fed. Rep. 562.

The facts are stated in the opinion.

Mr. **C. W. Bunn**, for plaintiff in error:

The court was in clear error in submitting to the jury negligence of the defendant based on negligence of the engineer of the freight train. The engineer of the freight train and the section foreman were fellow servants.

Randall v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Quebec S. S. Co.* v. *Merchant*, 133 U. S. 375 (33: 656); *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 (38: 1009).

Messrs. **Reese H. Voorhees**, *A. K. McBroom*, and *L. H. Prather*, for defendant in error:

The facts, if true, make the defendant liable, and therefore constitute a good cause of action.

Northern P. R. Co. v. *Herbert*, 116 U. S. 642 (29: 757); *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612).

It is entirely within the court's discretion as to whether a witness shall or shall not give his testimony as a continuous narrative.

Thomp. Trials, § 354; 3 Chitty, Gen. Pr. 894.

Where the ground of objection to a question put to a witness is not given, the exception is unavailing and cannot be reconsidered.

Toplits v. *Hedden*, 146 U. S. 252 (36: 961).

The court had no power to direct a nonsuit without the plaintiff's consent. Plaintiff was entitled to his trial by jury.

D'Wolf v. *Rabaud*, 26 U. S. 1 Pet. 476 (7: 227); *Elmore* v. *Grymes*, 26 U. S. 1 Pet. 469 (7: 224); *Crane* v. *Morris*, 31 U. S. 6 Pet. 598 (8: 514); *Castle* v. *Bullard*, 64 U. S. 23 How. 172 (16: 424); *Silsby* v. *Foote*, 55 U. S. 14 How. 218 (14: 394).

Where defendant's counsel made no motion asking that the court direct the jury to return a verdict for defendant, and proceeded to take testimony in its own behalf, the court's refusal to direct a verdict for defendant cannot be assigned as error.

Accident Ins. Co. v. *Crandal*, 120 U. S. 527

NOTE.—*As to fellow servants and their negligence; who are fellow servants; vice principal; superior servant; liability of master,*—see note to Baltimore & O. R. Co. v. Baugh, 37: 773.

As to who are coemployees or coservants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant, see note to Hough v. Texas & P. R. Co. 25: 612.

As to negligence; responsibility of master for carefulness and competency of coservants,—see note to Wabash R. Co. v. McDaniels, 27: 605.

As to master's duty to furnish suitable and safe machinery and appliances; and liability to servant for their being insufficient or out of repair,—see note to Richmond & D. R. Co. v. Elliott, 37: 728.

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(30: 740); *Grand Trunk R. Co.* v. *Cummings*, 106 U. S. 700 (27: 266); *Robertson* v. *Perkins*, 129 U. S. 233 (32: 686).

The risk incidental to defective appliances and machinery was not within the plaintiff's contract of service.

Northern P. R. Co. v. *Herbert*, 116 U. S. 642 (29: 755); *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349 (37: 1107); *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554 (34: 235).

If different minds might honestly draw different conclusions from the evidence, the case should be left to the jury.

Texas & P. R. Co. v. *Cox*, 145 U. S. 593 (36: 829); *Gardner* v. *Michigan C. R. Co. supra*; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745).

In jumping from the hand car, under the circumstances, plaintiff was not guilty of contributory negligence. In a sudden emergency, called upon to act quickly, he was not held to the same degree of care as under ordinary circumstances.

Union P. R. Co. v. *McDonald*, 152 U. S. 262 (38: 436); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408 (36: 485).

The question of contributory negligence was properly left to the jury.

Kane v. *Northern C. R. Co.* 128 U. S. 91 (32: 339); *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745).

If the failure to give warning of the approaching train was due to the negligence of the conductor, he was a vice principal and the master is liable.

Chicago, M. & St. P. R. Co. v. *Ross*, 112 U. S. 377 (28: 787).

The engineer and the plaintiff were not engaged in the same common work.

Where one owns and uses a thing with the nature and operation of which people are not generally acquainted, and which, when not properly controlled, is dangerous to the public, and the control of which is exclusively in the owner of such thing, or one acting for him, the owner, having sole control, is held to the extremest care which reasonable human foresight, skill, and caution can produce, and which is necessary to protect human life from the dangerous thing he has set in operation.

Potter v. *Faulkner*, 1 Best & S. 895; *Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Dixon* v. *Bell*, 5 Maule & S. 198.

The corporation's duty to control its deadly agency must be performed, though the person lawfully on its premises pays nothing.

Philadelphia & R. R. Co. v. *Derby*, 55 U. S. 14 How. 485 (14: 509); *McKone* v. *Michigan C. R. Co.* 51 Mich. 601, 47 Am. Rep. 596; *Texas & P. R. Co.* v. *Best*, 66 Tex. 116; *Illinois C. R. Co.* v. *Hammer*, 72 Ill. 347; *Western & A. R. Co.* v. *Turner*, 72 Ga. 292, 53 Am. Rep. 842; *Larkin* v. *New York & N. R. Co.* 46 N. Y. S. R. 658; *Louisville, N. A. & C. R. Co.* v. *Phillips*, 112 Ind. 59.

The law will not permit the corporation, even for a consideration and by express contract, to relieve itself of its duty to control its dangerous agency.

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357 (21: 627); *Grand Trunk R. Co.* v. *Stevens*, 95 U. S. 655 (24: 535); *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 344 (12: 465); *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174 (23: 872); *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107 (18: 170); *United States Exp. Co.* v. *Kountze*, 75 U. S. 8 Wall. 342 (19: 457).

Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiff below was an ordinary day laborer employed under a section boss or foreman to keep a certain portion of the roadbed of the defendant in repair. The foreman had power to employ and discharge men, and to superintend their *work, and was himself [360 a workman. He employed the plaintiff, who, with the rest of the men employed in the gang, —some 4, 5, or 6,—was carried to and from his work daily on a hand car worked by the men themselves.

In August, 1886, on the 28th of the month, an accident occurred as the men were on their way to their work. They were using a hand car with what is alleged to have been a defective brake. The foreman had complained of it to the yardmaster a short time before, who had promised a better one. In the mean time and as a temporary makeshift, the foreman had provided the car with a brake which consisted of a bit of wood, 4×4, fastened on the side of the car with a bolt, and the long arm acted as a lever and pressed the shorter portion of the timber against the wheel. In that way the car had been run for a day or two before the morning of the accident. On that day, the plaintiff with the rest of the men in the gang and the foreman started on the hand car to go over a certain portion of the section to inspect the condition of the road. They were running the car very rapidly under the direction and supervision of the foreman and had arrived at a narrow cut in the road around a curve, when they were suddenly confronted with a freight train coming through the cut in the opposite direction. There had been no warning or signal of any kind given by any of the employees on the freight train of its approach, and plaintiff below knew nothing of the fact that any freight train was expected. Efforts were made to stop the hand car, and as the speed did not seem to be slackened in time, plaintiff became frightened and undertook to jump from the front end of the car, when he stumbled over some tools that were on the car and fell between the rails in front of it. As the hand car approached him he put his foot up against it in order to prevent its running over him, but the impetus of the car was too great, and it ran over and doubled him up and wrenched his spine, causing him great internal injuries. The other hands jumped off the car, removed it from the track and took the plaintiff out of danger before the freight train passed by.

The injuries of the plaintiff were of a very serious nature, and *his legs became par [361 alyzed, and he was rendered a cripple for life. He commenced this action against the defendant below to recover damages on account of the negligence of the agents and servants of the defendant. The negligence claimed consisted in:

1. The defective brake on the car, which it is alleged was an appliance for the prosecution

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of the work on the defendant's road and necessary to be used to enable the employees to perform their duties, and that as such appliance it was the duty of the defendant to see that it was reasonably safe and fit for the purpose intended.

2. The negligence of the foreman in charge of the gang, who directed the speed of the hand car and ran it at a hazardous rate of speed, when he knew that a train coming towards him was expected, while the other members of the gang were ignorant of that fact.

3. The negligence of the train hands on the approaching train in giving no signals of their approach around the curve and through the cut, although they were near a public crossing and some signals were necessary on that account.

Upon the trial evidence was given tending to prove the above facts, and, among other things, the judge charged the jury as follows:

"I think that the case, when stripped of all the side issues and the incidental questions surrounding it, resolves itself into just this question for this jury to determine: Whether the injury to the plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred; or whether the injury was a mere accident, which was the result of one of the ordinary hazards of the employment in which he was engaged; whether it was an ordinary risk of his employment, or whether an extraordinary danger caused by the negligence on the part of the defendant; whether that negligence was a negligence of the foreman in running the hand car too fast up to a point which he knew to be dangerous, and which he did not warn the other men working on the hand car of, so that 362] *it was impossible for them, without extreme hazard to their lives, to avoid a collision; or whether the negligence was on the part of the officers in charge of the freight train in approaching a curve in the cut, which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell.

"If, in any of these respects, there was actual neglect on the part of defendant which placed the plaintiff in a situation of extraordinary danger, something clear beyond the ordinary risks of his employment, and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable to damages."

The defendant below excepted to each of the above propositions as laid down by the learned judge in his charge, and the jury rendered a verdict in favor of the plaintiff, which was affirmed by the circuit court of appeals for the ninth circuit, and the defendant below sued out a writ of error from this court to review the judgment.

Many of the facts surrounding the happening of this accident are similar in their nature to those existing in the case of the *Northern P. R. Co.* v. *Peterson*, 162 U. S. 346 [*ante*, 994]. The employment of the plaintiff below, the nature of the work, and the powers of the section boss under whom he worked are substantially the same as those existing in the other case. We may refer to the general principles of the law of master and servant applicable to these facts which are set forth in the opinion of this court in that case and which we think govern the case at bar upon those facts.

In regard to the particular allegations of negligence above set forth, it is not necessary, in the view we take of this case, to express any opinion whether the alleged defect in the brake on the hand car rendered it a defective appliance within the meaning of the law rendering the master liable for a failure to provide a reasonably safe and proper appliance for the work to be done by his employees.

There were two other propositions submitted to the jury by the learned judge, each of which was, as we think, of a material nature and also clearly erroneous.

First. We think it was error to submit[363 to the jury the question of the negligence of the employees on the extra freight train in failing to give the signals of its approach. This failure, assuming that it constituted negligence, was nothing more than the negligence of coservants of the plaintiff below in performing the duty devolving upon them. The principle which covers the facts of this case was laid down in *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 [27:1003], and that case has never been overruled or questioned. *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 [28:787], is a different case, and was decided upon its own peculiar facts. See *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 380 [37:772, 779]. Among the latest expressions of opinion of this court in regard to views similar to those stated in the case of *Chicago, M. & St. P. R. Co.* v. *Ross*, *supra*, is the case of *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 [38:1009]. It seems to us that the *Randall* and the *Hambly Cases* are conclusive, and necessitate a reversal of this judgment. In the *Hambly Case* it was held that a common day laborer in the employ of a railroad company, who, while working for the company under the orders and direction of a section boss or foreman on a culvert on the line of the company's road, received an injury through the negligence of a conductor and of an engineer in moving a particular passenger train upon the company's road, was a fellow servant with such engineer and with such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted. We are unable to distinguish any difference in principle arising from the facts in these two cases.

The question of the negligence of the hands upon the extra freight train should not have been submitted to the jury as constituting any right to a recovery against the corporation on the ground of such negligence.

Second. We also regard it as erroneous to have submitted to the jury the general question whether Kirk, the section foreman, was negligent in running his hand car at too high a speed just prior to the accident. Kirk and the plaintiff below were coemployees of the company, and the neglect of Kirk, if it existed, in driving his hand car too fast (assuming it was *in proper condition) was not such[364 negligence as would render the company responsible to Kirk's coemployee. It was not

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the neglect of any duty which the company as master was bound itself to perform. This we have held in the *Peterson Case*, and for the reasons there stated. While it may be assumed that the master would have been liable if a defective brake had been the cause of the accident, yet the defendant below is, under the charge of the judge, permitted to be made liable by proof of the speed of the hand car, if the jury found that Kirk, the foreman, knew it to be dangerous and that the accident happened because of that speed, even though it would have happened if the brake had been the regular kind and in good order. The language of the court does not separate the question of general negligence in running a hand car which was in good order too fast from that which might be negligence with reference to running a hand car with a defective brake at the same rate of speed. For using in a negligent manner a defective appliance furnished by the master, the latter might be liable if a coemployee were thereby and in consequence thereof injured. As the master furnished the defective appliance, it would be no answer to say that it was negligently used. But, on the other hand, the master would not be responsible for the negligent use of a proper appliance. From the language used by the court the company might have been held liable if Kirk were running the hand car at a dangerous rate of speed, although the jury found the brake actually used to have been sufficient. A dangerous rate of speed was therefore held to be negligence, for which the company would be liable. But it is said that the fact of a dangerous rate of speed is necessarily so mingled and intimately connected with the fact of a defective brake that it is impossible to regard the speed separate and distinct from the defect, so that when the question of excessive speed was submitted to the jury as a possible foundation for the finding of negligence, it was in substance and effect a submission to the jury of the question of excessive speed in the particular case of a hand car supplied with a defective brake. We think this is not an answer to the objection, and that 365] there was error in submitting the *question of excessive speed to the jury in the manner in which it was done in this case. From the evidence set forth in the record it is clear that the jury might have taken the view that the temporary brake was, while it lasted, as adequate for the purpose as any other, but that the hand car, assuming it was in good order, was negligently run at a dangerous rate of speed so that it could not have been stopped in time, even if it had been supplied with a regular brake. In that event, under the judge's charge, the jury might have held the company responsible for the mere negligence of the foreman Kirk in running a hand car adequately supplied at a dangerous rate of speed. That neglect, we hold, the company was not responsible for.

Upon the other question of the negligence of the employees on the freight train, the error in the charge is not rendered harmless by any explanation given by the learned judge. The difficulty remains uncured. The jury might have found from the evidence that this hand car while going at the rate of speed stated could have been stopped with the extemporized brake, in time to prevent any danger of a collision, in case the proper signals had been given by the hands on the freight train, but that the accident resulted from their failure to give those signals, and that such failure was negligence on their part. The verdict may have been based upon such negligence. We hold the company was not liable for the negligence of the hands on the freight train in failing to give proper signals.

These two important and material errors on the part of the learned judge who tried the cause, in his charge to the jury, having never been remedied or in any manner cured, we are compelled to sustain the exceptions taken to such charge.

The judgment entered upon the verdict of the jury must be reversed, and the cause remanded with instructions to grant a new trial.

The *Chief Justice* and *Mr. Justice* **Field** and *Mr. Justice* **Harlan** dissent.

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Errr.*, [366
v.
GEORGE S. LEWIS ET AL.

(See S. C. Reporter's ed. 366-383).

Wood cut on government land—action for destroying same by fire.

1. The presumption is that the cutting of wood on unsurveyed government land is illegal; and affirmative evidence showing that it was cut for the purposes and under the circumstances which make the cutting lawful under the acts of Congress is necessary on the part of a person claiming a right to recover from a railroad company for negligently setting fire to such wood.
2. Persons who have cut wood on unsurveyed government land, and drawn it and piled it on another part of such land near a railroad, do not have such possession of the wood as constitutes prima facie evidence of title sufficient to enable them to maintain an action against a wrongdoer for the negligent destruction of the property by fire.

[No. 166.]

Argued March 24, 1896. Decided April 13, 1896.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Ninth Circuit for the District of Montana in favor of the plaintiffs, George S. Lewis *et al.*, against the Northern Pacific Railroad Company, defendant, for damages for the destruction of a large quantity of wood by fire communicated from the engines of the company. *Judgment of the Circuit Court of Appeals and of the Circuit Court*

NOTE.—*As to liability of railroad company for fires set by it along its line; what admissible to prove negligence by company.*—see note to Grand Trunk R. Co. v. Richardson, 23: 357.

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reversed, and cause remanded to the latter court with instructions for a new trial.

See same case below, 7 U. S. App. 254.

Statement by *Mr. Justice* **Peckham:**

This action was brought by the defendants in error against the railroad company to recover damages for the destruction of some 10,000 cords of wood by fire communicated to the wood by sparks from the engines of the company.

It was alleged in the amended complaint that the railroad company neglected and failed, for a long time prior to the happening of the fire, and while using and operating their railroad, to keep each side of the railroad track free from dead grass, weeds, brush, and other dangerous and combustible material, as by law they were required to do, and that the company used locomotives which threw from their smokestacks large amounts of live cinders and sparks, and that the company carelessly and negligently operated and used its road, and by reason thereof, and on the 5th day of August, 1890, in Jefferson county, Montana, set fire to the grass, weeds, and other combustible and dangerous material, which the defendant had negligently and carelessly allowed to remain by the side of the track, and the fire spread rapidly and consumed and destroyed the cord wood belonging to the plaintiffs, as partners, then being in Jefferson county, Montana, and along and near the railroad track, of the amount of 9,400 cords, and of the value of $25,350.

The defendant by its answer denied all negligence, and denied "that on or about the date **367**] aforesaid, or on any other *day or date, the defendant set any fire which consumed or destroyed any cord wood belonging to the plaintiffs or any or either of them." The defendant also put in issue the value of the cord wood, and alleged that whatever was lost was lost through the contributory negligence of the plaintiffs.

The case came on for trial at the circuit court of the United States for the ninth circuit for the district of Montana, held in December, 1891, and January, 1892, and resulted in a verdict for the plaintiffs for the sum of $21,487.83. The company sued out a writ of error from the United States circuit court of appeals for the ninth circuit, and that court affirmed the judgment. 7 U. S. App. 254. The company then sued out a writ of error from this court.

Upon the trial of the action the plaintiffs to maintain the issues on their part introduced evidence tending to show that in the month of April, in the year 1889, they entered upon a portion of the unsurveyed public domain of the United States, lying on the easterly slope of the Rocky mountains, in the county of Jefferson, state of Montana, and there chopped and caused to be chopped about 10,000 cords of wood from the timber then standing and growing upon such public lands; that the wood was cut over an area of country of about 3 miles, north and south, and about 2 by 2½ miles, east and west; that the wood so cut was white pine, and much of it was made of trees of less diameter than 8 inches. The plaintiffs also gave evidence that they were citizens of the United States, and that the plaintiff, George S. Lewis, at the date of the cutting of said wood, was a resident of Butte, Montana, and that the other plaintiffs resided at White Sulphur Springs in the state of Montana. It was further shown that after the wood was cut it was drawn to a point near the railroad and there piled. That the place where the wood was so piled was on the unsurveyed public lands of the United States and about 200 yards south of the railroad operated by the defendant.

Plaintiffs also gave evidence tending to show that they had purchased from various parties during the summer of 1890 about 5,000 cords of white pine cord wood, which had *also[**368** been cut on the public unsurveyed lands of the United States, some of it on the tract of country from which plaintiffs had cut, and the remainder was cut on the north side of the railroad track above mentioned, and over a strip or area of country about 2 miles in length. Further evidence was given on the part of plaintiffs tending to show negligence on the part of the defendant either in the construction or in the management of its engines, and tending to show that the fire which destroyed the wood in question was communicated to it as alleged in the amended complaint.

Evidence was given on the part of the defendant tending to show that it was not guilty of any negligence in the premises, and that it was not liable for the results of any fire which may have destroyed the wood in question.

At the conclusion of all the evidence, the defendant moved the court to instruct the jury to return a verdict for it upon the grounds:

"1. That the title or ownership of the wood is directly in issue, and the testimony does not show that the plaintiffs had either a general or special property in the said cord wood or any thereof.

"2. The testimony shows that at the time said cord wood was destroyed the same was the property of the United States, and that in and about the cutting and removal thereof from the public unsurveyed lands of the United States the said plaintiffs were trespassers and wrongdoers.

"3. The testimony does not show that the lands whereon the cord wood was cut were distinctly mineral in character, or were more valuable for the mineral therein contained than for agricultural purposes or for the timber growing thereon.

"4. The testimony does not show that such cord wood was cut under the license granted by the act of Congress of June 3, 1878, or in compliance with the rules and regulations established thereunder by the Secretary of the Interior, but, on the contrary, the evidence clearly shows that the said cord wood, and the whole thereof, was cut in utter disregard of said act of Congress and the said rules and regulations of the Secretary of the Interior.

*"5. Because the testimony shows that[**369** said cord wood was the property of the United States, and that plaintiffs have neither right nor title thereto nor the possession thereof."

Other grounds were stated not material to be now considered.

The court denied the motion and refused to

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so instruct the jury, and the defendant duly excepted.

The defendant then, among other requests, asked the court to charge the jury that "it being shown conclusively by the testimony in this case that plaintiffs cut said cord wood on lands belonging to the United States; that such cord wood was so cut without license or authority of the United States, and was not removed from such lands at the date it was consumed,—the plaintiffs did not have either the actual or constructive possession of such wood at the date of its destruction, and are therefore not entitled to recover." This request was refused, and defendant duly excepted.

The court was further asked to charge that "if you should find from the testimony that plaintiffs purchased some of this wood from other parties who had cut it from trees growing in that vicinity, this will make no difference so far as their right to, or ownership of, such wood is concerned. The region of country where this cutting was done being public unsurveyed lands of the United States, the plaintiffs were bound at their peril to take notice of the fact that the timber growing thereon was the property of the United States, and could only lawfully be severed therefrom under the provisions of the act of Congress of June 3, 1878, and in compliance with the rules and regulations established thereunder. In order to prove their title to so much of the wood as was purchased, it is not enough to show that they bought it of a certain named person, but plaintiffs must go further and show that the person had acquired title to it by compliance with the act of Congress and rules and regulations prescribed by the Secretary of the Interior. If the person cutting such wood was himself a trespasser, he acquired no title to the wood cut, and could convey none to plaintiffs. The rightful owner of such wood could follow it and reclaim it, no matter where, or in whose possession it might be found, so long as he could identify it."

370]*This request the court refused, and the defendant duly excepted to such refusal.

Among many other assignments of error made by the defendant is the following: "The court also erred in refusing to give the instruction requested by the defendant in the following words, to wit: 'It being shown conclusively by the testimony in this case that plaintiffs cut said cord wood on lands belonging to the United States, that such cord wood was so cut without license or authority of the United States, and was not removed from such lands at the date when it was consumed, the plaintiffs did not have either the actual or constructive possession of such wood at the date of its destruction, and are therefore not entitled to recover.'"

Mr. **William J. Curtis,** for plaintiff in error:

Defendants in error, unless they had some special or general property in the wood destroyed, could not recover.

St. Louis, I. M. & S. R. Co. v. *Hecht*, 38 Ark. 357; *Ohio & M. R. Co.* v. *Jones*, 27 Ill. 41; *Prescott & A. R. Co.* v. *Rees* (Ariz.) 28 Pac. 1134; *Murphy* v. *Sioux City & P. R. Co.* 55 Iowa, 473, 39 Am. Rep. 175.

Defendants in error had no property, general or special, in the wood destroyed.

Deffeback v. *Hawke*, 115 U. S. 392 (29: 423); *Davis* v. *Wiebbold*, 139 U. S. 507 (35: 238); *Caha* v. *United States*, 152 U. S. 211 (38: 415); *Bolles Woodenware Co.* v. *United States*, 106 U. S. 432 (27: 230).

The possession of defendants in error being shown, upon their own case, to have resulted solely from their own theft of the property, it cannot avail them.

United States v. *Stone*, 49 Fed. Rep. 848; *The Arrogante Barcelones*, 20 U. S. 7 Wheat. 496 (5: 507); *Hall* v. *Coppell*, 74 U. S. 7 Wall. 542 (19: 244); *Desmare* v. *United States*, 93 U. S. 605 (23: 959); *Burbank* v. *Conrad*, 96 U. S. 291 (24: 781); *Meguire* v. *Corwine*, 101 U. S. 108 (25: 899); *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261 (26: 539); *McGrath* v. *Merwin*, 112 Mass. 467, 17 Am. Rep. 119.

The fire having been communicated to the wood in question through the burning of tops and branches left by defendants in error in the "draw" leading to the piles, in violation of law, they cannot recover.

Simpson v. *Bloss*, 7 Taunt. 246.

Defendants in error were guilty of contributory negligence.

Illinois C. R. Co. v. *McClelland*, 42 Ill. 355.

Messrs. **Thomas C. Bach** and *William Wallace, Jr.*, for defendants in error:

The action is one of trespass, or trespass on the case. It was brought against a wrongdoer for its negligent destruction of the cord wood. Plaintiffs were in possession of the property when it was so destroyed, and the defendant did not seek to connect itself with the title. Under such a state of facts, the plaintiffs, by proof of their possession, also proved their title against the wrongdoing defendant.

Graham v. *Peat*, 1 East, 244; *Lambert* v. *Stroother*, Willes, 221; *Jeffries* v. *Great Western R. Co.* 34 Eng. L. & Eq. 122; *Kissam* v. *Roberts*, 6 Bosw. 163; *Hoyt* v. *Gelston*, 13 Johns. 151; *Cook* v. *Howard*, 13 Johns. 276, 284; *Aikin* v. *Buck*, 1 Wend. 466; *Demick* v. *Chapman*, 11 Johns. 132; *Squire* v. *Hollenbeck*, 9 Pick. 551, 20 Am. Dec. 506; *Hanmer* v. *Wilsey*, 17 Wend. 91; *Parker* v. *Hotchkiss*, 25 Conn. 321; *Todd* v. *Jackson*, 26 N. J. L. 525; *Ashmore* v. *Hardy*, 7 Car. & P. 501; *Whittington* v. *Boxall*, 5 Q. B. 139; *Cary* v. *Holt*, 2 Strange, 1238; *Wustland* v. *Potterfield*, 9 W. Va. 438; *Craig* v. *Gilbreth*, 47 Me. 417; *Gilson* v. *Wood*, 20 Ill. 37; *Gardiner* v. *Thibodeau*, 14 La. Ann. 742; *Boston* v. *Neat*, 12 Mo. 125; *Crawford* v. *Bynum*, 7 Yerg. 381; *Fuller* v. *Bean*, 30 N. H. 181; *Golden Gate Mill. & Min. Co.* v. *Hendy Mach. Works*, 82 Cal. 184; *Criner* v. *Pike*, 2 Head, 398; *Tarry* v. *Brown*, 34 Ala. 159; *Kemp* v. *Seeley*, 47 Wis. 688; 2 Greenl. Ev. § 618.

The rule is the same in trover, a mere wrongdoer is not permitted to question the title of a person in the actual possession and custody of the goods whose possession he has wrongfully invaded.

Greenl. Ev. § 639; *Ward* v. *Carson River Wood Co.* 13 Nev. 44; *Jeffries* v. *Great Western R. Co.* 34 Eng. L. & Eq. 122; *Bartlett* v. *Hoyt*, 29 N. H. 319; *Burke* v. *Savage*, 13 Allen, 408; *Shaw* v. *Kaler*, 106 Mass. 448; *First Parish in*

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Shrewsbury v. *Smith*, 14 Pick. 297, 302; *Sutton* v. *Buck*, 2 Taunt. 302; *Duncan* v. *Spear*, 11 Wend. 54, 57; *Wincher* v. *Shrewsbury*, 3 Ill. 283, 35 Am. Dec. 108; *Knapp* v. *Winchester*, 11 Vt. 354; *Harker* v. *Dement*, 9 Gill, 12.

Were right of recovery denied the possessor for injury to his possession, the law of "might" alone would be applicable to personal property after it had tortiously passed out of the hands of the true owner.

First Parish in Shrewsbury v. *Smith*, 14 Pick. 302.

A mere stranger cannot question the right of one in possession or put him on the proof or disclosure of his title.

Gulf, C. & S. F. R. Co. v. *Johnson*, 10 U. S. App. 627, 54 Fed. Rep. 474.

Where plaintiff can prove his case without proving his wrong, he can recover, because the defendant cannot avail himself of a wrong to justify his own wrongdoing.

Welch v. *Wesson*, 6 Gray, 505.

No forfeiture having been declared by the act of Congress or by the department, the court will not declare one in favor of this wrongdoing defendant.

Philadelphia, W. & B. R. Co. v. *Philadelphia & H. de G. Steam Towboat Co.* 64 U. S. 23 How. 209 (16: 433); *Powhatan S. B. Co.* v. *Appomattox R. Co.* 65 U. S. 24 How. 247 (16: 682); *Pratt* v. *Short*, 79 N. Y. 437, 35 Am. Rep. 531; *Howell* v. *Stewart*, 54 Mo. 400; *Watrous* v. *Blair*, 32 Iowa, 58.

The mere fact that we left the tree tops and branches in the draw does not prove either that we were negligent in leaving them there or that our act contributed to the injury.

The mere fact that the fire followed down the draw does not prove either that we were negligent, or that the fire took that course by reason of our act—much less does it prove that the tops or branches took fire first and communicated the fire to the wood piles.

Norris v. *Litchfield*, 35 N. H. 277, 69 Am. Dec. 546; *Platz* v. *Cohoes*, 89 N. Y. 220, 42 Am. Rep. 286; *Sutton* v. *Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Hall* v. *Ripley*, 119 Mass. 135; *Steele* v. *Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191; *Louisville, N. A. & C. R. Co.* v. *Krinning*, 87 Ind. 351; *Richmond & D. R. Co.* v. *Medley*, 75 Va. 499, 40 Am. Rep. 734; *Philadelphia & R. R. Co.* v. *Schultz*, 98 Pa. 341; *Philadelphia & R. R. Co.* v. *Hendrickson*, 80 Pa. 188, 21 Am. Rep. 97; *Lindsay* v. *Winona & St. P. R. Co.* 29 Minn. 412, 43 Am. Rep. 228; *Kalbfleisch* v. *Long Island R. Co.* 102 N. Y. 521, 55 Am. Rep. 832.

Mr. Justice **Peckham** delivered the opinion of the court:

The cases cited by the defendants in error show the doctrine to be quite clearly established that an action of trespass *de bonis asportatis* does not technically involve the question of title. It relates to the possession only of personal property, and it is brought to recover for the injury to that possession. In such action it is held that an allegation of the ownership of the property is not material and that it need not be made, or if made that it need not be proved. Proof of possession simply is sufficient upon the theory that possession is prima facie evidence of some kind of rightful ownership or title. Therefore it is held that proof of title to property in a stranger with whom the defendant does not connect himself in any way is no defense to the action as the injury is to the possession. Trespass *de bonis asportatis* assumes a taking of the property by the defendant out of the possession of the plaintiff, and if the title be in a stranger with which the defendant does not connect himself, that fact is no answer to the cause of action. The possession of the plaintiff is enough under such circumstances against a wrongdoer. If the defendant cannot connect himself with the title in the third person, he is as to the plaintiff a wrongdoer, having no right to disturb the possession of the plaintiff. (*Aikin* v. *Buck*, 1 Wend. 466; *Hanmer* v. *Wilsey*, 17 Wend. 91; *Kissam* v. *Roberts*, 6 Bos. 163.) *Many[373 other cases are to the same effect. The rule is said to be different in trover and replevin on the theory that those actions are not actions grounded on the mere possession, but founded upon a right or title in the plaintiff upon the strength of which he must recover, and that hence title in a third party may be a defense, even though the defendant is not in any way connected with it.

But this action is not an action of trespass *de bonis asportatis*. There has been no asportation, and that fact must be proved in such an action. The cause of action here alleged and proved was a negligent act on the part of the defendant, committed on the defendant's own land, and causing in its results the burning up and destruction of the wood in question. The action is therefore more accurately and properly described as an action of trespass on the case instead of trespass *de bonis asportatis*.

The ground of the plaintiffs' right of action is the damage which has been caused them by the negligent act of the defendant, and unless they are able to prove some damage, consequent upon such negligent act, the plaintiffs are not entitled to recover. This is not an action where they would be entitled to nominal damages if no damages whatever were in fact sustained or proved. They must prove the nature and extent of the damage, and if the property destroyed were not owned by them, and if they had no special property therein, and did not have possession thereof, it is entirely plain that no cause of action was proved. The plaintiffs claim that, so far as the defendant is concerned, they did prove property in the wood, and that such proof was made by showing that they were in possession thereof at the time of its destruction, and as simple possession is prima facie evidence of right and title sufficient to support this action, the plaintiffs made out their case. It may be assumed that possession alone is sufficient, even in an action of this nature, in the absence of any evidence explaining that possession or showing that plaintiffs had no title to the property. In this case the plaintiffs, in the course of making out their cause of action, showed the facts which proved that they had neither the title nor the possession.

*The bill of exceptions states that the [374 wood was cut upon the unsurveyed public lands of the United States. The lands were owned by the United States, and the trees growing thereon were its absolute property as much so

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as any other article of property possessed by the government. Entering upon those lands by the plaintiffs for the purpose of cutting trees was a plain act of trespass, illegal in its nature, and unjustified by any fact appearing in this case. The plaintiffs in cutting down trees committed an illegal act, and while the title to the standing timber was in the United States, the plaintiffs by severing the trees from the freehold acquired no right, title, or interest in them by reason of such severance.

In *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44-64 [22: 551-558], it was held that where title to land upon which the lumber was cut was in the state, severing the timber from the realty did not change the title. Its character was changed from realty to personalty, but its title was not affected. It continued as previously the property of the owner of the land and could be pursued wherever it was carried. All the remedies were open to the owner which the law afforded in other cases of the wrongful removal or conversion of personal property. See also *Turley* v. *Tucker*, 6 Mo. 583, 35 Am. Dec. 449. It is plain, therefore, that the plaintiffs obtained no right or title to the trees by cutting them on the lands owned by the United States under circumstances such as are set forth in this bill of exceptions.

It is urged, however, that under the act of June 3, 1878 (1 Supp. to U. S. Rev. Stat. 1874-1881, p. 327), where no evidence is given upon the subject, the presumption is that the plaintiffs had complied with the provisions of that act, and that the cutting was therefore legal, and the timber was their own property.

The 1st section of that act reads as follows:

"Sec. 1. *Be it enacted, etc.*, That all citizens of the United States and other persons, bona fide residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and 375] remove, *for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

The 3d section of that act reads as follows:

"Sec. 3. Any person or persons who shall violate the provisions of this act, or any rules or regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding $500, and to which may be added imprisonment for any term not exceeding six months."

There was no evidence tending to show that the lands where the wood was cut were mineral, or that in cutting, handling, or removing the wood the plaintiffs had complied or attempted to comply with the provisions of the above act or with the rules or regulations prescribed by the Secretary of the Interior.

The plaintiffs claim that in the absence of any evidence to the contrary, the presumption is that when they cut the timber they complied with and came under the conditions provided for in the above cited act, and that the burden rested upon the defendant to show that the conditions mentioned in the act had not been complied with by them. If the plaintiffs are right in this contention, then it must be presumed that the cutting of the timber was lawful and the plaintiffs thereby acquired title to it. If, however, they are in error in their claim, then it appears that the timber never belonged to them, and that fact would have a most material bearing upon the question whether they had, in fact or in law, any possession of the timber at the time of its destruction.

*The absolute ownership of these lands [376 being at the time in the United States, it had as owner the same right and dominion over them as any owner would have. No one had the right to enter upon the lands; no one had the right to cut a stick of timber thereon without its consent. Any one so going upon the lands and cutting timber would be guilty of the commission of an act of trespass. The government, however, chose to make some exceptions in favor of certain classes of people to whom was given the right to cut timber for certain purposes: (1) They were to be citizens of the United States; (2) bona fide residents of the state or territory mentioned in the act; (3) they were to be permitted to fell and remove any timber or trees growing or being on the public lands, provided they were mineral, and not subject to entry under existing laws of the United States; and they were authorized and permitted to fell and remove such timber only for building, agricultural, mining, or other domestic purposes. The cutting and removing were to be done under rules and regulations prescribed by the Secretary of the Interior. Outside of these exceptions, there was no right in any person to cut a particle of timber on these public lands of the government.

The right to cut is exceptional and quite narrow, and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal. *United States* v. *Cook*, 86 U. S. 19 Wall. 591 [22: 210].

In the case last cited it was held that the timber upon the lands occupied by the Indians could not be cut by them for purposes of sale alone, but that it could be cut for the purpose of improving the land and the better adapting it to convenient occupation, and that when the timber had been cut incidentally for the improvement of the land, and not for the purpose of cutting and selling it, there was no restriction on the sale of it. The Indians having only the right of occupancy in the lands, and, therefore, presumptively no right to cut timber for the purpose of selling, it was further held that if they cut *timber in the process [377 of improving the land, that fact must be shown;

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the presumption was against the authority to cut and sell the timber. Every purchaser from them, it was held, was charged with notice of this presumption, and that to maintain his title it was incumbent on the purchaser to show that the timber was rightfully severed from the land. So here. As the government was the sole and absolute owner of these lands and of the timber growing thereon, the presumption would be against the right of any third person to cut the timber, and if he claimed the right by virtue of any authority or license given him by the owner, that is, the government, he would be compelled to show it. There was no evidence given on this subject by either party, and hence the plaintiffs did not satisfy the burden of proof which rested upon them in this behalf.

Again, the consent to cut timber granted by the act of 1878 being upon the conditions and for the purposes therein specified and to the classes of persons therein described, whether the plaintiffs, who did this cutting, had complied with those conditions and had cut timber for the purposes mentioned, and were within the class of persons described in the statute, were facts which rested peculiarly within their own knowledge, the burden of showing which would naturally and rightfully be cast upon them. As the plaintiffs failed to show that they came within the conditions and exceptions specified in the act of 1878, the presumption that they cut the timber illegally became conclusive. Nor did the plaintiffs obtain any rights under § 8 of the laws of Congress approved March 3, 1891, entitled "An Act to Repeal Timber Culture Law and for Other Purposes." 26 Stat. at L. 1099. That section was amended by the act approved on the same day, March 3, 1891, 26 Stat. at L. 1093. Neither section grants any relief to one situated like the plaintiffs. The section in either act looks to a criminal prosecution or civil action by the United States for trespass upon public timber lands to recover for the timber and lumber cut thereon, and it is provided that it should be a defense if the defendant should show that the timber was so cut or removed by a 378]resident of the *state or territory for agricultural, mining, manufacturing, or domestic purposes, and had not been transported out of the same. If the plaintiffs had shown these facts they would have proved enough to sustain their case on this point. They showed nothing upon the subject. It is not a case of condonation. It is simply a question whether the plaintiffs have brought themselves within any of the exceptions provided for in the statute of 1878, and we hold that the burden was upon them to show the facts which constituted the exception if they existed.

We have, then, an act of pure trespass, committed by the plaintiffs in entering upon the lands of the government and cutting down trees belonging to the owner of such lands. We find that the title to the timber was in the government before it was cut, and that the title remained in the government subsequently to the cutting. The plaintiffs still being trespassers, still being utterly without title to the wood thus cut, changed its *situs* from one part of the land belonging to the government to another part of the land belonging to the same owner. The plaintiffs in going or being upon the land at all for the purpose of illegally cutting or removing timber are trespassers; they neither own it nor claim to own it, nor have they the slightest title to or interest in it, nor any ownership of or title to the timber which they have illegally cut. They have carried property which did not belong to them, which they acquired and took by means of this trespass, from one part of the owner's domain to another part thereof. Can they be said under such circumstances to be in possession of such property? Can they be in possession of property to which they have not the slightest title, while that property remains upon the land of the owner, from which land the trees were cut and upon which land the plaintiffs could not (for the purpose of illegally cutting or removing timber) enter or remain for one moment without the commission of a trespass? These facts being proved, is there any such possession as is prima facie evidence of title, right, or ownership in the plaintiffs such as will enable them to maintain an action against a wrongdoer for the negligent destruction of this *property? We think not. It is[379 not a case for the application of the principle that mere possession is sufficient in order to maintain an action against a wrongdoer. There is no possession in this case. The plaintiffs in the course of their evidence show that they have no title to the wood, and at the same time they show that they were not in possession of it. As the wood in question belonged to the United States at the time of its destruction, and at that time was piled on its own lands, we fail to see why the government could not now commence an action against the company to recover the value of the wood, and if negligence were proved succeed in its suit. If plaintiffs' action could be sustained, the judgment herein would be no bar to the maintenance of an action by the government, and the company would find itself subject to the payment of damages twice over. It seems to us quite clear that the plaintiffs have shown no such possession as would be necessary to sustain this action, even if the defendant were not permitted to show title in a third person without connecting itself with the stranger. It is unnecessary to say whether the plaintiffs would have proved a good cause of action by proof of possession merely, if the facts in regard to the illegal character of the cutting had also been proved.

A reference to a few cases in the state courts will not be out of place.

In the case of *Turley* v. *Tucker*, 6 Mo. 583, 35 Am. Dec. 449, it appeared that the plaintiffs were owners of a saw mill, and cut down trees on the public lands and marked them, in convenient lengths, for their purposes. While the logs remained where felled a portion of them was taken by Tucker to his mill, and the plaintiff sued the defendant in an action of trover, for the value of the logs thus taken. The defendants requested the court to charge that if the jury found that the plaintiff cut the timber taken by the defendant, without a bona fide view to its use, and did not use the same, the timber being and appertaining to the public domain and lying at the place where felled, then the plaintiff was a trespasser against the United States, and could not recover against the defendant for using a part of

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said timber. This was refused, and on the con-
380]trary *the court instructed the jury that "although the logs might have been cut by plaintiff, on the public ground for their own use, yet they acquired such property in the logs as would enable them to maintain an action of trover for the logs against a wrongdoer." The instruction actually given was held to be erroneous. It is true the action is described as one of trover, but the principle laid down in the opinion is quite pertinent here. The court says: "The authorities are very clear that mere possession is only prima facie evidence of property to maintain this action against a wrongdoer." The question was, whether the plaintiff by cutting timber on the land of the United States, acquired such possession. There was evidence which alone and unexplained tended to establish the fact of possession, but there were other facts connected with the possession which at the same time proved it to have arisen out of a tort, and that kind of possession was held to be insufficient, because the evidence, while tending to establish possession, at the same time and thereby, proved an absolute property in another. In other words, the tortious possession was held to be no possession in that case. In the case at bar the title to the property was at the time of its destruction in the government; the property was then on land owned by the government; the plaintiffs had no right or title to that land, and made no claim of title to or interest in it; and on these facts the plaintiffs cannot be held to have been in possession of the property.

In *Ohio & M. R. Co.* v. *Jones*, 27 Ill. 41, it was held that to authorize one to recover for an injury to property he must show that he is the absolute or qualified owner thereof. It was stated in that case that there was no evidence that the plaintiff was the owner of the property or that he had possession of it, and that although possession might be evidence of ownership, there must be some evidence of possession. As there was none, the court reversed the judgment for the plaintiff.

In *Murphy* v. *Sioux City & P. R. Co.* 55 Iowa, 473, 39 Am. Rep. 175, it was held that one who, without authority, cuts and stacks hay on unenclosed prairie owned by others, acquires
381] no property in such hay, and *having neither ownership nor possession, cannot maintain an action for its destruction. The plaintiff brought his action to recover for an alleged negligent setting fire to the prairie and permitting it to escape, thereby burning 168 tons of hay, of which the plaintiff alleged he was the owner. The answer denied that the plaintiff was the owner of the hay alleged to have been burned. The trial was by jury and resulted in a verdict for the plaintiff for the value of the hay. Respecting his ownership, the plaintiff testified that the hay was on unenclosed prairie. "The land upon which I cut this grass and stacked the hay was not mine. I had gone onto the land and cut the grass and stacked it. My claim to be owner of the hay is based on this. I cut it and put it up; that is all the claim I have. I had no license to cut or stack hay there." The defendant asked the court to instruct the jury that if it found "from the testimony that the plaintiff had cut and stacked the hay, for the burning of which he seeks to recover in this action, upon land which he did not own, and if you further find that the plaintiff had no license or permission to cut the grass upon said land, and stack the hay therefrom thereon, the title to said hay so cut and stacked was not in the plaintiff, and he cannot maintain an action to recover for the destruction thereof by fire which burned over the prairie upon which the same was stacked." This was refused. The court did instruct the jury that, "in the absence of some title or right of defendant in the land upon which the grass was stacked, and from which it was grown and cut, the ownership of the hay in plaintiff, as against the defendant, is not disproved by showing that the said land from which the grass was grown and cut, and upon which it was stacked, was not the property of plaintiff, nor can the ownership of plaintiff be disproved as against defendant by showing that the plaintiff had no license or permit from the owner of the land to cut the grass or stack the same upon the land where it was burned." The court held that upon authority as well as upon principle, as the plaintiff entered upon the land of another without license and cut grass therefrom and made hay, he acquired no property therein, and that, "as he did not own the *land upon which the hay was stacked, [382
he had no constructive possession of it; having neither title nor possession, it seems to be a necessary consequence that he cannot recover."

This seems to be very much such a case as the one at bar. In the one case the hay was cut from land not owned by the plaintiff, and was stacked by him thereon, and was destroyed by fire alleged to have been the negligent act of the defendant. In the other the wood is cut from land not owned by plaintiffs and is piled upon land not owned by them, and while thus piled is destroyed by the negligent act of the defendant; and yet it was held in the Iowa case that the plaintiff had no sufficient possession of the property destroyed to maintain the action. We see no reason why the same rule should not be applied to this case.

In *Missouri P. R. Co.* v. *Cullers*, 81 Tex. 382, 13 L. R. A. 542, the supreme court of Texas laid down the proposition, "that if it is established that the plaintiff was not the owner of the property and had no other interest therein than the bare possession thereof, then, where the measure of damage relied upon is the value of the property injured, destroyed, or converted, in such case the defendant would not be legally liable to compensate the plaintiff for the value of property which he did not own, and ought to be permitted to prove title in a third party, not only for the purpose of disproving the plaintiff's right, or rather claim, for damages without an injury to himself, but also to avoid being compelled to respond in double damages for the same injury to the property. Until such outstanding title or a title in the defendant is established, however, the possessory right of the plaintiff is sufficient to justify a full recovery. Hence it is correctly said that the actual possession of property is prima facie proof of the ownership thereof, but it amounts to no more than this."

There is no actual possession in such a case as this where the property belongs to a third

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person, and is still on the premises of that third person, to go upon which is an act of trespass on the part of the individual claiming to be in possession of the property. Neither can any constructive possession be based upon these facts. Hence it would appear that plain-
383]tiffs had *failed to maintain their action for the wood cut by themselves.

They do not occupy any more advantageous position in regard to the wood purchased by them from those who had with their knowledge cut it from the lands of the United States. Plaintiffs had the same rights only as the persons from whom they purchased, and could maintain no action which they could not maintain. *Bolles Woodenware Co.* v. *United States*, 106 U. S. 432-435 [27: 230, 231].

The persons from whom the plaintiffs purchased cut the timber under the same circumstances as the plaintiffs cut that which they claim, and such persons had the same rights that the plaintiffs had, and no more.

The court should have charged the jury as requested, both in regard to the rights of the plaintiffs at the time of the fire in and to the wood cut by them, and also as to their rights in and to the wood purchased by them from others.

The judgment of the circuit court of appeals is reversed; the judgment of the circuit court is reversed, and the cause remanded to that court with instructions to grant a new trial.

CHARLES McINTIRE, *Jr.*, Admr. of CHARLES McINTIRE, Deceased, *Plff. in Err.*,

v.

EDWIN A. McINTIRE ET AL.

(See S. C. Reporter's ed. 383-399.)

Setting aside probate of will — insufficient ground.

1. Immaterial alterations which do not materially change a will, and which are not of such a nature as to justify the presumption that it had been revoked in whole or in part, will not be sufficient ground for setting aside the probate of the will.

2. Testimony of witnesses that one fold of paper on which a codicil to a will was written, being about one fourth of a half sheet, had been torn off after they read the document, and that it contained a memorandum as to the glasses of the testator, but that they could not remember that it contained anything else, is insufficient ground for annulling the probate of the will,—especially when they believed at the time of reading the will that they were beneficiaries under it.

[No. 142.]

Argued March 13, 1896. Decided April 13, 1896.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment of that court overruling a motion for a new trial and affirming the judgment of the Special Term of that court in favor of the defendants, Edwin A. McIntire *et al.*, in proceedings brought by Charles McIntire to set aside a will of David McIntire. *Affirmed.*

See same case below, 8 Mackey, 482.

The facts are stated in the opinion.

Messrs. **Wm. G. Johnson, Calderon Carlisle,** and *Jeremiah M. Wilson*, for plaintiff in error:

The caveator was entitled to have submitted to the jury the question whether the papers purporting to be the will were in fact executed by David McIntire.

Greenleaf v. *Birth*, 34 U. S. 9 Pet. 298 (9: 135); *Chesapeake & O. Canal Co.* v. *Knapp*, 34 U. S. 9 Pet. 567, 568 (9: 232); *Baylis* v. *Travelers' Ins. Co.* 113 U. S. 320, 321 (28: 990); *Phœnix Mut. L. Ins. Co.* v. *Doster*, 106 U. S. 32 (27: 66); *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 122 (22: 783); *Ewing* v. *Burnet*, 36 U. S. 11 Pet. 50 (9: 628); *United States* v. *Laub*, 37 U. S. 12 Pet. 5 (9: 978); *Bank of the Metropolis* v. *Guttschlick*, 39 U. S. 14 Pet. 30, 31 (10: 310, 311); *Head* v. *Hargrave*, 105 U. S. 45 (26: 1028).

The caveator was entitled to have submitted to the jury the question whether the paper now bearing date January 7, 1880, had been revoked by the testator, if in fact it was made by him.

Barroll v. *Reading*, 5 Harr. & J. 176; *Pegg* v. *Warford*, 4 Md. 393, 394; *Barroll* v. *Peters*, 20 Md. 178.

Mr. **Enoch Totten,** for defendants in error:

Alterations to affect a deed, bond, or contract must be material alterations.

Reed v. *Kemp*, 16 Ill. 445; *Steele* v. *Spencer*, 26 U. S. 1 Pet. 552 (7: 259).

Alterations in a will made by a stranger do not affect the validity of the testament in other respects.

Grubbs v. *McDonald*, 91 Pa. 241; *Smith* v. *Fenner*, 1 Gall. 174; *Parker* v. *Ash*, 1 Vern. 256; *Plume* v. *Beale*, 1 P. Wms. 389; *Haines* v. *Haines*, 2 Vern. 441; *Mason* v. *Poulson*, 40 Md. 368.

The date is no part of the will.

Deakins v. *Hollis*, 7 Gill & J. 311; *Wright* v. *Wright*, 5 Ind. 392.

The court must determine the materiality of the alterations and it is error to submit that to the jury.

Steele v. *Spencer*, 26 U. S. 1 Pet. 561 (7: 262).

It was for the jury to determine whether the alteration was made before or after its execution and with or without the consent of the maker.

Milliken v. *Marlin*, 66 Ill. 20.

It was the duty of the court to instruct the jury to find all the issues for the defendants.

Pleasants v. *Fant*, 89 U. S. 22 Wall. 122 (22: 783); *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 480 (27: 1004); *Robertson* v. *Edelhoff*, 132 U. S. 614 (33: 477); *Marshall* v. *Hubbard*, 117 U. S. 419 (29: 920); *Hathaway* v. *East Tennessee, V. & G. R. Co.* 29 Fed. Rep. 489; *Metropolitan R. Co.* v. *Moore*, 121 U. S. 570 (30: 1025).

Mr. Justice **White** delivered the opinion of the court:

The question for our determination is whether the supreme court of the District of

NOTE.—*As to interpretation of wills; intention of testator to govern,*—see note to Pray v. Belt, 7: 309.

That domicil of testator governs validity of will and distribution; foreign will necessary to be proved where assets are,—see note to Smith v. Union Bank, 6: 212.

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Columbia, at a general term thereof, erred in affirming the action of a special term of the court, sitting as a circuit court, in peremptorily instructing a jury to find certain issues in a will contest favorably to the defendants. The contest in question was begun by Charles McIntire in the probate branch of the court, for the purpose of annulling the probate of a certain alleged last will and testament of his elder brother, David McIntire. The original contestant having died intestate pending the action, he was succeeded, as a party plaintiff, by his son, his duly qualified administrator, who was also, in his individual capacity, a legatee under the probated will.

Issues were framed in the probate branch and certified to the circuit court to be determined by a jury. The opinion of the general term is reported in 8 Mackey, 482.

The following facts were established, and are necessary to be stated for a proper understanding of the case:

David McIntire resided in Washington from about 1866 until his death, at the age of seventy-two years, on April 1, 1884. He never married, and left an estate consisting of personal property exceeding $50,000 in value, and the following collateral kindred: Charles McIntire, a younger brother, and his son Charles McIntire, Jr.; Edwin A. McIntire, Martha McIntire, Elizabeth M. Test, Emma T. McIntire, and Adaline McIntire, children of a predeceased elder brother, Edwin T. McIntire; and also the following grandnieces 385] and *grandnephews: Annie Laura McIntire, wife of William T. Galliher; Emma V., William E., and Henry N. McIntire, children of Henry McIntire, a deceased son of the testator's elder brother, Edwin T. McIntire. For several years immediately prior to his death David McIntire lived at the home of William T. Galliher, husband of his grandniece Annie Laura.

Four or five hours after the death of David McIntire an examination was made by his nephew, Edwin A. McIntire, and by Mr. Galliher and his wife, and her sister Emma V. McIntire, of a chest which had belonged to decedent, and in a tin case therein were found two separate writings, which were read and examined by each one present. On April 8, 1884, these documents, pasted together, were proved, in the probate branch of the supreme court of the district, as the last will and testament of Mr. Intire, by the joint affidavit of the four persons above named, who, as above stated, first inspected the writings after the death of the testator. The documents were admitted to probate on April 12, 1884, and letters of administration issued to E. A. McIntire. As probated, the writing read as follows:

January 7th, 1880.

This my last will and Testament. I David McIntire, Tin Plate Worker, of this city (of) Do will Bequeath or Devise to my Nephews and Nieces That is to say, From July the first 1st eighteen hundred and fifty-four (1854) To the opening of, or reading of this Paper, One thousand three hundred and fifty dollars and sixty-four cents (1,350.64) is to be calculated at Six 6 per cent interest That amount whatever it may be is to be given to each of my Brother Edwin's children. The remainder if any, is to be equally divided Between my Brothers Edwin and Charles children.

David McIntire. (Seal.)

(Indorsed on back:)

The Judges of the Courts, lay it down as a rule in law, that, what a person leaves in his, handwriting, with his name attached, is his, Will, and it is the law. The law, requires no *particular formality in action, or words[386 to constitute a valid will or request.

David McIntire.

January 1, 1880.

At my death, or after i wish my body to be taken to Philadelphia, and deposited in the "Macphelah Cemetery" Vault with the cover unscrued and remain in that condition until friends or relatives are satisfied, and then deposited in the lot with the other graves. And providing "Macphelah Cemetery" should be sold and a disposition of those made in the family lot, by the family, then the instruction as stated above is to follow that disposition.

David McIntyre or tire.

To provide for the demise when it should come, to the great proprietor of all. My clothing is to go to those that they fit. If there is more than one, a rough estimate is to be made and divided so recipients may have a word and be satisfied nephews first,—I do not leave them as a legacy they must take them as their own. To avoid trouble, i. e. not of any account whatever, To those that i appoint to settle see that those things are carried out.

D. McInt.

You must act understandingly there will be no money in bank.

If the articles are worth having. To give satisfaction to all interested. Provided the surroundings should be disturbed. That is the names i have written down with the articles attached to them. It is my intention that they take them as their own. David McIntire.

To Lizzy M'Intire Test as she is raising more boys. Hence my Chest with all my clothing or wearing apparel, coat, vest, pants, shirts, drawers, socks, etc. The large double shawl, the vegetable studs goes with the shirts. The sewing apparatus. The 5 glass stopper vials.

To Emma V. The writing desk with all the writing apparatus pens, ink, paper, envelopes, pencils. The cotton mufler, red silk handkerchief, and gold studs.

*To Chas. M'Intire Jr. The telescope-[387 gun and one pocket knife, Webster's Dictionary and Pocket Book.

The linen Pocket handkerchief to Normy.

The sachel & strap, Martha, addyline, Emma.

It will subserve clearness of statement to mention here that the sum specifically given, by the writing dated January 7, 1880, to the children of testator's brother Edwin, equalled an indebtedness owing to the testator by his younger brother Charles.

In February, 1885, a suit was filed on the equity side of the supreme court of the District of Columbia, on behalf of Charles McIntire, Jr., and Mrs. Galliher and her sisters and brothers, all claiming as legatees under the probated will, seeking the appointment of

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a receiver to take possession of the estate in question until the appointment of a new administrator, it being alleged that Edwin A. McIntire had been guilty of fraudulent and deceptive practices, that his bond was insufficient, and that the estate was not safe in his hands. An amicable settlement of this suit was had.

Shortly after the adjustment of this suit, on June 5, 1885, these contest proceedings, heretofore referred to as begun by Charles McIntire, were instituted in the probate branch.

The amended petition of Charles McIntire contained the following allegation with reference to the alleged invalidity of the will in question:

"Petitioner further says, upon information and belief, that the said paper-writing, bearing date January 7, 1880, was not executed by the said David McIntire, or, if so executed, that he was not at that time of sound mind nor conscious of the contents of the same, nor that he executed the same freely and voluntarily, nor that the same is his final and complete last will; and he is advised and believes that the said paper-writing purporting to be the last will and testament of the said David McIntire have been fraudulently altered by the said Edwin A. McIntire with the intent and effect thereby to cheat and defraud the next of kin of said decedent."

Answers were filed on behalf of Edwin A. 388] McIntire, his *sisters, and their mother (as assignee of her daughter Adaline, who died in July, 1885), and the issues certified to the circuit court branch to be determined by a jury were as follows:

"1. Was the paper-writing, as now probated and now bearing date January 7, 1880, purporting to be the last will and testament of said David McIntire, deceased, executed by said David McIntire in due form as required by law?

"2. Was the said David McIntire at the time of the alleged execution of the said paper-writing as now probated and now bearing date January 7, 1880, of sound and disposing mind and capable of making a valid deed or contract?

"3. Were the contents of the said paper-writing, as now probated and now bearing date January 7, 1880, read to or by the said David McIntire or otherwise made known to him at or before the execution thereof?

"4. Was the said paper-writing, as now probated and now bearing date January 7, 1880, executed by the said David McIntire under the undue influence or by the fraud of any person or persons?

"5. Is the said paper-writing, as now probated and now bearing date January 7, 1880, the complete and final last will and testament of the said David McIntire?

"6. Has the said paper-writing, purporting to be the last will and testament of the said David McIntire, deceased, probated on the 8th day of April, 1884, or any part thereof, been fraudulently altered since the death of the said David McIntire, and before the probate thereof, by any person or persons to the prejudice of any of the next of kin or heirs-at-law of said David McIntire?

"7. Has the said instrument purporting to be the last will and testament of said David McIntire, deceased, been in any respect altered since the death of said David McIntire, and, if any such alterations have been made, what were the said alterations and how were they made? Were such alterations made by any party interested under said will or with the privity of any party interested under said will?

"8. Has the said instrument purporting to be the last will and testament of said David McIntire, deceased, or any part thereof, been revoked?"

*Two trials of these issues were had.[389 On the first the findings of the jury were set aside. On the second trial (June, 1889) the court instructed the jury to find all the issues favorably to the defendants, which was done, and the general term overruled a motion for a new trial.

With this preliminary statement, we come to the consideration of the question whether the trial court rightly instructed the jury to return a verdict in favor of the defendants. In the proceedings before the jury no attempt was made to establish that the testator had ever been of unsound mind, or that the execution of the testamentary writings in question were the result of the exercise upon him of any undue influence, hence the 2d and 4th issues were properly determined. So, also, the evidence all tended to show that the writings in question were the same documents which were found in the tin case belonging to the deceased, and that the contents were in his handwriting, except in so far as the questions of alteration or suppression are concerned, which we shall hereafter consider.

To the extent, therefore, of these facts, the instructions given by the trial court were also undoubtedly correct.

The real controversy is whether there was proof supporting the claim that material alterations had been made in the will after the death of the testator and before its probate, and also whether there was proof sustaining the charge that a material part thereof had been suppressed. The conflicting contentions of the parties on this subject are as follows: The contestant asserts that evidence was introduced tending to show that the will proper, when it was first taken by Edwin A. McIntire into his possession, was dated January 1, 1880, whereas as probated it reads January 7, 1880; that the date of the second paper or codicil had been altered from January 1, 1884, so as to read January 1, 1880; that the words "of the city of," in the will proper, had been altered by Edwin A. McIntire, or by his procurement, so as to read "of this city;" that the second writing or codicil which disposed of the wearing apparel was originally a full double sheet of legal cap paper, but that one of the folds, that is, one fourth of a half *sheet,[390 which had upon it matter written by the testator, had been torn off after it had been taken into E. A. McIntire's possession and before the writing was probated; that the proof showed that this was done with the connivance of the defendants. The defendants, on the other hand, assert that the clear preponderance of proof established that the will as probated was in the condition in which it was found after the death of the testator. Both

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parties, besides the direct evidence by them offered, introduced much indirect testimony to sustain their respective positions. Thus, the contestant sought to corroborate his theory that the will had been materially altered by testimony going to show that subsequent to January 1, 1880, the testator had become unfriendly to the contestees who are named in the alleged writing, and had presumably altered the will which he had previously written in their favor. On the other hand, the defendants assert that their contention is fortified by evidence tending to show that prior and subsequent to the 1st of January, 1880, the testator was greatly incensed at his brother Charles because of the existence of a long outstanding indebtedness due him by Charles, which has been heretofore referred to, and therefore had reason not to make a will in his favor. In addition, the contestant, in order to sustain the alleged proof of material alterations and suppression, offered much evidence, which was excluded, which, it was claimed, if it had been admitted, would have tended to show that Edwin A. McIntire, with the approval of the other defendants, made false representations to the probate judge in procuring the grant of letters of administration and in fixing the amount of the bond to be by him given in that capacity; that deceptive practices were resorted to to prevent the testator's brother Charles, who resided in Pennsylvania, from seeking to qualify as administrator, and that untruthful and fraudulent statements were also made by E. A. McIntire to the legatee, Charles McIntire, Jr., to his attorneys and to others as to the amount of the estate and its assets, and also that E. A. McIntire concealed the possession of a large amount of assets and made a false inventory. It is manifest that the **391**] correctness of the ruling *of the lower court in instructing a verdict, as well the question whether prejudicial error resulted from the action of the court in excluding the testimony as to McIntire's misconduct in relation to the inventory and his misrepresentations and fraudulent action as to other matters (apart from the alleged alterations or suppression of the will), must depend primarily on whether the direct testimony as to alterations and suppression left it uncertain whether such alterations or suppression were of a vital character. If there was not only no adequate proof to have supported a verdict resting on the fact that there had been material alterations and suppression, but, on the contrary, if there was a clear preponderance of proof the other way, it is obvious that it becomes immaterial for the purpose of ascertaining the validity of the will to determine whether or not, in other respects, McIntire was guilty of fraud and wrongdoing.

In examining the testimony for the purpose of ascertaining whether there is any proof of material alteration and suppression the question to be determined is, whether there was any proof of such alteration or suppression as would have sustained an affirmative answer by the jury to the eighth issue. The mere fact that the proof may have established that after the death of the testator alterations were made which did not materially change the will, and which were not of such a nature as to justify the presumption that the testator had revoked the will, in whole or in part, would not have authorized a verdict, the result of which would have been to set aside the probate of the will.

We come now to determine whether there was evidence that there had been such material alterations or suppression as would have supported a verdict setting aside the will. The only witnesses testifying on this subject on behalf of the contestant were Mr. and Mrs. Galliher and Emma V. McIntire. Before examining the testimony of these three witnesses it must be borne in mind, as already stated, that they all three read the contents of the documents in question after the death of David McIntire, when they were first taken from the receptacle in which they were found. These witnesses were *peculiarly interested in the [**392** provisions of the writings, as they naturally anticipated that the deceased would give at least a portion of his estate to the children of his dead nephew, with whom he had been for many years in direct contact under the same roof. Seven days following this careful reading and inspection of the papers, they stated under oath, in an affidavit, intended to be the basis for the admission of the writings to probate, that "these papers were discovered in a tin case in a chest late the property of the decedent; that they are now and have been for years past well acquainted with the handwriting of the deceased, and they believe the entire writing and signatures are in his handwriting." After the will had been admitted to probate and the administrator appointed in February, 1885, in the petition filed in the equity suit, supported by the affidavits of these witnesses, they treated the writings in question as a valid will of David McIntire, and asserted rights under it. The testimony given by these witnesses as to the alterations in the will is as follows:

Mrs. Galliher testified that she read over the papers when they were found, and that the one dated January 1, 1880, originally bore the date January 1, 1884, while the one now dated January 7, 1880, originally read January 1, 1880, and the latter paper had on it the words "of the city of," instead of the words, as now, "of this city;" that the document was written on a new, full-length sheet of paper, one eighth of which is now missing, and "looked as if it had been just written, folded and put in the chest." The two papers were disjoined. The next she saw of the papers, after Edwin A. McIntire retained possession of them, was in the probate court, on April 8, 1884, when she deposed to their genuineness. She said she then noticed the change in the date, and the alteration of the words "of the city of," and called the attention of her uncle (E. A. McIntire) thereto, who replied that he thought it better to have them both one date, and that he altered the will to read "of this city, . . . because otherwise he would have to take it to Philadelphia to probate it, and he could not give bond there." Mrs. Galliher further testified that she did not think she noticed at that time that a part of the will had been *torn [**393** off. She was asked the question, "At the time of signing this affidavit did you know that those papers had been altered and mutilated?" and answered, "Yes, sir; but, as I

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said, Mr. McIntire told me that that made no difference. I had perfect confidence in him; he was a lawyer, and I knew nothing about it; he was my uncle, and I thought I could trust him."

The witness also testified that she remembered particularly that upon the paper originally dated 1884 there was contained a bequest of the testator's glasses to those who would take them or have them. She was asked, "Did you know whether there was any other writing on the papers?" and answered, "That I don't remember."

On cross-examination, in answer to the question how she came to make the examination of the papers which resulted in discovering that a portion of one paper had been torn of, the witness answered that it was indirectly caused by receiving an intimation from her uncle, Edwin A. McIntire, that her brothers, sister, and herself would not be beneficiaries under the will, and that on such second examination she discovered that there had been slight alterations in two letters "of" that she had not noticed on the day the will was probated, and she also then noticed that a fold of the second paper was torn off, because she missed the provision about the glasses. The witness claimed that the bequest of the glasses was impressed upon her memory because of the oddity of the expression concerning them. She also testified that she had the paper sufficiently in her mind to miss anything that was taken out of it that had been impressed upon her memory. She was then asked, "Now, would you say to the jury that there was no other writing on that fold that you say was torn off?" and answered, "That I do not remember; I can't say that there was or was not." The witness also testified that she was prejudiced against her aunts and their brother on account of an alleged conspiracy on their part to hurt her husband's good name; that the contestant came to see her about the will in February or March, 1885, at a time when she was dissatisfied because she 394] was not a beneficiary under *it. She further testified that she thought the will as probated was all right, and should stand as the last will of David McIntire, until she discovered that she was not to be benefited by it.

Mr. Galliher testified that he read and examined the papers found in the tin case; that he thought the paper now dated January 7, 1880, was the same paper except as to the alterations already referred to; that the paper now dated January 1, 1880, was originally dated January 1, 1884, and that he made a copy of it on April 1, 1884, and that he made a memorandum of the items on the other, which memorandum, however, was not exhibited. He said that at the time he signed the affidavit for probate of the writings he probably read the affidavit which he signed, but did not notice the alterations, and first learned of them from his wife upon leaving the court-room. He did not then return to examine the will, but some time after went back and looked at the papers and then discovered the changes of date and the alterations of the word "the" to "this" and the erasure of the word "of," but did not think he then noticed that a part of one sheet was gone. Subsequently, on his attention being called to the absence of the provision in reference to the glasses, he again examined the papers, and thought it was then he discovered that a portion had been torn off. He was asked, "Did you know of any other writing on those papers besides the expression about the glasses, to which you have referred, that is not there now?" and answered, "I do not, sir." On cross-examination, the witness testified that he had a distinct and clear recollection that the codicil was a complete sheet at the time it was taken from the chest, and that it was probably within a month after the probate of the will that he discovered that it had been mutilated. He could not, however, assign any reason why, after being informed by his wife of the alterations on leaving the court-house immediately after the probate of the will, he did not at once return, and if the fact was as claimed call the attention of the court to the matter. The witness further testified that for a good while after the probate he thought his wife was a legatee *under the will. [395 He made the second examination of the will at the court-house before the intimation from Mr. McIntire that his wife would have no interest under the will, "so as to know of my [his] own knowledge that these corrections had been made." When asked how he happened to discover that a part of one paper was torn off, he answered: "Because it was a whole sheet at the time I turned it over to E. A. McIntire, and this bequest was on there in regard to the glasses; that portion of the sheet had disappeared and that bequest was not on there." Despite the discovery of the alleged alterations and mutilations referred to, the witness said he did not go to see Mr. McIntire or demand from him an explanation, and did not call the attention of anybody to the subject until some six or eight months afterwards, when he spoke of it in the office of certain attorneys, on being interrogated in regard to the alterations. Prior to that, after hearing from Mr. McIntire that his wife would not share in the estate, witness consulted an intimate friend, a lawyer, but the witness said he did not think he told him that the will had been mutilated and altered.

Emma V. McIntire testified that on her inspection of the writings when they were taken from the chest on April 1, 1884, there was no paper dated January 7, 1880, but that the paper now bearing such date was one of the papers found, except as to the date; also that the words "of the city of" in said paper had been altered to read "of this city." This witness also testified that she thought the second paper, now dated January 1, 1880, was one of the papers found in the chest, except that the date was January 1, 1884, when she first saw it, and that a remark to the effect that the paper was written the January previous to the death of testator was made at the time the papers were examined on April 1, 1884. She also testified that she thought the second paper was "originally a complete sheet; just the length of the other one." She remembered having heard the paper read, and that there was some remark in it about glasses. She further testified that both papers were read aloud, and that then each one took them and read them severally, and that they all *supposed that she [396 and her sister and brothers were entitled to

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the share in their uncle David's estate, which would have come to their father had he lived. The witness also swore that she did not discover the alterations when she verified the affidavit in the probate court, wherein she averred the authenticity of the documents, though she read the papers carefully at the time she made the affidavit, which latter statement, however, was subsequently qualified on cross examination by the statement that perhaps she had not read them as carefully as she ought to have done. She further stated that she did not notice the alterations until her sister called her attention to them.

The foregoing condensed summary is substantially all the testimony given by Mr. and Mrs. Galliher and Emma V. McIntire, bearing upon the question of the alleged material alterations and suppression of the documents constituting the probated will. As already stated, these witnesses were the only ones who testified on this subject on behalf of contestant, and upon their testimony the case necessarily depends. If we leave entirely out of view the evidence of the defendants to the effect that the papers constituting the will as probated were precisely in the condition they were when taken from the tin case, we do not think a jury could have properly inferred from his testimony that in the alleged missing portion of the will there existed provisions so in conflict or inconsistent with the probated will as to have operated to materially alter or revoke it. That the actual alterations to which the witnesses testify in no way materially modified or abrogated the will is too clear for discussion. The whole case, hence, depends upon the assertion that there was sufficient evidence to have authorized the jury to find that there was a material mutilation or suppression. But none of the three witnesses testified—granting their testimony as to the mutilation to have been true—that the part torn off contained anything but the reference to the glasses of the testator. It is urged, however, that whilst they recollected that the torn off part had in it the memoranda as to the glasses, they did not remember whether it embraced anything else, 397]and, therefore, *non constat, that it might not have contained other things, and thus would have justified the jury in drawing the presumption of a fraudulent suppression of provisions which, if known, might have revoked or modified the will. But this contention entirely obscures the difference between the failure of a witness to recollect a fact, which from the nature and extent of his knowledge he must necessarily have recalled if it existed, hence giving rise to the implication that, where it is not remembered it did not exist, and the contrary case, where from the position and means of knowledge of a witness, his failure to remember justifies no such deduction. The failure of these witnesses to remember comes clearly under the first of these categories. They were willing and friendly witnesses for the contestant, manifestly desirous of stating everything favorable to his claims. They examined the will immediately after the death; they then not only heard it read aloud, but also read it themselves; they then thought that they were interested in it as legatees. If any provision had existed revoking the will, or materially changing its provisions, such fact would in the very nature of things have been impressed upon their minds above and beyond everything else. When, therefore, after swearing to the validity and completeness of the will for the purpose of probate, after asserting rights under it in the equity suit filed against the administrator, they subsequently declared that they did not recollect whether there had been any material alteration or suppression, their want of memory necessarily negatives the presumption which might otherwise result from their testimony, if their sources of information and relation to the will had not been of the kind just mentioned. This is particularly the case as to the testimony of Mr. Galliher. He not only examined and read the will after the death, not only testified as to its completeness when it was probated, but actually made a complete copy of the will proper, and a memorandum of the items on the other paper or codicil at the time when it was examined and before it was turned over to E. A. McIntire to be probated. The context of his testimony indicates that, before he testified at the trial, he refreshed his memory by reference *to [398 the contemporaneous copy and memoranda. It follows, therefore, when in answer to the point-blank question, "Did you know of any other writing on those papers besides the expression about the glasses to which you have referred that is not there now?" he said, "I do not know, sir," that he negatived the possibility of there having been such material alterations, because his means of knowledge were such that he must necessarily have known of the fact had it existed. Indeed, we can see no reason to doubt that if the issue presented had been probate *vel non* that the testimony introduced by the contestant here would have justified the admission of the documents to probate, that is, after eliminating the immaterial alterations which the testimony of the contestant asserts to have been made. This being true, it follows that the testimony which would have been adequate to probate the will cannot, at the same time, be sufficient to destroy the probate and annul the will.

The case of *Jones* v. *Murphy*, 8 Watts & S. 275, relied upon by the plaintiff in error, is not in point. In that case the existence of a second will was proved, which the evidence tended to show had been destroyed by interested parties, but there was an absence of direct evidence of the contents of the missing paper. Evidence was introduced, however, justifying the inference that the testator might have designed an alteration of the provisions of the earlier will in favor of a daughter, from whom he was estranged when the first will was executed, but who subsequently became reconciled to her father. The court held that where a fraudulent suppression was proved, and, in addition, other circumstances, such as a motive for a material change in a former will, the jury, in the absence of evidence as to the contents of the later testamentary writing, might presume that it contained a clause revoking the prior will. Here, however, we have two documents, the will proper, evidently deliberately and carefully written, and another instrument having the effect of a codicil, both being sedulously preserved by the testator. It

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is an asserted change or suppression in the latter instrument which, it is contended, would have justified the jury in finding the will to have 399] been revoked, *although the testimony affirmatively established that even if the suppression asserted existed, it contained no provision revoking the will. The necessary effect of the action of the trial judge in directing findings favorable to the contestees was to hold that the contestant was not entitled to relief. In this conclusion we concur, although the negative answers given to the 5th and 7th questions are not literally accurate, in the light of the evidence as to the immaterial alterations offered on behalf of the contestants.

The judgment is therefore affirmed.

WILLIAM H. PALMER ET AL., *Plffs. in Err.*,
v.
MARY H. BARRETT.

(See S. C. Reporter's ed. 399-404.)

Jurisdiction of state courts over land leased by the United States.

A lease by the United States to a city for market purposes, of vacant land which was a part of land ceded by the state to the United States for the purposes of a navy yard and naval hospital, with a provision that the United States may retain such use and jurisdiction no longer than the premises are used for such purposes, operates, at least while the lease is in force, to suspend the exclusive authority and jurisdiction of the United States over the leased land, and thereby makes it subject to the jurisdiction of state courts in an action for ouster therefrom.

[No. 194.]

Submitted March 31, 1896. Decided April 13, 1896.

IN ERROR to the City Court of Brooklyn, New York, to review a judgment of that court after affirmance thereof by the Court of Appeals of that state rendered in favor of the plaintiff, Mary H. Barrett, against the defendants, William H. Palmer *et al.*, in an action for damages for unlawful ouster of plaintiff from the possession of two market stands in the city of Brooklyn, etc. *Affirmed.*

See same case below, 135 N. Y. 336.

Statement by *Mr. Justice* **White:**

This is a writ of error to the city court of Brooklyn, an inferior court of the state of New York. The action was brought to recover damages for an alleged unlawful ouster of the plaintiff from the possession of two market stands in the Wallabout market, in the city of Brooklyn, and to recover damages for the conversion of certain described personal property which was a part of said stands. Defendant Palmer answered by a general denial, while the defendant Droste, in addition to specific denials, alleged in substance that he lawfully acquired the premises in controversy by a lease from Palmer, his codefendant, and a lessee of the city of Brooklyn.

It appeared from the proof that the stands in question were erected upon ground, part of lands acquired by the *government of the 400] United States for the purposes of a navy yard and naval hospital, and that by chapter 355 of an act of the legislature of the state of New York, passed June 17, 1853, that state ceded to the United States jurisdiction over the lands acquired for the purposes stated. The statute of the state of New York making the cession provided as follows:

"1. The jurisdiction of this state over all lands in and adjacent to the city of Brooklyn, belonging to the United States, and used and occupied as a navy yard and naval hospital, and which has not heretofore been ceded to the United States, is hereby ceded to the United States for the uses and purposes of a navy yard and naval hospital, on the condition contained in this act, and according to the plan furnished by the Navy Department, and bounded as follows:

"2. Such jurisdiction is ceded as aforesaid on the condition that the United States shall pay, or cause to be paid, to the city of Brooklyn the sum of $11,383.73, with interest from the 1st day of February, 1852, until paid, being the balance of an assessment now due on a part of said lands for grading and paving Flushing avenue. . . .

"4. The United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded and no longer. . . . Nor shall the jurisdiction so ceded to the United States impede or prevent the service or execution of any legal process, civil or criminal, under the authority of this state.

"5. Nothing in this act contained shall be construed so as to allow the common council of the city of Brooklyn hereafter to tax or assess any of the lands of the United States for any purpose whatsoever."

In October, 1884, an agreement was entered into between the commandant of the Brooklyn navy yard, representing the Navy Department, and a commissioner of the department of city works of the city of Brooklyn, which agreement recited that permission was granted to the city of Brooklyn to occupy certain described portions of "vacant" government *land [401 situated on Washington and Flushing avenues, in the city of Brooklyn, "to be used only as a stand for the market wagons bringing produce into the city from the adjacent country and those with whom they trade; that the city of Brooklyn will patrol and efficiently police the said premises from the hospital wall on the east to the navy-yard fence on the westerly side of Washington avenue; that no permanent buildings or structures be erected on the lands, there being no objection to the erection of wooden booths, sheds, or other temporary buildings for the sale of groceries, farm produce, horse feed, and other goods for restaurant purposes, and for the purpose of shelter from the weather; and that during the occupancy of said premises by the city of Brooklyn the water tax for water consumed by the navy yard be reduced to the same rate as that charged to manufacturing establishments in the city of Brooklyn." The agreement further provided that the permit in question might be terminated at any time on thirty days' notice from the Secretary of the Navy, when the city

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should be entitled to remove all property thereon not belonging to the United States.

At the close of the testimony counsel for defendant moved the court to dismiss the complaint, because of a want of jurisdiction over the subject-matter of the action. This want of jurisdiction was based on the contention that the land upon which the stands were erected was to all intents and purposes territory of the United States, and that as the action was local in its character the courts of another sovereignty could not entertain jurisdiction.

The motion to dismiss being denied the cause was submitted to the jury, who found for the plaintiff. Judgment having been entered on the verdict the cause was appealed to the general term of the court, where the judgment was affirmed. This judgment of affirmance was subsequently affirmed by the court of appeals of the state (135 N. Y. 836 [17 L. R. A. 720]), and after the filing of the mandate in the clerk's office of the city court of Brooklyn, a writ of error was allowed by a justice of this court.

Messrs. **H. E. Tremain** and **M. L. Towns** for plaintiff in error.

Messrs. **Hugo Hirsh** and **Henry S. Rasquin** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Beyond the fact that the government was the owner of the land known as the Wallabout market at the time of the passage by the legislature of the state of New York of the act of June 17, 1853, the record does not disclose when or how the government acquired title to the land. Counsel for plaintiffs in error, however, say that the following act of Congress, approved March 3, 1853 (10 Stat. at L. 224, chap. 102), relates to this land:

"For the purpose of paying the lien existing on the lands recently purchased as an addition to the navy yard at Brooklyn, $12,247.05, to be paid by the Secretary of the Navy, if upon examination he shall find the same to be due as a lien on the purchase of the said land, and the Secretary of the Navy is thereby empowered and directed to sell and convey to any purchaser all that part of the navy-yard lands at Brooklyn between the west side of Vanderbilt avenue and the hospital grounds, containing about 26½ acres, including Vanderbilt and Clinton avenues: *Provided*, That said lands shall not be sold at less price than they cost the government, including interest with all assessments and charges: *And provided further*, That prior to the sale of said lands exclusive jurisdiction shall be ceded to the United States of all the remaining lands connected with the said navy yard, belonging to the United States."

This act rather tends to make certain what would be inferable from the New York statute, that the land in question had been purchased by the United States without the consent of the state being given at the time the purchase was made. If, therefore, we assume that the lands were acquired by the government 403]*by purchase, still § 8 of article 1 of the Constitution of the United States, conferring upon Congress authority to exercise exclusive legislation over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, has no application. *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525 [29: 264]. The question therefore depends upon the provisions of the act of the legislature of the state of New York, already referred to, by which jurisdiction was ceded to the United States. Looking at that act, we find that it was "for the uses and purposes of a navy yard and naval hospital," and that it was therein expressly provided "that the United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded, and no longer. . . . Nor shall the jurisdiction so ceded to the United States impede or prevent the service or execution of any legal process, civil or criminal, under the authority of this state." The power of the state to impose this condition is clear. In speaking of a condition placed by the state of Kansas on a cession of jurisdiction made by that state to the United States over land held by the United States for the purposes of a military reservation, this court said, in *Fort Leavenworth R. Co.* v. *Lowe* (p. 539 [269]), *supra:* "It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the state might see fit to annex, not inconsistent with the free and effective use of the fort as a military post."

Now, the land in question here was clearly not used by the United States and occupied by it for a navy yard or naval hospital. On the contrary, it composed a part of the vacant land adjoining the navy yard, which had been leased by the United States to the city of Brooklyn for market purposes. The lease contained a specific proviso that the grounds should be patrolled and policed by the city authorities. Moreover, a direct consideration was received by the United States for the lease, since it provided that a supply of water for all the *purposes of the navy yard at re- [404 duced rates should be furnished by the city to the United States during the use by the former of the land covered by the lease. In the absence of any proof to the contrary, it is to be considered that the lease was valid, and that both parties to it received the benefits stipulated in the contract. This being true, the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the governmental purposes of the United States therein specified. Assuming, without deciding, that if the cession of jurisdiction to the United States had been free from condition or limitation, that the land should be treated and considered as within the sole jurisdiction of the United States, it is clear that under the circumstances here existing in view of the reservation made by the state of New York in the act ceding jurisdiction the exclusive authority of the United States over the land covered by the lease was at least suspended whilst the lease remained in force.

These views dispose of the only Federal

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question which the case presents, and *the judgment below is therefore affirmed.*

LEWIS P. KELSEY ET AL., *Appts.*,
v.
W. J. CROWTHER ET AL.

(See S. C. Reporter's ed. 404-409.)

Specific performance.

Failure of a vendor to tender an abstract of title as he agreed to do does not relieve the purchaser from the necessity of performance or offer to perform on his part, as a condition of specific performance in his favor.

[No. 74.]

Submitted November 19, 1895. Decided April 13, 1896.

APPEAL from a decree of the Supreme Court of the Territory of Utah affirming the decree of the District Court of the Third District of that Territory in favor of the defendants, William J. Crowther *et al.*, in an action brought by Lewis P. Kelsey *et al.*, plaintiffs, to obtain a decree for specific performance of an agreement to sell and convey to plaintiffs certain land in the county of Salt Lake in that territory. *Affirmed.*

See same case below, 7 Utah, 519.

Statement by *Mr. Justice* **Shiras:**

Lewis P. Kelsey and James K. Gillespie filed their second amended complaint in this case in the district court of the third district of the territory of Utah, December 13, 1888, against William J. Crowther, John T. Lynch, and William Glasmann, alleging that on or about September 12, 1887, *the defendant [405 Crowther was seised in fee simple of a certain tract of land containing 40 acres, situate in the county of Salt Lake, territory of Utah; that on that date the plaintiffs and Crowther entered into an unwritten agreement whereby the plaintiffs agreed to buy and Crowther agreed to sell to them the said tract for the sum of $3,250, it being agreed, as alleged, that a portion of the tract, containing 10 acres, was to be conveyed at once, and $500 of the said sum to be paid upon the conveying thereof, and that the remaining portion, containing 30 acres, was to be conveyed at the time, in the manner, and for the amount set out in a certain written contract, which, as alleged, was prepared solely in pursuance of the said unwritten agreement. It was alleged that the 10-acre portion of the tract was not worth $500, and that such sum was agreed by them and Crowther to be received by him, not only in payment for the 10 acres, but also as part consideration for the remaining 30 acres. The said written agreement was as follows:

Salt Lake City, Utah, }
September 13, 1887. }

Received of Lewis P. Kelsey and J. K. Gillespie the sum of $50, being part consideration of the purchase price, to wit, $2,750, at which the undersigned agrees and contracts to sell, and by good and sufficient warranty deed

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NOTE.—*As to when specific performance decreed, and when refused,* see notes to Hepburn v. Dunlop, 4: 65; Colson v. Thompson, 4: 253; and Brashier v. Gratz, 5: 322.

That title may be made at any time before decree; necessary parties to action, objection to; unnecessary parties; when objection made, striking out parties,—see notes to Hepburn v. Dunlop, 4: 65, and Morgan v. Morgan, 4: 242.

One seeking specific performance must fulfil the contract on his part; offer to perform; excuse for omission; impossible compliance; substantial compliance; condition precedent; mutuality of performance.

Plaintiff must do all in his power to fulfil his part of the contract which he is seeking to enforce, according to its terms. Thayer v. Wilmington S. Min. Co. 105 Ill. 540; Sharps' Rifle Mfg. Co. v. Rowan, 35 Conn. 127; Weingærtner v. Pabst, 115 Ill. 412; Minneapolis Industrial Exposition v. Brown, 43 Minn. 77; Holdeman v. Chambers, 19 Tex 1; Taft v. Leavitt, Wright (Ohio) 389; McClure v. King, 15 La. Ann. 220; Moore v. Skidmore, Litt. Sel. Cas. (Ky.) 453, 12 Am. Dec. 333; Clay v. Turner, 8 Bibb, 52; Wright v. Delafield, 23 Barb. 498.

One who has performed his contract in good faith is entitled to enforce his obligation against the other contracting party. Ellis v. Burden, 1 Ala. 458; Laning v. Cole, 4 N. J. Eq. 229; Traphagen v. Traphagen, 40 Barb. 537; Hulmes v. Thorpe, 5 N. J. Eq. 415; Dewey v. Life, 60 Iowa, 361.

While a vendee of land is not bound to accept a defective title, he cannot object to the vendor's title until he restores possession of the land to the vendor. Gans v. Renshaw, 2 Pa. 34, 44 Am. Dec. 152.

A plaintiff who has refused the deed tendered cannot maintain an action to compel a specific performance. Emrich v. White, 102 N. Y. 657; Gale v. Archer, 42 Barb. 320.

It is not always necessary that plaintiff shall have performed his part of the contract. This he may escape by showing that he is ready and willing to perform. Jenkins v. Harrison, 66 Ala. 345; Forsyth v. McCauley, 48 Ga. 402; Belle Greene Min. Co. v. Tuggle, 65 Ga. 652; Botsford v. Burr, 2 Johns. Ch. 416; Baldwin v. Salter, 8 Paige, 473; Thomson v. Scott, 1 McCord Eq. 39; Colson v. Thompson, 15 U. S. 2 Wheat. 336 (4: 253); Goman v. Salisbury, 1 Vern. 240.

Or that defendant by his conduct has rendered compliance with the contract on plaintiff's part impossible or vain. As where the obligor has performed the most of his contract and the remainder is voluntarily done by the obligee although the obligor has been ready and willing to do all himself. Church v. Steele, 1 A. K. Marsh. 323.

Or some other sufficient excuse for his default. Cox v. Boyd, 38 Ala. 42; Jordan v. Deaton, 23 Ark. 704; Campbell v. Harrison, 3 Litt. (Ky.) 292; Moore v. Skidmore, Litt. Sel. Cas. (Ky.) 453; Stevenson v. Dunlap, 7 T. B. Mon. 134; Babcock v. Emrich, 64 How. Pr. 435; Ludlow v. Cooper, 13 Ohio, 552.

If the undertaking on plaintiff's part is not a condition precedent, his failure to perform it will not prevent a specific performance in his favor. Minneapolis & St. L. R. Co. v. Cox, 76 Iowa, 306; Mitchell v. Long, 5 Litt. (Ky.) 71.

Or if the act required of him be a merely nugatory one, his failure to do it will not impair his rights to a specific performance. Coale v. Barney, 1 Gill & J. 324.

An executor or administrator need not tender performance in order to claim it. Mhoon v. Wilkerson, 47 Miss. 633.

Where the obligation upon plaintiff is not a condition precedent equity will see to it that defend-

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convey, free of all liens, to said Kelsey and Gillespie the following described lot of ground, to wit: The east thirty (30) acres of the south half of the southwest quarter of section three (3), township one (1) south, of range one (1) west, Salt Lake meridian.

Said purchasers to have after this date thirty (30) days for the examination of the title of said premises, and in case said title is adversely reported on by the attorneys of said purchasers, then said part consideration hereby receipted shall be at once returned to said purchasers; but if said title is approved, I hereby contract and agree to and with said Kelsey and Gillespie that I will at once, on payment of said balance of the agreed purchase money, to wit, $2,700, duly execute, sign, and acknowledge and deliver a full and perfect warranty deed, conveying to said purchasers the entire title to 406] *said premises, and I agree to at once furnish an abstract of title to said premises and other needful papers.

WM. J. CROWTHER. [SEAL.]

The plaintiffs alleged that Crowther failed to furnish them an abstract of title to the land; and that by reason of such failure they were unable to examine the title within thirty days; that notwithstanding the fact that the abstract was not furnished as agreed, they tendered to Crowther on October 14, 1887 (being the next day after the said period of thirty days had expired), the sum of $2,700, and demanded a conveyance of the property, which Crowther refused to execute to them. They further stated that, as they were informed and believed, the defendants Lynch and Glasmann claimed to have obtained from Crowther some interest in the said 30 acres, but that such pretended interest was acquired by the said defendants subsequently to the making of the said contract, and with full knowledge of the existence thereof, and was therefore subject and subordinate to the rights of the plaintiffs.

The plaintiffs stated that they were ready and willing to pay the said sum of $2,700 to Crowther, and asked the court to decree that Crowther execute to them a warranty deed, conveying to them the said 30 acres of land, free of all liens; that Lynch and Glasmann be required to set forth the nature of their respective claims to the land; that such claims were subject and subordinate to the plaintiffs' rights therein, and wholly invalid, and that Lynch and Glasmann be perpetually enjoined from asserting any claims whatever to the property adverse to the rights of the plaintiffs.

The defendants demurred to the said complaint, and their demurrer having been overruled, they filed their answer on December 13, 1888, wherein they denied that the written contract was executed in pursuance of the alleged unwritten agreement, or that such unwritten agreement was ever made; denied that the 10-acre portion of the tract was not worth $500, or that that amount was any part of the alleged agreed consideration for the 30 acres; and denied that the plaintiffs tendered to Crowther, on October 14, or at any other time, the *sum of $2,700, or any sum. [407 It was stated in the answer that the defendants Lynch and Glasmann had purchased the said 30 acres from Crowther subsequently to November 4, 1887, and that such purchase was made and the entire consideration therefor paid by them without any knowledge or notice on their part of any contract in favor of the plaintiffs, or of any of their alleged rights in the property.

On January 30, 1889, the court, having theretofore heard the testimony and argument, found the facts to be as follows:

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ant is protected by requiring the plaintiff to show that he is able to do his part, and in the absence of such a showing, as where it appears that insolvency or some other cause will render it doubtful if he can fulfil his part, the court will not relieve him. Sims v. McEwen, 27 Ala. 184.

Where, by agreement under seal, A covenanted to sell to B a tract of land, and make a warranty deed therefor, and B covenanted to pay a certain sum therefor by instalments—held: that B was not entitled to a decree for a specific performance on the payment of the first instalment, without giving security, by mortgage or otherwise, for the remaining instalments. Van Scoten v. Albright, 5 N. J. Eq. 467.

Vendor is not always bound to a literal compliance with his obligation, but may establish his position in a court of equity by a substantial performance of it. Shaw v. Livermore, 2 G. Greene, 338; Clark v. Sears, 3 Iowa, 104; Johnston v. Mitchell, 1 A. K. Marsh. 227, 10 Am. Dec. 727; Church v. Steele, 1 A. K. Marsh. 330; Fitzgerald v. Britt, 43 Iowa, 498.

If the vendor stands by and suffers the vendee to make valuable improvements, and does not demand a strict compliance with the terms of the contract by the vendee, equity will deem him to have waived a strict compliance, and upon a substantial compliance, equally favorable to him, will decree a conveyance. Farley v. Vaughn, 11 Cal. 227.

It is in equity a sufficient performance, by a purchaser of land, of a stipulation to pay the taxes, to allow it to go to sale for taxes, and bid it off himself, if he seeks no inequitable advantage from the tax sale; it is an indirect mode of payment. Oliver v. Croswell, 42 Ill. 41.

Enforcement will be denied him if the contract be one that he has repeatedly broken, even if the other party has been guilty of the first breach, and he will be left to his legal remedies. Ohio Steel Barb Fence Co. v. Washburn & M. Mfg. Co. 26 Fed. Rep. 702.

A tenant under a lease containing a covenant to renew cannot enforce such covenant if he has violated other covenants in his lease as by a prohibited use of the premises. Gannett v. Albree, 103 Mass. 372.

Specific performance of a contract for the sale of land will not be decreed where, at the time of filing the bill and at the time of trial, the plaintiffs are indebted to defendant for the balance of purchase money, which they have not offered to pay. Askew v. Carr, 81 Ga. 685.

Specific execution of an agreement will not be decreed at the instance of a party who has been in default, and where the specific execution would be injurious to the other party. Vail v. Nelson, 4 Rand. (Va.) 478.

Equity will not require a defendant to specifically perform covenants of a personal character where, from any cause, by a like proceeding instituted by defendant, the plaintiff could not be compelled to perform his part of the covenants. Bozon v. Farlow, 1 Meriv. 459; Coslake v. Till, 1 Russ. 376; Stocker v. Wedderburn, 3 Kay & J. 303; Hills v. Croll, 2 Phil. Ch. 60; Rutland Marble Co. v. Ripley, 77 U. S. 10 Wall. 339 (19: 955); Port Clinton R. Co. v. Cleveland & T. R. Co. 13 Ohio St. 544.

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"First. That the written contract set forth in the complaint was executed by the defendant W. J. Crowther, and delivered to the defendants. [Meaning, doubtless, to the plaintiffs.]

"Second. That at no time during the thirty days therein specified did the said plaintiffs tender or offer to pay the said defendants the $2,700, purchase price of the said land; that at no time during the said period did the said plaintiffs signify their intention to accept the terms of said contract and to purchase the said land.

"Third. That on the 14th day of October, 1887, plaintiffs and defendant Crowther had further conversation on the subject of this purchase, but that on that day the plaintiffs or either of them did not tender $2,700, or any part thereof, or any other sum, as per said agreement, for the said ground to the defendant Crowther, and the said plaintiffs were not ready or willing to pay the balance of the purchase money for the said property to the defendants."

Upon these facts the court found, as its conclusion of law, that the defendants were entitled to judgment, and, on January 30, 1888, judgment for the defendants was duly entered. An appeal was taken by the plaintiffs to the supreme court of the territory (7 Utah, 519) of Utah, and there, on September 12, 1891, the judgment was affirmed: whereupon the plaintiffs appealed to this court.

Messrs. **Parley L. Williams** and **Orlando W. Powers** for appellants.

Mr. **Arthur Brown** for appellees.

408] **Mr. Justice* **Shiras** delivered the opinion of the court:

Upon the facts contained in the previous statement, there is no room to doubt that the judgment of the trial court dismissing the complaint, and the judgment of the supreme court of the territory of Utah affirming that judgment, were correct, unless there was material error in the action of the district court in failing to find whether the appellee Crowther tendered the abstract of title called for in the contract.

The appellants contend that the question of the tender of the abstract was in issue and was material; that, under the system of pleading prevailing in the courts of the territory of Utah, full findings are required upon every material issue; and that if any material issue is left unfound, it is ground for reversal of the judgment.

But, even if it be conceded that Crowther did not tender the abstract, the finding of that fact would not have rendered a different judgment necessary; and hence the supposed fact was really immaterial.

The action was in the nature of a bill for specific performance of a contract for the sale and purchase of a tract of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an action for damages brought by Crowther. But if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance. To entitle themselves to a decree for a specific performance of a contract to sell land it has always been held necessary that the purchasers should tender the purchase money. This is the rule in the ordinary case of a mutual contract for the sale and purchase of land. And the rule is still more stringently applied in the case of an optional sale, like the present one, where time is of the essence of the contract, and where Crowther could not have *enforced spe- [409 cific performance. In such a case, if the vendee wish to compel the other to fulfil the contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal. *Bank of Columbia* v. *Hagner*, 26 U. S. 1 Pet. 464 [7: 222]; *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 359 [19: 962].

The 2d and 3d findings were expressly to the effect that at no time during the thirty days specified in the contract did the plaintiffs tender or offer to pay the defendants the purchase money, nor signify their intention to accept the terms of the contract, and that said plaintiffs were not ready or willing to pay the balance of the purchase money. Those were the findings of the trial court, and the supreme court reached the same conclusions upon a review of the testimony which was all in the record; and its conclusions upon this as a question of fact are not reviewable by this court. *Howe* v. *Victoria Copper Min. Co.* 160 U. S. 303 [*ante*, 436].

The bill and answer disclose an issue as to the claim of Lynch and Glasmann that they were bona fide purchasers for value, without notice, of the tract of land specified in the contract between the plaintiffs and Crowther; and as the answers were fully responsive to the allegations of the complaint, and as no evidence was adduced by the plaintiffs to sustain the bill in that particular, there would seem to be no reason why the complaint should not have been dismissed on that issue. As, however, neither the trial court nor the supreme court adverted to that phase of the case, and as there may have been reasons not disclosed to us by the record why that ground of defense was not put forward, we shall not consider it.

The supreme court of the territory also expressed the opinion that, upon the facts disclosed by the record, the complainants had a full and complete remedy at law for all the damages they may have suffered by reason of any and all breaches of the contract, if any were committed, by the defendant Crowther. No errors, however, have been assigned to this ruling.

We think the appellants have failed to sustain their specifications of error, and *the decree of the supreme court of the territory is accordingly affirmed.*

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410] T. M. MONTGOMERY, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 410, 411.)

Decoy letter—indictment for embezzling letters containing money.

1. The fact that a letter was a decoy is no defense to an indictment of a railroad postal clerk for embezzling and stealing it when it contained money.
2. Evidence that letters containing money belonged to inspectors who mailed them, and were decoys with a fictitious address, intended to be intercepted and withdrawn from the mails before they reached the persons to whom they were addressed, does not constitute a variance from an indictment for embezzlement of and stealing them, averring that they came into possession of defendant as a postal clerk, to be conveyed by mail and to be delivered to the persons addressed.

[No. 186.]

Submitted March 27, 1896. Decided April 13, 1896.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment convicting Thomas M. Montgomery for embezzling and stealing letters containing money which had come into his possession as a railway postal clerk. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Creed F. Bates** and *Lewis Shepherd* for plaintiff in error.

Mr. **Edward B. Whitney**, Ass'tant Attorney General, for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

Thomas M. Montgomery, the plaintiff in error, was indicted in the circuit court of the United States for the eastern district of Tennessee, for the crime of embezzling and stealing, on March 8 and 9, 1890, certain letters containing money in United States currency, which had come into his possession as a railway postal clerk or route agent, on the railway mail route between Chattanooga, Tennessee, and Bristol, Tennessee. The defendant was tried, convicted, and sentenced to be confined at hard labor for the term of two years in the penitentiary at Columbus, Ohio.

At the trial it appeared that the letters taken had been mailed for the purpose of detecting the defendant; in other words, were "decoy" letters; and thereupon the defendant asked the court to instruct the jury that, as the letters taken were mailed for the purpose of entrapping defendant into the commission of a crime, there could be no conviction of the defendant for the taking of said letters.

The refusal of the court to so charge is the subject of the first assignment of error.

411] *To dispose of this assignment it is sufficient to cite the case of *Goode* v. *United States*, 159 U. S. 663 [*ante*, 297], where it was held that, in an indictment against a letter carrier charged with secreting, embezzling, or destroying a letter containing postage stamps, the fact that the letter was a decoy is no defense.

Error was likewise assigned to the refusal of the court to charge that there was a fatal variance between the indictment and proof in respect to the description of the letters, for the stealing or embezzling of which the defendant was indicted.

In the indictment it was averred that the letters in question had come into the defendant's possession as a railway postal clerk, to be conveyed by mail and to be delivered to the persons addressed. It was disclosed by the evidence that the letters and money thus mailed belonged to the inspectors who mailed them, and were to be intercepted and withdrawn from the mails by them before they reached the persons to whom they were addressed.

There is no merit in this assignment. The letters put in evidence corresponded, in address and contents, to the letters described in the indictment, and it made no difference, with respect to the duty of the carrier, whether the letters were genuine or decoys with a fictitious address. Substantially this question was ruled in the case of *Goode* v. *United States*, above cited.

The judgment of the court below is affirmed.

NOTE.—*As to obstructing the mail; what constitutes the offense,*—see note to United States v. Kirby, 19: 278.

T. J. BRYAN, *Appt.*,
v.
M. W. KALES.

(See S. C. Reporter's ed. 411-415.)

A mortgagee in possession, when cannot be ousted.

A mortgagee in possession after irregular foreclosure proceedings in which he bid in the property cannot, while his debt is past due and unpaid and no offer to redeem or tender of payment is made, be ousted in ejectment by the holder of the bare legal title, which, if the foreclosure was void, is subject to the lien of the mortgage and the mortgagee's right of possession until the debt is paid.

[No. 198.]

Submitted December 19, 1895. Decided April 13, 1896.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of the Second Judicial District of that Territory in favor of the defendant, M. W. Kales, in an action brought by T. J. Bryan to recover possession of a tract of land. *Affirmed.*

See same case below, 31 Pac. 517.

Statement by *Mr. Justice* **Shiras**:

*This was an action of ejectment [412 brought August 12, 1887, in the district court of the second judicial district of the territory of Arizona, county of Maricopa, by T. J. Bryan against M. W. Kales, to recover possession of a tract of land in that county containing 160 acres. The case was tried by the court, a jury having been waived, and on December 6, 1890,

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judgment was entered for the defendant, whereupon the plaintiff appealed to the supreme court of the territory of Arizona. In that court the case was heard upon an agreed statement of facts, and the judgment of the district court was affirmed. The plaintiff then appealed to this court.

The facts, as they appear in the agreed statement, are substantially as follows:

On May 26, 1882, one Jonathan M. Bryan, who then owned the S. E. ¼ of section 2, T. 1 N., R. 8 E., Gila and Salt river meredian, being the land in controversy in this action, executed to the said M. W. Kales his promissory note for the sum of $5,615, payable May 26, 1883, with interest at the rate of 1½ per cent a month, and to secure the same, on the said date he and his wife, Vina Bryan, executed and delivered to Kales a mortgage of all the said land.

On August 29, 1883, Jonathan M. Bryan died intestate, leaving Vina Bryan, who was his wife at the time he acquired the said property, his widow and sole heir. On September 13, 1883, the said M. W. Kales filed his application for letters of administration in the probate court of the said county wherein Jonathan M. Bryan resided at the time of his death, and in which the said land was situate, and such proceedings were had thereon that Kales was duly appointed administrator of Bryan's estate on September 24, 1883. He proceeded in the administration of the estate until December 6, 1884, when the administration was closed, and he was discharged from his trust. In such proceedings the said property was not distributed.

Kales, while he was so acting as administrator, and while he was the owner of the note and mortgage, brought an action in the district court of the territory of Arizona, by a complaint filed October 3, 1883, in which he, M. W. **413**]Kales, as *plaintiff, sued himself, M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, as defendant, asking for judgment upon the note and foreclosure of the mortgage, and for a sale of the land to satisfy the judgment. To that suit Vina Bryan was made a party defendant. On the same day a *lis pendens* was duly filed in the office of the county recorder of the said county. On October 3, 1883, a summons was duly issued out of the said court, and duly served upon M. W. Kales, administrator, the defendant named in the action; and on the same day a summons was duly issued and served upon the said Vina Bryan. M. W. Kales, administrator, as defendant, made answer on the same day, and admitted each and every allegation of the complaint, and consented that a judgment and decree might be entered in accordance with the prayer thereof; and Vina Bryan, answering the complaint, denied any individual liability on her part to the plaintiff, admitted each and every material allegation in the complaint, in so far as the same did not imply a personal liability on her part; disclaimed all right, title, and interest in the said property in any way conflicting with the mortgage; and prayed to be dismissed.

Upon a day of the regular term of the said court, October 16, 1883, the said cause came on for trial, and the same having been tried and duly submitted, the court on that date rendered judgment against M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, defendant, in favor of M. W. Kales, plaintiff, for the sum of $5,330.80, entered a decree to foreclose the said mortgage, and ordered that the said property be sold to satisfy the judgment, and that the defendants be barred and foreclosed of all equity of redemption of, in, and to the said property from and after the delivery of the sheriff's deed to the same. On November 10, 1883, an order for the sale of the property was issued out of the court on the judgment and delivered to the sheriff of Maricopa county for execution, and on December 15, 1883, the sheriff, having advertised the land for sale under the judgment for the time prescribed by law, offered the same for sale to the highest bidder, for cash, and sold the same to the said M. W. *Kales for the sum of $4,500, that being [**414** the highest price bid, and subsequently executed and delivered to Kales a deed therefor, dated June 19, 1884.

Afterwards Vina Bryan, the widow of Jonathan M. Bryan, married one R. D. Brown, and thereafter,—namely, on June 29, 1887,—she conveyed, by quitclaim deed, in the name of Vina Brown, to T. J. Bryan, the plaintiff in the present action, such interest as she then had in the said land.

It further appears by the agreed statement of facts in this case that Kales paid the said amount for the property, and that such amount was the market value of the same; that from the date of sale to the time of the commencement of this action, Kales paid $434.88 in taxes and $3,048.87 for improvements upon the property; that M. W. Kales, the plaintiff in the said suit, was the same person as M. W. Kales, administrator, the defendant therein; that at the time of the commencement of the present suit the defendant was in possession of the property; that no part of the property was sold by the said administrator in the course of his administration, and that the note and mortgage executed to Kales were not paid or satisfied in any way, unless by the said sale.

Messrs. **Wm. A. McKenney,** *Webster Street,* and *Ben. Goodrich* for appellant.

Messrs. **R. C. Garland, A. H. Garland,** and *A. O. Baker* for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

Whether the judgment in the case of *Kales* v. *Kales, Administrator of the Estate of Jonathan M. Bryan,* was void because of the alleged fact that the plaintiff, suing as the creditor of the estate to foreclose a mortgage, was the same person who, as defendant, represented the estate; whether the judgment was open to attack collaterally; and whether Mrs. Vina Brown, who was the widow and sole heir of Jonathan M. Bryan, was estopped from assailing the judgment, by reason of *having appeared[**415** and answered in the foreclosure suit, acknowledging the debt and consenting to the sale,—are questions which we deem it unnecessary to determine. There was another ground of defense so conclusive and free from difficulty

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that we prefer to place upon it our judgment affirming that of the court below.

It is admitted that the defendant below was a mortgagee in possession, with his debt past due and unpaid. The plaintiff was not offering to redeem, and had not tendered payment of the debt, but stood on the bare legal title, subject, if the foreclosure proceeding were void, to the lien of the unpaid mortgage and to the right of the mortgagee to retain possession until his debt was paid. This is the English doctrine, and it prevails generally in the United States. *Birch* v. *Wright*, 1 T. R. 378; *Simpson* v. *Ammons*, 1 Binn. 176, 2 Am. Dec. 425; *Hill* v. *Payson*, 8 Mass. 559; *Parsons* v. *Welles*, 17 Mass. 419; *Doe* v. *Roe* ("*Brobst* v. *Brock*"), 77 U. S. 10 Wall. 519 [19: 1002]. And such, as we learn from the opinion of the supreme court of the territory of Arizona in the present case, is the law of that territory.

The judgment of the supreme court of the territory of Arizona is accordingly affirmed.

T. J. BRYAN, *Appt.*,
v.
GEORGE T. BRASIUS ET AL.

(See S. C. Reporter's ed. 415-419.)

Ejectment—purchaser at judicial sale.

1. A person in possession of land claiming under irregular foreclosure proceedings by which, if void, he acquired the rights of the mortgagee, cannot be ousted in ejectment by one who claims under the mortgagor.
2. An irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such.

[No. 200.]

Submitted December 19, 1895. Decided April 13, 1896.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of the Second Judicial District of that Territory in favor of the defendant in an action of ejectment brought by T. J. Bryan, plaintiff, against George T. Brasius *et al.*, defendants. *Affirmed.*

See same case below, 31 Pac. 519.

Statement by *Mr. Justice* **Shiras:**

In his lifetime one Jonathan M. Bryan, who was the owner of the 160 acres of land in con-
416 troversy in this action, being the *N. E. ¼ of section 5, T. 1 N., R. 3 E., Gila and Salt river meridian, executed and delivered his promissory note to M. W. Kales, February 23, 1883, for the sum of $2,500 payable February 23, 1884, with interest at the rate of 1½ per cent a month. To secure the payment of the note, on the same day he executed and delivered to Kales a mortgage of all the said land. At that time, and also at the time he acquired the said property, Jonathan M. Bryan was a married man, his wife being Vina Bryan. On August 29, 1883, Jonathan M. Bryan died intestate, leaving Vina Bryan his widow and sole heir; and on September 24, 1883, the said M. W. Kales was duly appointed administrator of his estate by the probate court of Maricopa county, territory of Arizona, wherein the said land was situate, and continued in such office until the administration was closed, December 6, 1884. In the administration of the estate the said property was not distributed.

On September 28, 1883, Kales brought an action in the district court of the territory of Arizona county of Maricopa, in which he, M. W. Kales, as plaintiff, sued himself, M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, as defendant, and in which he asked for judgment upon the note and foreclosure of the mortgage, and for a sale of the mortgaged premises to satisfy the judgment. A summons was duly issued out of the said court on October 5, 1883, and on the same day was duly served on M. W. Kales, administrator, the defendant named in the action, who, on the day following, made answer, and admitted each and every allegation of the complaint filed, and consented that judgment or decree might be entered in accordance with the prayer thereof.

On the 9th day of October, 1883, being a day of the regular term of the said court, the said cause came on for trial, and the same having been tried and duly submitted, the court, on October 16, 1883, rendered judgment against M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, defendant, in favor of M. W. Kales, plaintiff, for the sum of $2,670, entered a decree to foreclose the mortgage, and ordered that the property be sold to satisfy the judgment; and *on [417 November 8, 1883, an order for the sale of the premises was issued out of the said court on the judgment and delivered to the sheriff of Maricopa county for execution.

On December 15, 1883, the sheriff, having advertised the property for sale under the judgment for the time prescribed by law, offered the same for sale to the highest bidder, for cash, and sold the same to the said M. W. Kales for the sum of $2,975, that being the highest price bid, and issued to Kales a certificate of sale therefor, which certificate, on June 13, 1884, was sold and assigned by him to one J. T. Sims for the sum of $3,500. On June 16, 1884, the sheriff executed and delivered to J. T. Sims, the assignee of the certificate of sale, a deed for the property, and on February 28, 1887, Sims conveyed the property to George T. Brasius.

In the meantime Vina Bryan married one R. D. Brown, and on June 28, 1887, she conveyed the said property, by quitclaim deed, in the name of Vina Brown, to T. J. Bryan.

By the agreed statement of facts upon which the present case was heard in the court below, and in which the matters stated above are to be found mentioned, it further appears that M. W. Kales, the plaintiff in the said suit, was the same person as M. W. Kales, administrator, the defendant therein; that at the time the present cause of action arose the defendants were in possession of the said property; that no part of the property was sold by the administrator of Jonathan M. Bryan's estate in the course of administration; that the said note and mortgage were never paid or satisfied, unless by the sale under the said foreclosure pro-

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ceedings; that at the said sale made by the sheriff the property sold for its market value; that immediately after the purchase of the property by J. T. Sims, he entered into possession thereof, and that he and those claiming under him were still in possession of the same when the statement of facts in this case was prepared; that Sims and those claiming under him have, since June 16, 1884, paid taxes upon the property, and that after that date he and they made valuable improvements upon the premises, which remain thereon, without any notice of the claim of the plaintiff in this action or his grantor, except such notice as may have **418**]been *imparted by the record in the said suit; and that at the time when Sims bought the property and paid the purchase money therefor he did not know and had no notice that M. W. Kales, from whom he obtained the assignment of the said certificate of sale, was the same person who was the administrator of the estate of Jonathan M. Bryan, deceased, except such notice as may have been imparted by the record aforesaid.

The present action, which was an action of ejectment to recover possession of the said property, was brought July 11, 1887, by T. J. Bryan, the grantee, as aforesaid, of Vina Bryan, against George T. Brasius and others, in the district court of the second judicial district of the territory of Arizona in and for the county of Maricopa. At the trial a jury was waived, and the case was tried by the court. On December 2, 1890, a judgment was entered in favor of the defendant, and the plaintiff thereupon appealed to the supreme court of the territory of Arizona, where the judgment of the said district court was affirmed. The plaintiff then appealed to this court.

Messrs. **Wm. A. McKenney,** *Webster Street,* and *Ben. Goodrich* for appellant.

Messrs. **R. C. Garland, A. H. Garland,** and *A. C. Baker* for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

This case differs from the case of *Bryan* v. *Kales,* just decided, in the particular that the mortgagee Kales is not himself the defendant, but the defendants in possession are his alienees. The question thus presented is precisely the one that was ruled in the case of *Doe* v. *Roe* ("*Brobst* v. *Brock*") 77 U. S. 10 Wall. 519 [19: 1002], where this court held that a mortgagor of land cannot recover in ejectment against the mortgagee in possession, after breach of the condition, or against persons holding possession under the mortgagee; and also held that an irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser **419**] at such sale all the rights *of the mortgagee as such. *Gilbert* v. *Cooley,* Walk. Ch. 494, and *Jackson* v. *Bowen,* 7 Cow. 13.

So in *Jackson* v. *Minkler,* 10 Johns. 479, it was held that the assignee of a mortgage, in possession of the premises, is protected by the mortgage, though no foreclosure of it was shown, against an action of ejectment by a mortgagor.

The judgment of the court below (*Bryan* v. *Brasius* (Ariz.) 31 Pac. 519) was placed on this ground, and it is accordingly *affirmed.*

T. J. BRYAN, *Appt.,*
v.
D. H. PINNEY ET AL.

(See S. C. Reporter's ed. 419.)

Bryan v. *Brasius,* 162 U. S. 415 [*ante,* 1022], followed.

[No. 199.]

Submitted December 19, 1895. Decided April 13 1896.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona. *Affirmed.*

See same case below, 51 Pac. 548.

The facts are stated in the opinion.

Messrs. **William A. McKenney,** *Webster Street,* and *Ben Goodrich* for appellant.

Messrs. **D. H. Pinney,** *A. C. Baker, A. H. Garland,* and *R. C. Garland* for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

This was an action of ejectment brought by T. J. Bryan in the district court of the second judicial district of the territory of Arizona, against D. H. Pinney, Mary E. Pinney, M. H. Sherman, George H. Mitchell, George W. Maull, and the Bank of Napa, to recover possession of block 98 in the town of Phœnix, county of Maricopa. The facts of this case, so far as they present questions for our consideration, are similar to those of the case of *Bryan* v. *Brasius,* just decided, and for the reasons there given, and on the authorities there cited, *the judgment of the supreme court of Arizona is affirmed.*

ARTHUR D. ANDREWS, *Plff. in* [**420**
Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 420-425.)

Mailing obscene letters—when an offense under U. S. Rev. Stat. § 3893—evidence.

1. It is no defense to the crime of mailing obscene letters, under U. S. Rev. Stat. § 3893, as amended by the act of September 26, 1888, that they were sent in answer to letters written under an assumed name by a government detective.
2. Mailing a private sealed letter in an envelope on which nothing appears but the name and address, if it contains obscene matter, is an offense under U. S. Rev. Stat. § 3893, as amended by the act of September 26, 1888.
3. An obscene letter is not vitiated as evidence against a person mailing it, on the ground that it was opened by a person to whom it was not addressed, contrary to the proviso in U. S. Rev. Stat. § 3893, as amended by the act of September 26, 1888, when it was opened by the person to whom it was actually sent, although the address was fictitious, it being addressed to him under a fictitious name.

[No. 532.]

Submitted January 23, 1896. Decided April 13, 1896.

NOTE.—*As to obstructing the mail; what constitutes the offense,*—see note to United States v. Kirby, 19: 278.

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IN ERROR to the District Court of the United States for the Southern District of California to review a judgment of that court convicting Arthur D. Andrews for violation of U. S. Rev. Stat. § 3893, as amended by the act of Congress of September 26, 1888, chap. 1093. *Affirmed.*

See same case below, 58 Fed. Rep. 861.

Statement by *Mr. Justice* **Shiras:**

This case is here upon a writ of error sued out of the district court of the United States for the southern district of California, wherein the plaintiff in error was indicted, tried, convicted, and sentenced for violation of U. S. Rev. Stat. § 3893, as amended by the act of Congress of September 26, 1888, chap. 1093, § 2 (25 Stat. at L. 496). The indictment contained two counts, each of which alleged that in the year 1893, at the city of Los Angeles, county of Los Angeles, the plaintiff in error "did knowingly, wilfully, and unlawfully deposit and cause to be deposited in the United States postoffice at the said city of Los Angeles, county and district aforesaid, for delivery, a certain obscene, lewd, and lascivious letter addressed to 'Mrs. Susan Budlong, box 661, Los Angeles, Cal.;'" and that the said letter was then and there unmailable matter by reason of the indecent character of its contents. **421** The two counts *differed merely in that they described two different letters, alleged to have been dated respectively November 1 and November 3, 1893, and to have been respectively deposited in the said postoffice November 2 and November 3, 1893.

U. S. Rev. Stat. § 3893, as amended by the act of September 26, 1888, is as follows:

"Sec. 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, pamphlet, book, advertisement, or notice of any kind giving information, directly or indirectly, where or how or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails from any postoffice, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken from the mails for the purpose of circulating or disposing of, aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than $5,000, or imprisonment at hard labor not more than five years or both, at the discretion of the court; and all offenses committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and the same effect as if this act had not been passed: *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself."

The defendant demurred to the indictment on the ground that the facts stated therein did not constitute an offense against the laws of the United States. The demurrer was overruled, and the defendant then pleaded not guilty.

*The evidence adduced at the trial [**422** tended to prove that one M. H. Flint, a United States postoffice inspector, having seen in the Los Angeles Herald a certain advertisement bearing the address, "Spero; box 60, this office," mailed to that address a letter referring to the subject of the advertisement, signed "Susan H. Budlong, P. O. box 661, Los Angeles, Cal.," and received in answer thereto, through the postoffice at Los Angeles, a letter signed "Spero," being the letter described in the first count of the indictment; that Flint then sent another letter, signed as above, and having received an answer thereto signed "Spero," wrote a third time, and afterwards received out of the said postoffice a letter signed "A. D. A. 313 N. Broadway," being the letter described in the second count of the indictment. All the letters so received by Flint were enclosed in plain sealed envelopes, neither of which bore any writing save the address. Evidence was also introduced tending to connect the defendant with the mailing of the letters.

The said letters of Flint, and the testimony concerning the same, were introduced against the objections of the defendant, and to the introduction thereof he duly excepted.

At the conclusion of the evidence for the government, the defendant moved the court to instruct the jury to acquit him on the ground that if any offense had been committed it had been done at the request of Flint, a government officer, and on the ground that the evidence was insufficient to connect the defendant with the alleged offense. The motion was denied by the court, to which ruling the defendant excepted. The defendant then put in testimony tending to prove his good character, and to countervail the government's evidence to the effect that the said letters were mailed by him.

At the close of all the testimony the defendant requested the court to give the jury certain instructions, which request was refused. Other instructions were given instead, which do not appear in the record. To the court's refusal to give the instructions proposed by the defendant, and to the giving of other instructions, the defendant excepted.

Messrs. **J. Marion Brooks** and **M. D. Brainard** for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

Error is attributed to the court below in permitting the witness Flint to testify in the case, for the reason that he was an officer of the United States, and that correspondence was carried on, through the mails, for the sole purpose of obtaining evidence from the defendant upon which to base the prosecution.

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A similar contention was disposed of by this court in the case of *Grimm* v. *United States*, 156 U. S. 604 [39: 550], where it was said: "It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that the writer was a government official—a detective, he may be called—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by the government official." *Goode* v. *United States*, 159 U. S. 663 [*ante*, 297], though under a different statute, is to the like effect.

The evidence showed that the letters in question were private sealed letters, enclosed in envelopes upon which there was nothing but the name and address of the person to whom they were sent, and it is contended that the depositing of such letters in the mail is not an offense within the meaning of U. S. Rev. 424] Stat. § 3893, even as amended in *1888. By that amendment the word "letter" was inserted in the statute. In the case of *United States* v. *Chase*, 135 U. S. 255 [34: 117], which was the case of an indictment for an offense committed before the amendment, *Mr. Justice* Lamar, who delivered the opinion of the court, expressly refrained from deciding "whether the term 'letter,' introduced by the amendment of 1888, could be held to include a strictly private sealed letter."

Owing, perhaps, to the doubt thus suggested, it was held in several of the lower courts that the word "letter," thus introduced into the statute, must, in the light of the other words used, be deemed to be some sort of a publication, and not merely private sealed letters. *United States* v. *Wilson*, 58 Fed. Rep. 768; *United States* v. *Warner*, 59 Fed. Rep. 355; and *United States* v. *Jarvis*, 59 Fed. Rep. 357. The contrary view was taken in *United States* v. *Andrews*, 58 Fed. Rep. 861,—the present case;—in *United States* v. *Nathan*, 61 Fed. Rep. 936; and in *United States* v. *Ling*, 61 Fed. Rep. 1001.

However, any doubt there may have been as to the proper meaning to be given to the word has been removed by the case above cited, of *Grimm* v. *United States*, 156 U. S. 604 [39: 550], where mailing a private sealed letter in an envelope on which nothing appeared but the name and address, but containing obscene matter, was held to be an offense within the statute.

It is likewise argued that, because of the provision of the law that nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself (25 Stat. at L. 496), the act of the inspector in opening the letters addressed to "Susan H. Budlong" was itself an offense against the law, which would vitiate the evidence thus produced against the defendant. The inspector, however, testified that he and Susan H. Budlong were the same person, or, in other words that the address was fictitious.

Complaint is made because the court failed to give defendant's requests for instructions; but the instructions actually given by the court are not disclosed by the record, and we may presume that such instructions covered the defendant's requests so far as they stated the law correctly. This we are *the more [425 ready to do in the present case, as no specific exceptions were taken to the action of the court in refusing or in giving instructions. *Reagan* v. *Aiken*, 138 U. S. 109 [34: 892].

There were other assignments of error, but we think they do not merit special notice.

The judgment of the court below is affirmed.

ROBERT B. DASHIELL, *Appt.*, *v.* JAMES B. M. GROSVENOR ET AL.

(See S. C. Reporter's ed. 425-434.)

Patent for breech-loading cannon.

The first claim of the patent No. 425,584, issued to Samuel Seabury April 15, 1890, for an improve-

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NOTE.—*For what patents are granted; when declared void,*—see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76, and Corning v. Burden, 14: 683.

As to when assignee may sue for infringement; when patentee must; when they must join,—see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13: 824.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,—see note to Corning v. Burden, 14: 683.

As to anticipation of patents; prior patents and publications; application and issue; claims and specifications,—see note to Leggett v. Standard Oil Co. 37: 737.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 006.

As to what constitutes infringement of patents; similarity of devices; designs; combinations; machines; construction of patent,—see note to Royer v. Coupe, 36: 1073.

Patentability of inventions; combinations; novelty; change of form, size, or material; new applications of old devices; anticipation; priority; construction of patent; infringement.

The operation or function of a machine is not patentable as a process. Risdon Iron & L. Works v. Medart, 158 U. S. 68 (39: 899).

The utility of a patent is presumed against one who has applied for a similar patent and made use of an equivalent device. Du Bois v. Kirk, 158 U. S. 58 (39: 895).

A municipality of elements does not make a combination patentable so long as each element performs some old and well-known function. Richards v. Chase Elevator Co. 158 U. S. 299 (39: 991).

A combination to be patentable must produce a result as a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Durhum v. Seymour, 23 Wash. L. Rep. 273.

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ment in breech-loading cannon, which claims a combination with such cannon of a breech-block which can be withdrawn backward, a breech-block carrier hinged to the breech, and a breech-block retractor hinged to the breech separate from the carrier, to move independently of it, to draw the breech-block thereinto and push it therefrom, but capable of moving the carrier while the breech-block is therein,—must be limited to the precise mechanism described, in view of the state of the art at the date of such invention; and it is not infringed by the Dashiell device, patented Feb. 9, 1892, by patent No. 468,331.

[No. 569.]

Argued January 9, 10, 1896. Decided April 13, 1896.

ON CERTIORARI to the Circuit Court of Appeals for the Fourth Circuit to review a decree of that court reversing the decree of the Circuit Court in favor of the plaintiff, and remanding the cause to the Circuit Court with instructions to dismiss the suit, in a suit in equity brought by James B. M. Grosvenor *et al.*, plaintiffs, against Robert B. Dashiell, for the infringement of letters patent issued to Samuel Seabury for an improvement in breech-loading cannon. *Decree of circuit court of appeals affirmed.*

See same case below, 62 Fed. Rep. 584, 25 U. App. 227.

Statement by *Mr. Justice* **Brown**:

This was a bill in equity by the appellees against Dashiell for the infringement of letters patent No. 425,584, issued April 15, 1890, to Samuel Seabury, a lieutenant in the United

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A combination to be patentable must produce a single new and useful result, or an old result in a better or cheaper manner as the product of the combination. The product of an aggregate of several results, each the complete result of one of the combined elements, does not make the combination patentable. S. F. Heath Cycle Co. v. Hay, 67 Fed. Rep. 246.

In a combination patent it is immaterial whether the elements are new or old, if the combination is novel and practically produces a new and useful result. Rhodes v. Lincoln Press-Drill Co. 64 Fed. Rep. 218.

The test whether a patent involves invention or mere mechanical skill is not whether every mechanic would do the work in one and the best way, but whether any mechanic might without invention do the work in the particular manner sought to be exclusively appropriated. Johnson Co. v. Pennsylvania Steel Co. 67 Fed. Rep. 940, 72 Pat. Off. Gaz. 594.

The test of novelty is essentially the same in the case of a manufacture and of a machine. Campbell v. Bayley, 18 U. S. App. 486, 63 Fed. Rep. 463.

Conception alone is insufficient to confer a prior right to a patent. The invention must be reduced to practice in the form of an operative machine. Front Rank Steel Furnace Co. v. Wrought Iron Range Co. 63 Fed. Rep. 995, 72 Pat. Off. Gaz. 288.

Knowledge of a prior device must be imputed to a patentee. Allen v. Steele, 64 Fed. Rep. 793.

Doubt as to the novelty of an invention is aided by the fact that it has gone into general use and displaced other devices. C. & A. Potts & Co. v. Creager, 155 U. S. 597 (39: 275), 70 Pat. Off. Gaz. 494.

The fact that the patented article may have been popular and met with large sales is not important when the alleged invention is without patentable novelty. Olin v. Timken, 155 U. S. 141 (39: 100), 69 Pat. Off. Gaz. 1361.

Increased speed of a machine, attributable only to the superior strength and firmness of a part, is not a new result which indicates invention. Vulcan Iron Works v. Smith, 62 Fed. Rep. 444.

A novelty involving a state of art so universal and common as the making and adjustment of clothing must be of a radical character to overcome the presumption against its patentability. Dalby v. Lynes, 64 Fed. Rep. 376, 71 Pat. Off. Gaz. 1317.

A mere carrying forward of original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent. Market Street Cable R. Co. v. Rowley, 155 U. S. 621 (39: 284), 70 Pat. Off. Gaz. 632.

Increasing the strength of a particular part in a prior machine is not invention. Vulcan Iron Works v. Smith, 62 Fed. Rep. 444.

That the means provided in an earlier patent may have been so feeble or inadequate as only imperfectly to perform their duty will not render their mere extension in size, number, or change of form a patentable improvement. Wells v. Curtis, 66 Fed. Rep. 318.

The use of the dried husk or pericarp of the cocoanut in place of cork or other buoyant substances in life preservers, buoys, or rafts is not patentable, although economy in manufacture and greater buoyancy of structure are obtained. *Re* Cheneau, 70 Pat. Off. Gaz. 924, 23 Wash. L. Rep. 107.

Mere improvements produced by the use in a usual known manner of previously known instruments from materials in general use, without application of any new principle, do not entitle their authors to a patent although the device goes into general use. Klein v. Seattle, 63 Fed. Rep. 702, 70 Pat. Off. Gaz. 131.

The discovery that a feature of a patentable invention which was valued for one purpose is also useful for another cannot be the basis of a separate patent. Durham v. Simonds, 69 Pat. Off. Gaz. 567, affirmed 71 Pat. Off. Gaz. 601.

The application of carbon, which has long been known as a nonconductor of heat, for the purpose of a crucible, or any other purpose, merely on account of its nonheat-conducting quality, is not the subject of invention, but is a mere mechanical appliance. *Re* Heroult, 23 Wash. L. Rep. 72, 70 Pat. Off. Gaz. 784.

There is no invention in a bracket support to obviate a sag or weakness in a long tray for drying malt. Toepfer v. Galland-Henning M. D. Mfg. Co. 67 Fed. Rep. 134.

The question whether a machine is anticipated by former machines depends upon whether, before any one had thought of the application of the device to the purpose, the applicant would construct the machine. Beach v. American Box Mach. Co. 63 Fed. Rep. 597, 69 Pat. Off. Gaz. 1067.

Models or drawings may constitute invention to avoid anticipation. Bowers v. Von Schmidt, 63 Fed. Rep. 572.

Prior knowledge and use by a single person is sufficient to defeat a patent. The manufacture of samples for a dealer constitutes prior use and knowledge by others than a subsequent patentee, although such samples were not known to others than the maker and one who aided in finishing them and the person for whom they were made, where they were capable of practical use complete, and the person for whom they were made was not under restrictions as to their disposal. Dalby v. Lynes, 64 Fed. Rep. 376, 71 Pat. Off. Gaz. 1317.

A patent for a combination as an entirety is not

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States Navy, for an improvement in breech-loading cannon. In his specification the patentee made the following statement of his invention:

"This improvement relates to breech-loading cannon in which a screw breech-block, which is withdrawn in a rearward direction, is employed, with a swing carrier or receiver hinged to one side of the breech of the gun, and into which the breech-block is withdrawn, 426] and which serves as a guide for *directing the breech-block into and from its seat in the breech and as a support for the breech-block while out of the gun. In such a gun there are three movements necessary to open the breech—namely: first, the turning of the breech-block to unlock it; second, the withdrawal of the breech-block backward into the receiver; and, third, the swing aside of the receiver with the breech-block in it. These three movements have hitherto been separately performed by hand, the breech-block having been first turned to unlock it by hand and then pulled by hand back into the receiver, and the receiver having been then swung aside by hand with the breech-block in it to open the breech.

"The object of this improvement is to provide for the more rapid working, loading, and firing of such breech-loading cannon by effecting all these movements in succession by a continuous movement of a single lever."

The plaintiff relied only upon the first claim of the patent, which reads as follows:

"1. The combination, with a breech-loading cannon and a breech-block for the same, which is withdrawn in a rearward direction, of a

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anticipated by several prior patents, publications, or machines, each containing separate parts of the entire invention. Rhodes v. Lincoln Press-Drill Co. 64 Fed. Rep. 218.

To constitute prior use or anticipation of a patent for a combination of old devices to secure a new result, there must be a device using all such co-operative parts or their mechanical equivalents in one machine. Wickes v. Lockwood, 65 Fed. Rep. 610.

Unsuccessful and abandoned experiments do not affect the validity of a subsequent patent. Deering v. Winona Harvester Works, 155 U. S. 286 (39: 153), 69 Pat Off. Gaz. 1641.

Testimony not controverted except by argument, to the effect that a model like that of a patent was made without difficulty from the drawings and specifications of a prior patent, is sufficient to establish anticipations. National Co. v. Belcher, 68 Fed. Rep. 665.

Conceiving the idea of an invention and embodying it in a successful experimental form which is abandoned, will not defeat a patent to another person who independently makes the same invention afterwards. Mast v. Iowa Windmill & P. Co. 68 Fed. Rep. 213.

Proof beyond a reasonable doubt is required to establish priority of invention against the decision of the patent office by suit under U. S. Rev. Stat. § 4915. Standard Cartridge Co. v. Peters Cartridge Co. 69 Fed. Rep. 408, 72 Pat. Off. Gaz. 742.

One who conceives an idea embodied in an invention by another to whom he communicates it is entitled to the patent therefor. Soley v. Hebbard, 23 Wash. L. Rep. 56, 70 Pat. Off. Gaz. 921.

As between interfering applicants for a patent, priority will be awarded to him who first produced an operative machine, rather than to him who first conceived the idea of the invention. Glidden v. Noble, 23 Wash. L. Rep. 485, 71 Pat. Off. Gaz. 141.

One who conceives a patentable idea, embodies it in means by which it can be carried out, and thereby perfects it, is the real inventor as against one who conceived the idea, but only imperfectly tested it, and did not develop it into practical utility, but abandoned any attempt to make it practically available. Ecaubert v. Appleton, 67 Fed. Rep. 917, 71 Pat. Off. Gaz. 1617.

Where the novelty of the convention is at least open to doubt, the patentee should be held to a rigid construction of his claims. Wright v. Yuengling, 155 U. S. 47 (39: 64), 69 Pat. Off. Gaz. 639; Wright v. Beggs, 155 U. S. 54 (39: 67).

The claims of a patent cannot be construed to include a feature not mentioned in the specifications but contrary thereto. Michigan C. R. Co. v. Consolidated Car-Heating Co. 67 Fed. Rep. 121, 71 Pat. Off. Gaz. 1028.

A patentee must abide by conditions imposed by the patent office and accepted upon the issuing of his patent, and cannot have a construction thereof which will do away with such conditions. Walter A. Wood Mowing & R. Mach. Co. v. William Deering & Co. 66 Fed. Rep. 547.

A presumption of substantial difference between two inventions arises from the grant of patents for both of them—especially when both applications were pending at the same time. Boyd v. Janesville Hay Tool Co. 158 U. S. 260 (39: 973), 71 Pat. Off. Gaz. 1315.

That a patentee did not realize the full extent of his discovery will not deprive him of all the necessary and legitimate results obtained by his invention, including those that were unexpected. Thomas Meter Co. v. National Meter Co. 65 Fed. Rep. 427, 70 Pat. Off. Gaz. 925.

Infringement is not prevented by the use of the patented invention in connection with improvements subsequently adopted by the inventor and not patented. Travers v. American Cordage Co. 64 Fed. Rep. 771, 70 Pat. Off. Gaz. 277.

Infringement of a patent is not avoided by improvement, where the improved article is essentially the same as that patented, and operates substantially in the same way producing the same result. Bowers v. Von Schmidt, 63 Fed. Rep. 572.

A patent in which the invention consists of making a part of the machine in a single casting, rather than in the integral construction of such part, is not infringed by a machine in which such part is composed of two pieces so securely bolted together as to produce the result of a single casting. Vulcan Iron Works v. Smith, 62 Fed. Rep. 444.

A machine operating upon the same principle as one held to infringe a patent, and substantially in the same way, will also be held an infringement. Gessner v. Globe Woolen Co. 63 Fed. Rep. 961.

A grating made up of short vertical slots, none of which run the entire height or even half the height of a spark arrester, does not infringe a spark arrester made of vertical bars with spaces between them for their whole length. Lehigh Valley R. Co. v. Kearney, 158 U. S. 461 (39: 1055), 72 Pat. Off. Gaz. 139.

To constitute infringement of a combination, the infringing device must include every element of the combination as claimed. Kinzel v. Luttrell Brick Co. 67 Fed. Rep. 926, 72 Pat. Off. Gaz. 900.

A patent for a combination is not infringed by a device omitting some of the elements claimed, although the omitted elements are not in fact of the essence of the real invention. Kinzel v. Luttrell Brick Co. *supra*.

Adding another element to a patented combination, making a new combination which performs a work which the patented combination could not, is not infringement. United States v. Berdan Firearms Mfg. Co. 156 U. S. 552 (39: 530).

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breech-block carrier hinged to the breech, and a breech-block retractor hinged to the breech separate from said carrier to move independently of said carrier to draw the breech-block thereinto and push it therefrom, but capable of moving the said carrier while the breech-block is therein, substantially as set forth."

The plaintiffs were Seabury, the patentee, and certain others, who were assignees of interests under the patent. The defendant was, when the suit was begun, an ensign in the United States Navy, and the infringing acts were admitted to have been done under his authority and procurement, under a contract between himself and the Navy Department, through which he was to be paid a stipulated sum for each gun manufactured, embodying the infringing device. For this device letters patent No. 468,831 had been issued to him February 9, 1892.

Upon a hearing, upon pleadings and proofs, the circuit court was of the opinion that the Seabury patent was valid, and the Dashiell patent an infringement thereon, and it entered a decree to that effect. 62 Fed. Rep. 584.

427] *On appeal to the court of appeals, that court was of opinion that an injunction would prohibit the officers in charge of the navy yard from manufacturing guns for use upon the war vessels of the United States, and for that reason ought not to be granted. The bill of complaint also relied upon certain allegations of fraud which the court held were material to be proved, and were not sustained; and for those reasons it reversed the decree of the court below and dismissed the bill. 25 U. S. App. 227.

Application was thereon made to this court for a writ of certiorari, which was granted.

Messrs. **Samuel F. Phillips, Wm. E. Singleton,** and *F. D. McKenney* for appellant.

Messrs. **William A. Jenner** and **William G. Wilson** for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

The question of infringement in this case turns largely upon the construction to be given to the first claim of the Seabury patent. If, as set forth in his specification, he is entitled to claim broadly, by the continuous operation of a single lever, the performance of the three movements necessary to open the breech of a breech-loading gun, *viz.*, unlocking the breech-block, pulling it back into the receiver, and swinging it to one side, the Dashiell patent, which effects the same movements in substantially the same way, would probably be an infringement. It is claimed that, prior to the Seabury patent, those three movements were separately made by hand, and that the novelty of his invention consists in their successive performance by the single sweep of a lever.

To ascertain whether he is entitled to this broad claim, it is necessary to consider somewhat at length the state of the art at the time the Seabury patent was issued. In modern war-

428] fare, *breech-loading guns have largely supplanted the old muzzle-loading patterns, and the skill of the inventor has been applied to perfecting the mechanism whereby the breech may be effectually closed, to prevent the escape of gas, and at the same time rapidly and easily opened and thrown back for the reception of another cartridge. Various forms of breech-block are used, but the patent in suit relates to what is known as the mutilated or slotted screw form, which consists of a circular plug of metal, with equal parts of its threads cut away. The interior surface of the breech or bore is also fitted with a corresponding screw, equal parts of which are also cut away. When the block is in the gun in position for firing the screw of the breech-block is interlocked with the corresponding threads in the interior of the gun, so that the breech-block is held so firmly to the gun itself as to be substantially a solid body of metal. After firing, the breech-block is turned partly around, so that the threads of the screw are released and brought opposite the smooth portion of the bore. This admits of the breech-block being withdrawn from the gun, where it rests upon what is known as the carrier, which is hinged to the breech and swung to one side, to leave the bore free for the reception of another cartridge. Formerly the three movements of turning the block, withdrawing it from the chamber, and swinging it to one side, had been separately performed by hand. Was Seabury the first to effect these three movements by the single and continuous operation of a lever?

John P. Schenkl purported to do this in the patent issued to him August 16, 1853, performing the movements "through the intervention of appropriate cams, catches, and springs, by the motion of a single lever, worked by the hand of a gunner." The movement of the lever was not continuous, and the gun was of a different class, opening in the middle of its length, tipping up its breech and receiving the cartridge at the muzzle of its rear section, like the ordinary muzzle loader. The lever is necessarily given a backward and forward motion to support the two portions of the gun, and turn the breech portion upward, and the same lever is also given another backward and

*forward motion, to again connect the [429 two portions of the gun together. Obviously it is not an anticipation.

The patent to Cochran of November, 1859, throws no light upon the question in this case. The same may be said of the patent to Goodwin of May, 1864. While the patent to Driggs and Schroeder of April 5, 1887, shows a decided advance in the method of breech-loading, there is nothing in the invention to indicate that the patentee had in mind the peculiar features claimed for the Seabury patent. The English patent to Farcot, a French engineer, issued the same day as the Driggs & Schroeder patent, relates to an apparatus so arranged that, by the rotation of a single axis, the successive movements necessary for introducing or withdrawing the breech-block are performed with ease, rapidity, and exactness. Mechanical means are utilized to operate the breech-block in all three of its movements, for opening as well as closing, and all of them are performed through a crank handle. Its appearance marks a step in advance in the development of the breech mechanism, and the accomplishment of the three motions in one.

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British patent No. 9,813 to Albert Sauvée, issued May 4, 1888, also exhibits mechanical gearing for operating a slotted screw breech-block, by a continuous movement in a given direction. In this patent the rotation of the breech-screw, its extraction, and the rotation of the carrier succeed each other, while the hand-crank is being turned in the same direction. The breech is closed by working the handle in the opposite direction.

The British patent to Sauvée of July 4, 1887, No. 9,458, also discloses a breech mechanism for operating a slotted screw breech-block, giving all the three necessary movements of rotation, retraction, and swinging aside, by the continuous movement of a simple hand lever. The breech-block in this patent is of conical form and not cylindrical, as in the other patents. The general arrangement shows a lever attached to the breech block near its middle, and connecting with the carrier by means of a fulcrum, so that power applied to the end of the lever will cause the breech-block to move 430] *forward and backward in the carrier, and into and out of the gun. Besides this, the necessary gear-wheels are fitted to provide necessary rotation to the block at the proper time. When the block is fully withdrawn upon the carrier, the latter is swung to one side by the continued motion of the same lever.

British patent No. 7,435, granted February 12, 1889, to Canet, also described, in the first claim, "an improved construction, whereby the opening of the breech of guns can be effected completely by a rotary movement always in the same direction, the rotation of the breech-screw being effected by the action of a rack mounted upon an endless screw, upon a toothed sector on the breech-block; the longitudinal movement of the breech-screw being effected by the direct action of a pinion upon the threads of the breech screw; and the pivoting of the bracket being effected by the direct action of the operating shaft upon the endless vertical screw."

Still another system, in which the free motions required of the breech-block are accomplished by a single movement of a lever, is found in the British patent No. 7,195 to Nordenfeldt, May 17, 1887. In its general principle of effecting these movements, it bears a closer resemblance to the Seabury patent than any other exhibit. "The invention," says the patentee, "relates to breech loading guns in which the breech is closed by a block entering the breech opening, and having spaced screw threads upon it engaging corresponding spaced screw-threads, within the breech of the gun. In such guns I give all the necessary movements to the breech-block by means of a lever handle and axis rotating through the arc of a circle. The same movement also actuates an extractor and gives the necessary movement to it for withdrawing the cartridge case from the chamber of the gun."

The patentee Nordenfeldt thus describes the operation of his device:

"In opening the breech, as soon as the lever handle is moved sufficiently far to disengage the screw-threads, a shoulder upon or moving with the lever handle comes against another shoulder upon the withdrawing arm, and this 431] then commences *to turn with the hand lever moving rearwards from the breech of the gun. In this movement it draws back the breech-block of the gun, the breech-block being engaged with the disengaging arm in the manner already described. In this way the breech block is landed upon the tray or support, and, as soon as this is the case, the tray or support also commences to move round with the lever handle carrying the breech-block to the rear, and at the same time conveying it to one side so as to leave the breech opening unobstructed. In closing the breech the same movements take place in reversed order. First, all the parts move together, whilst the breech block is brought back into position to enter the breech opening, then the tray or support remains stationary whilst the breech-block is thrust from off it by the withdrawing arm, and finally this arm remains at rest during the last part of the movement of the lever handle, whilst the rotary movement is imparted to the breech-block requisite to cause the engagement of the screw-threads."

The lever in that patent is entirely separate from the carrier and moves independently of it, except when the breech-block is fully supported by the carrier, at which time it moves with the latter. The breech-block is rotated by a rack sliding on the face of the breech of the gun, connecting with an arm or projection on the driving shaft. A large model of the breech mechanism of this patent, made from the drawings at the Navy Department, was put in evidence, with written directions for working it.

It is claimed by the plaintiffs in this connection that the model of the Nordenfeldt patent, so made and exhibited, is inoperative, and hence cannot be said to be an anticipation of the first claim of the Seabury patent; and such seems to have been the view of the learned judge who delivered the opinion of the circuit court. It does not clearly appear, however, whether this inoperativeness is due to a fault in the original construction of the machine or to a slight defect in the model made from the drawings in the Navy Department. This model was constructed largely of wood, and might very possibly have become so worn by experimental use, as to fail to *perform [432 perfectly all its functions. It does not seem probable that the patentee would have taken out a patent for a wholly inoperative combination, especially in view of the fact that there were at least half a dozen operative devices already in existence upon which his was claimed to be an improvement. Inoperative devices are frequently set up as anticipations, but they are usually such as have proved to be so far failures that the inventor has not taken out patents for them, and are resuscitated for the purpose of showing that other machines similar to the one patented have been invented before. The very fact that a machine is patented is some evidence of its operativeness, as well as of its utility, and where a model is constructed after the design shown in a patent which is not perfectly operative, but can be made so by a slight alteration, the inference is, that there was an error in working out the drawings, and not that the patentee deliberately took out a patent for an inoperative device.

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But, however this may be, it is clear that the model in question could be made operative by a very trifling alteration, increasing the friction between the bolt and the guideway in the withdrawing arm. Either the filling piece was made a little too small or else it had become worn by constant use of the model. That this was simply a question of friction was readily demonstrated by slipping a thin piece of paper between the filling piece and the bottom of the guideway, when the device appeared to be fully operative. The conclusion is irresistible that the alleged inoperativeness was not one due to any inherent defect in the mechanism described in the patent, but to a want of exactness in the model, due either to imperfect construction, or to the employment of another material than was contemplated in the patent.

As several of the patents above described show that, at the date of the Seabury invention, it was no longer a novelty to perform the three movements necessary to open and close the breech by the continuous movement of a single lever, it follows that the first claim of this patent cannot receive the broad construction claimed, but must be limited to the precise mechanism described. This is for a com-[433]bination: 1. Of a *breech-loading cannon and a breech-block capable of being withdrawn in a rearward direction from the gun. 2. A breech-block carrier hinged to the breech. 3. A breech-block retractor hinged to the breech separate from its carrier. 4. That the retractor shall move independently of the carrier, to withdraw the breech-block thereinto and push it therefrom. 5. And that it shall be capable of moving with the carrier, while the breech-block is therein.

It may be doubtful whether, in view of the Nordenfeldt patent, there is any novelty even in the exact combination described in this claim, since in both cases there is a vertical axial bolt or pivot hinged to the breech of the gun; a crank arm secured to this bolt and operating the rack; a retractor arm permanently secured to the breech-block and hinged to the breech separate from the carrier, and moved independently of it; a carrier hinged to the breech-block, the carrier and retractor being capable of moving together, while the breech-block is on the carrier; the movement being transmitted from the retractor to the carrier through the breech-block. But whether the Nordenfeldt device be an exact anticipation or not, the Dashiell device differs from the Seabury patent much more than the latter differs from the Nordenfeldt machine, since the retractor of the Dashiell device is not hinged to the breech at all, but is hinged to the carrier; and is not separate from the carrier, but is a part of it, and when the carrier moves, the retractor also moves. In the Seabury device the carrier and retractor move independently of each other; but as the claim says, they are separate from each other, whereas in the Dashiell device they are so intimately connected that when the carrier moves, the retractor moves with it. It is true that the retractor, though hinged to the carrier when turning on its pivot, acts as it would if it were hinged to the breech, yet Seabury having restricted himself to a retractor hinged to the breech separate from the carrier, in view of the state of the art, which appears to have been much more advanced than the plaintiffs are willing to concede, we think such difference is material. As before observed, in the Dashiell device the retractor is not hinged *to the breech, but to the carrier, and [434 is not worked independently of it, but in connection with it.

The truth is that, at the time the Seabury patent was taken out, the scope for invention was much more limited than Seabury apparently supposed. The mutilated form of screw-block, apparently a French device, had been in use for many years. Of course the use of this block implied some method of withdrawing it from the gun, swinging it to one side, and returning it to the bore. To accomplish this several devices were invented, most of them employing a swinging lever, a carrier, and a retractor. In some cases, as in the Canet patent, a toothed rack was used to rotate the breech-block, and in others a cam, and in two or three of these patents these movements were accomplished by the continued operation of a lever. Nothing, in fact, was left to the ingenuity of the inventor, but to devise new variations upon this combination, and, in our opinion, Dashiell's device is as great a departure from Seabury's as the latter is from the devices which preceded it.

We are therefore of opinion that, under the construction we are compelled to give the first claim of the Seabury patent, the Dashiell device is not an infringement.

This conclusion also renders it unnecessary for us to consider the questions discussed by the court of appeals in its opinion, in respect to one of which see *Belknap* v. *Schild*, 161 U. S. 10 [*ante*, 599], but for the reasons stated, *its decree, dismissing the bill, is affirmed.*

WILLIAM GRAVER, *Appt.*, [435
v.
BENJAMIN C. FAUROT.

(See S. C. Reporter's ed. 435-438.)

Question certified.

The question whether false swearing and perjury in answers by which the dismissal of a bill is obtained for want of equity will or will not constitute a ground for setting aside the decree, assuming that the bill for such relief is otherwise sufficient, is not one which the circuit court of appeals can certify to this court because of doubt arising from an alleged irreconcilable conflict between two decisions of this court, where the entire record is transmitted as part of the certificate, and the answer to the question propounded contemplates an examination of the whole case.

[No. 779.]

Submitted February 4, 1896. Decided April 13, 1896.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit certifying a question to be answered in a suit brought by William Graver to

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impeach for fraud a decree in equity rendered by the Superior Court of Cook County, Illinois, in a certain suit wherein William Graver was complainant and Benjamin C. Faurot *et al.* were defendants, by which decree complainant's suit was dismissed for want of equity. *Certificate dismissed.*

See same case below, 64 Fed. Rep. 241.

Statement by *Mr. Chief Justice* **Fuller:**

This case coming on to be heard on appeal from the circuit court of the United States for the northern district of Illinois, in the United States circuit court of appeals for the seventh circuit, that court ordered that a statement of facts and a question be certified to this court for its opinion and instruction.

It appears from the statement of facts that William Graver filed a bill in the superior court of the county of Cook in the state of Illinois to impeach for fraud a decree in equity rendered by that court July 6, 1889, in a certain suit therein depending, wherein William Graver was complainant and Benjamin C. Faurot and A. O. Bailey were defendants, by which decree complainant's bill was dismissed for want of equity; and that the suit was duly and properly removed into the circuit court of the United States for the northern district of Illinois.

The bill thus filed was set forth *in hæc verba*, together with a demurrer thereto, the decree of the circuit court sustaining the demurrer and dismissing the bill, and the opinion rendered by the circuit court on entering that decree.

The certificate then proceeded thus: "In view **436**] of the *decisions of the Supreme Court of the United States in the cases of *United States* v. *Throckmorton*, 98 U. S. 61 [25: 93], and *Marshall* v. *Holmes*, 141 U. S. 589 [35: 870], this court is in doubt touching the case in hand, and desires advice and instruction upon the following question: Whether (assuming the bill of complaint to be in other respects sufficient) the alleged false swearing and perjury in the respective answers of defendants in the original suit in the superior court of the county of Cook, state of Illinois, are, in the law, available in this suit as ground for a decree setting aside and declaring void the decree so rendered in the superior court of the county of Cook?

Messrs. **Robert Rae** and *Henry S. Monroe* for appellant.

Messrs. **Frank L. Wean** and *Frank O. Lowden* for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It appears from the opinion of the circuit court, sent up as part of the certificate and reported in 64 Fed. Rep. 241, that that court was impressed with the conviction that the complainant had been defrauded, but that the court could see no way to accord relief under the decision in *United States* v. *Throckmorton*, 98 U. S. 61 [25: 93], although the result might be different if the decision in *Marshall* v. *Holmes*, 141 U. S. 589 [35: 870], were followed. In other words, the circuit court indicated that it could have proceeded without difficulty on the principles expounded in either case if the other were out of the way. Finding it impossible to reconcile these cases, or to make a definitive choice between them, because *United States* v. *Throckmorton* was cited without disapproval in *Marshall* v. *Holmes*, the circuit court sustained the demurrer *pro forma*, and the case was transferred to the circuit court of appeals. But when this had been accomplished the court of appeals apparently found itself in a similar quandary, and this resulted in the certificate under consideration.

Doubtless the determination of contested questions in cases properly brought before us involves the resolution of doubts, *if any [**437** are entertained, in respect of the scope of particular decisions, but we cannot approve of the mode adopted in this case of ascertaining the precise bearing of former judgments.

In civil cases the intention of Congress as to the certification provided for in §§ 5 and 6 of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), is to be arrived at in the light of the rules prevailing prior to that date in relation to certificates of division of opinion under U. S. Rev. Stat. §§ 650, 652, 693. *Maynard* v. *Hecht*, 151 U. S. 324 [38: 179]. It was well settled as to them that each question had to be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to other issues of law in the case; that each question must be a question of law only and not of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the cause; and could not embrace the whole case, even where its decision turned upon matter of law only, and though it were split up in the form of questions. *Jewell* v. *Knight*, 128 U. S. 426, 432 [21: 190, 192]; *Fire Ins. Asso.* v. *Wickham*, 128 U. S. 426 [32: 504].

By the 6th section of the judiciary act the circuit court of appeals is not permitted to certify the whole case to us, though we may require that to be done when questions are certified, or may bring up by certiorari any case in which the decision of that court would otherwise be final. But here the entire record is transmitted as part of the certificate, and the answer to the question propounded contemplates an examination of the whole case. It is true that the court of appeals asks us to assume the bill of complaint to be "in other respects sufficient," that is, sufficient to entitle complainant to relief, if the fraud alleged were available. But if we should find that the bill was insufficient when tested by principles accepted in both cases referred to, we should be indisposed to return an answer not required for the disposition of the case. In any view we should be compelled, in answering, to analyze the facts charged, in order to determine whether in legal effect they raise the question involved in *Marshall* v. *Holmes*, 141 U. S. 589 [35: 870], or that involved in *United States* v. *Throckmorton*, 98 U. S. 61 [25: 93], assuming that the *legal effect of the facts in those [**438** two cases were not the same; or, if it were, to determine whether the facts set up here fall within the same category, and direct which decision should govern.

This practically requires us to pass upon the whole case as it stands, and to decide whether the demurrer was properly sustained or not.

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But the whole case is not before us for decision, and the certificate discloses that the doubt of the courts below is based on the assumption that this court has applied well-settled general principles of law differently in two different cases upon the same state of facts. While some hesitation in decision may temporarily result until it is finally determined whether that assumption is justified, and, if justified, the anomaly is corrected, we think such determination ought not to be attempted save where the point must be disposed of on a record after final decree.

In the absence of power to deal with the whole case, the question amounts to no more than an inquiry as to whether in our opinion there is an irreconcilable conflict between two of our previous judgments, and a request, if we hold that to be so, that we put an end to that conflict. We do not regard these as questions or propositions of law in a particular case on which we are required to give instruction.

Certificate dismissed.

439] HENRY W. BLAGGE ET AL., Admrs., *Plffs. in Err.*,
v.
FRANCIS V. BALCH, Administrator.

WILLIAM GRAY BROOKS, Admr. of the ESTATE of HENRY GRAY, Deceased, ET AL., *Plffs. in Err.*,
v.
ROBERT CODMAN, Admr. with the Will Annexed of the Estate not already Administered of WILLIAM GRAY THE ELDER, ET AL.

AUGUSTUS R. S. FOOTE ET AL., *Plffs. in Err.*,
v.
WOMEN'S BOARD OF MISSIONS ET AL.

(See S. C. Reporter's ed. 439-466.)

French spoliation claims — who entitled to award.

1. Next of kin according to the statutes of distribution of the respective states of the domicil of the original sufferers are the persons entitled to the benefit of the act of Congress of March 3 1891 (26 Stat. at L. 897, 908, chap. 540), appropriating money for French spoliation claims, with a proviso that awards shall be on behalf of next of kin, instead of assignees in bankruptcy where original sufferers were adjudicated bankrupts, and that awards in the cases of individual claims shall not be paid until the court of claims certifies that personal representatives on whose behalf the award is made represent the next of kin, and also that the courts which granted administrations shall certify that such representatives have given adequate security for the legal disbursement of the awards.
2. The next of kin living at the date of the act, and not those living at the death of the original sufferer, are those entitled to the award on a French spoliation claim under the act of Congress of March 3, 1891.

[Nos. 177, 284, 207.]

Argued and Submitted March 24, 25, 1896
Decided April 13, 1896.

The first two of said cases were in error to the Supreme Judicial Court of the State of Massachusetts to review a judgment in the first case, No. 177, affirming the judgment or order of the Probate Court in and for the County of Norfolk in that State, distributing a fund or a part thereof among the representatives of Crowell Hatch; and in the second of said cases, No. 284, to review a judgment of the Supreme Judicial Court of Massachusetts, that certain funds in the hands of the complainant William Gray, Administrator, be paid over to the residuary legatees named in the will of William Gray the elder. The third of said above cases, No. 207, was in error to the Superior Court of the County of New Haven, State of Connecticut, to review a judgment of that court affirming the decree of the Probate Court for the District of New Haven, Connecticut, ordering the distribution of a fund to residuary legatees under the will of William Leffingwell *et al.* *The said judgments severally reversed*, and the causes remanded for further proceeding.

See same case below, 157 Mass. 144, 159 Mass. 77, 62 Conn. 347.

Statement by *Mr. Chief Justice* **Fuller:**

These are writs of error to review judgments of the supreme judicial court of Massachusetts in Nos. 177 and 284, and a judgment of the superior court of the county of New Haven, Connecticut, in No. 207.

Plaintiffs in error in No. 177 are administrators *de bonis non* with the will annexed of the estate of Crowell *Hatch, deceased, late of [440 Roxbury Massachusetts, and defendant in error is administrator *de bonis non* with the will annexed of the estate of Henry Hatch, deceased.

Crowell Hatch died in the year 1805, leaving three daughters and one son, Henry Hatch. By his will, all his property was given in equal shares to the four children. Of each of the three daughters there are descendants now living. The son died leaving a widow but no issue, and left by his will the residue of his estate to his widow, who did not afterwards marry. Crowell Hatch was never bankrupt and his estate and the estates of his four children have always been and are solvent. Plaintiffs in error as administrators of the estate of Crowell Hatch have received from the United States certain moneys for the loss of the brig Mary, being one of the claims on account of the spoliations committed by the French government prior to July 31, 1801, which were reported to Congress by the court of claims pursuant to the statute of the United States of January 20, 1885 (23 Stat. at L. 283, chap. 25), and for the payment of which Congress made appropriation by the statute of March 3, 1891 (26 Stat. at L. 862, chap. 540). By the statutes of Massachusetts in force when Crowell Hatch died, his estate, after the payment of debts and the expenses of administration, would have been distributed, if intestate, equally

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among his children. Stat. at L. 1789, chap. 2; Stat. at L. 1805, chap. 90, §§ 1 and 2.

The probate court in and for the county of Norfolk, in which proceedings were pending, ordered a partial distribution of the fund of nine sixteenths among the descendants of the three daughters and of three sixteenths to the administrator of Henry Hatch, the son. From this order an appeal was taken to the supreme judicial court, and the case reserved for the full court, by which the decree appealed from was affirmed. 157 Mass. 144.

In No. 284, William Gray, as administrator *de bonis non* with the will annexed of the estate of William Gray, who was a sufferer from the French spoliations, filed his bill in equity in the supreme judicial court of Massachusetts **441**] for *instructions as to the disposition of a fund which had been paid to him under the act of Congress of March 3, 1891. On his death, pending the cause, Robert Codman succeeded to the administration and was substituted as complainant. All the living legatees and next of kin and the representatives of such as were deceased were made parties defendant. The case was heard by a single judge of the supreme judicial court of Massachusetts and reported by him to the full court, which entered a final decree that the funds in the hands of the complainant should be "paid over as assets of the estate of William Gray the elder, and as passing under his will to the residuary legatees named therein." 159 Mass. 477.

William Gray died November, 1825, leaving five sons, William R., Henry, Francis C., John C., and Horace, and one daughter, Lucia G. Swett. He left a will by which, after a specific legacy to the daughter and a conditional legacy to each son, he gave the residue to his five sons, excluding the daughter. The fund in question, if it falls to the estate at all, is part of the residue. William R. died in 1831, intestate, leaving four children him surviving, one of whom died in 1880 leaving five children. In 1829 Henry assigned his interest in his father's estate to his four brothers, and died in 1854 leaving ten children. Francis C. died in 1856 and John C. in 1881, testate, but without issue. Horace died in 1873, intestate, leaving five children. In 1847 he assigned all his property under the insolvent laws of Massachusetts to Hooper, Bullard, and Coffin, as assignees for creditors, and of these assignees two survive and are parties. Mrs. Swett died in 1844. She had had four children, of whom William G. died in 1843, leaving a daughter surviving; John B. died in 1867, leaving a daughter surviving; Samuel B. died in 1890, leaving five children; and one child, Mrs. Alexander, still survives.

The representatives of the three brothers, William R., Francis C., and John C., and the assignees of Horace, contended that the fund passed by the will of William Gray, and should be paid to them in equal proportions as representing four of the five residuary legatees, and as being assignees of the fifth son, Henry. The individual descendants of the brothers, except **442**]*those of Henry, made no contrary claim, and by their answers either took the same position or admitted the allegations of the bill and submitted the questions to the court.

The representatives and descendants of Henry Gray insisted that the fund did not pass under the will, but was a new and subsequent gift in favor of the next of kin of William Gray; that it should go to the nineteen grandchildren of William Gray, excluding the great-grandchildren, namely, the three children of William R., who survived at the date of the act of Congress, the ten children of Henry, the five children of Horace, and Mrs. Alexander, the one surviving child of Mrs. Swett; and that they were entitled to ten nineteenths of the fund distributed *per capita* among the grandchildren.

The representatives and descendants of Lucia G. Swett also contended that the fund did not pass under the will and was a subsequent gift in favor of the next of kin of William Gray, but they insisted that in the distribution among the next of kin of William Gray, to be ascertained at the date of the passage of the act, the issue of the deceased children should take by right of representation the shares of their parents according to the statute of distributions, or that the fund should be distributed among the representatives of the next of kin to be ascertained at the death of William Gray the elder. Distributed *per stirpes*, they claimed for the children and grandchildren of Mrs. Swett one fourth of the fund, one sixteenth to Mrs. Alexander, one sixteenth to the daughter of William G., one sixteenth to the daughter of John B., and one eightieth to each of the five children of Samuel B., making another sixteenth; or that taking the distribution as of the date of the death of William Gray, the administrator of the estate of Mrs. Swett was entitled to one-sixth part of the fund as the representative of one of the six children of William Gray, surviving him.

In No. 207 the facts appeared to be these: In 1797 the firm of Leffingwell & Pierrepont owned a ship and cargo which was seized by a French privateer in June of that year and became the subject of a French spoliation claim. William Leffingwell, the senior partner, lived in New Haven, *Connecticut, and [**443** died testate in 1834. His estate was finally settled in 1844, and no mention of his interest in this claim was made in his will or in the distribution of his estate. The surviving partner lived in New York and died testate in 1878. His executor presented the claim to the court of claims in 1880, and a favorable decision was secured in 1888, and an appropriation made by the act of March 3, 1891. In 1886, administration *de bonis non* on the estate of William Leffingwell was taken out by Oliver S. White in the probate court for the district of New Haven, Connecticut, and the administrator has received from the representatives of the surviving partner half the net proceeds of the award. The probate court, in settling the question of the administration *de bonis non*, treated the fund as part of the residuary estate of the testator, and ordered its distribution to the residuary legatees under his will and their representatives or successors. An appeal was taken to the superior court, which, in conformity to the advice of the supreme court of errors (62 Conn. 347), affirmed the decree of the court of probate.

William Leffingwell left as his next of kin

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him surviving the four children named in his will, Mrs. Street, Mrs. Williams, Lucius W., Edward H., and the children of his deceased son William C. Mrs. Street died testate and solvent in 1878; Mrs. Williams and Edward H. died testate and without issue; and the next of kin of William Leffingwell living March 3, 1891, were, as was agreed, according to the statute of distributions of Connecticut, (1) plaintiffs in error, the grandchildren of Mrs. Street; (2) six children of Lucius W., a grandson of Lucius W., and the widow of a deceased son of Lucius W.; (3) a son of William C. and three grandchildren of said William C. The probate decree ordered the fund distributed among the five residuary legatees named in the will of William, "one fifth thereof to the executors or administrators of Caroline Street, a daughter of said deceased." If this one fifth were considered as general assets of Mrs. Street's estate, it went to the residuary legatee under her will, the Women's Board of Missions, otherwise it belonged to plaintiffs in error as through her the next of kin of **444**] William Leffingwell on one line of *descent. Plaintiffs in error claimed that on March 3, 1891, when the act of Congress was passed, they were entitled to their due shares *per stirpes* of the fund, to wit, one third thereof, there being only three of the five children of William Leffingwell who survived him, whose descendants were living at that date.

Mr. **George A. King,** for plaintiffs in error in *Blagge* v. *Balch*, No. 177:

The fund received by the plaintiffs in error in their capacity of administrators goes to the next of kin living at the passage of the act.

Gardner v. *Clarke*, 9 Mackey, 268; *Re Clement's Estate*, 150 Pa. 89; *Bailey's Appeal*, 160 Pa. 391; *Frelinghuysen* v. *United States*, 110 U. S. 71 (28: 74); *Williams* v. *Heard*, 140 U. S. 529 (35: 552).

Messrs. **Francis V. Balch** and **Felix Rackemann,** for defendant in error in *Blagge* v. *Balch*, No. 177:

Had the actual international settlement been literally (what in effect it was) that the United States, as a nation, paid France, as a nation, say $10,000 000 as indemnity for our national disregard of the treaty of 1778, and thereafter the claims of our citizens against France had been liquidated at the same amount, and the money repaid, there can be no doubt that the money would have rested in the United States Treasury as the property of the citizens of the United States who had suffered the losses, and charged with a trust as clear as any statute law could make it.

Williams v. *Heard*, 140 U. S. 529, 540, 541 (35: 550, 555).

Where private rights are sacrificed by the government *pro bono publico*, the government is bound to make compensation and indemnify the individuals.

Ware v. *Hylton*, 3 U. S. 3 Dall. 245 (1: 588); *United States* v. *The Peggy*, 5 U. S. 1 Cranch, 110 (2: 51).

The claims were assets from the date of the original losses to the date of payment. Nothing could more conclusively show that Congress regarded the claims which it was paying as valid obligations than the fact that it should have thought necessary to provide in the act that the awards should not go to the old assignees in bankruptcy of the original claims. They could not have done so upon any theory of gratuity.

Gardner v. *Clarke*, 9 Mackey, 261; *Frelinghuysen* v. *United States*, 110 U. S. 71 (28: 74); *Comegys* v. *Vasse*, 26 U. S. 1 Pet. 193 (7: 108).

Davis, J., in *Gray* v *United States*, 21 Ct. Cl. 340, says of these claims that they were "individual in their inception but made national" only "by their presentation through the diplomatic department of the government."

The citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere is given him.

Cushing v. *United States*, 22 Ct. Cl. 1; *Holbrook* v. *United States*, 21 Ct. Cl. 438-441.

The proviso only applies to cases where the original sufferer was bankrupt. No part of it is intended to operate in any other case. All other cases stand on the word "pay" and the designation of the payees in the schedule.

Richards v. *Maryland Ins. Co.* 12 U. S. 8 Cranch, 84 (3: 496).

But the proviso is not applicable at all to the present appropriations.

The Concord ("*Henry* v. *United States*") 27 Ct. Cl. 142.

The period of decision is always, in the absence of clear intent to the contrary, the period at which heirs or next of kin are determined.

2 Jarman, Wills, 5th Am. ed. 670.

Even if the court should believe that in some vague and general way the next of kin living at the date of the act were intended to take, the intent is not so expressed that it can so take effect.

The highest courts of Massachusetts, Connecticut, and Pennsylvania have decided in support of the position here contended for.

Balch v. *Blagge*, 157 Mass. 144; *Codman* v. *Brooks*, 159 Mass. 477; *Re Clement's Estate*, 150 Pa. 85; *Leffingwell's Appeal*, 62 Conn. 347.

The Pennsylvania court has reversed its first decision.

Re Clement's Estate, 160 Pa. 391.

Messrs. **Jabez Fox, William Gray Brooks,** *Harvey D. Hadlock*, and *W. G. Russell* for plaintiffs in error, in *Brooks* v. *Codman*, No. 284.

Mr. **Joseph B. Warner** for defendants in error, in *Brooks* v. *Codman*, No. 284.

Mr. **William Warner Hoppin** for plaintiffs in error, in *Foote* v. *Women's Board of Missions*, No. 207.

Messrs. **James H. Webb** and **John W. Alling** for defendants in error, in *Foote* v. *Women's Board of Missions*, No. 207.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*The French spoliation claims arose [**454** from the depredations of French cruisers upon our commerce and from the judgments of French prize courts, and could have been enforced against France only by our government either by diplomacy or by war. In the negotiations leading up to the treaty of September 30, 1800 (8 Stat. at L. 178), these claims of individuals

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were presented by our commissioners to France, who in turn asserted claims as a nation against this government for failure to comply with treaty guaranties and action in contravention of treaty. The sufferers from the French spoliations have constantly contended that, by that treaty as finally agreed on and ratified, all claims for indemnity were mutually renounced, and that, therefore, an obligation to indemnify them rested upon our government.

January 20, 1885, an act of Congress was approved (23 Stat. at L. 283, chap. 25), providing that "such citizens of the United States, or their legal representatives, as had valid claims to indemnity upon the French government arising out of illegal captures, detentions, seizures, condemnations, and confiscations prior to the ratification of the convention between the United States and the French Republic concluded on the 30th day of September, eighteen hundred, the ratifications of which were exchanged on the 31st day of July following," might apply to the court of claims within two years from the passage of the act, and "that the court shall examine and determine the validity and amount of all the claims included within the description above mentioned, together with their present ownership, and, if by assignee, the date of the assignment, with the consideration paid therefor," and "they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor," and that "such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimants or Congress; and all claims not finally presented to said court within the [455] period of two years limited by this *act shall be forever barred; and nothing in this act shall be construed as committing the United States to the payment of any such claim."

Proceeding to advise under this act, the court of claims, in many cases, found with regard to claims therein presented that the original sufferers had valid claims to indemnity upon the French government prior to the convention of 1800; that these claims were relinquished to France by the United States government by that treaty in part consideration of the relinquishment of certain national claims of France against the United States; and that this use of the claims raised an obligation under the Constitution to compensate the individual sufferers for their losses. *Gray* v. *United States*, 21 Ct. Cl. 343; *Holbrook* v. *United States*, 21 Ct. Cl. 435; *Cushing* v. *United States*, 22 Ct. Cl. 28.

As to the present ownership of the claims, the court in *Buchanan* v. *United States*, 24 Ct. Cl. 74, 81, said:

"What it has endeavored to do is to ascertain the person in whom the legal title and custody exist; that is to say, the legal representative who in an ordinary suit at law or proceeding in equity would be deemed the proper party to maintain an action for the recovery of similar assets of the original claimants. In the cases of individual owners or underwriters, the court has required a present claimant to file his letters of administration and prove to the satisfaction of the court that the decedent whose estate he has administered was the same person who suffered loss through the capture of a vessel.

"In cases of partnership the court has required evidence of survivorship, and has allowed only the administrator of the survivor to prosecute the claim.

"In cases of bankruptcy, it has held, under the decisions of the supreme court, that the claim passed to the assignee, and that on his death it passed to his administrator.

"And where the evidence has shown the bankrupt estate to be still unsettled, the court has held the legal title to be still vested in the assignee.

"In cases of incorporated companies no longer in existence, *the court has required only the decree of a court of competent jurisdiction transferring their rights of action to the hands of a receiver. [456]

"In none of these cases has the court assumed to determine who were the next of kin of a deceased claimant; nor whether there are any; nor in what proportion were the several interests of partnership owners; nor whether creditors or descendants have the superior equity; nor whether the children of a bankrupt are entitled to a residue of his estate; nor whether the receiver of a defunct corporation represents creditors or stockholders. In other words, the court has not assumed to determine what persons are legally or equitably entitled to receive the money which Congress may hereafter appropriate for the discharge of these claims.

"When the validity of a claim against France and the relinquishment thereof by the United States under the 2d article of the treaty of 1800, and the amount in which the original claimant suffered loss, have been determined and reported, Congress will be in possession of all the facts which this court under its present restricted jurisdiction can possibly furnish. It will then be within the legislative discretion—

"(1) To ascertain through the proper committees who are the persons who should receive the money; or

"(2) To provide for the ascertainment of that fact by additional legislation; or

"(3) To confide the money to the administrators and receivers who, with the exception of a few still existing corporations, constitute the present claimants, trusting that they and the courts of which they are the officers and agents will distribute the funds among the creditors or next of kin of the original claimants.

"The decisions in these spoliation cases are not judgments which judicially fix the rights of any person; and the obligations of the government are so far moral and political that they cannot be gauged by the fixed rules of municipal law for the measure of legal damages."

These advisory conclusions having been reported to Congress, the act of March 3, 1891, (26 Stat. at L. 897, 908, chap. 540), *was [457] passed making appropriations to pay certain enumerated claims with the following proviso:

"*Provided*, That in all cases where the origi-

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nal sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the court of claims shall certify to the Secretary of the Treasury that the personal representative on whose behalf the award is made represents the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

The cases in hand turn upon the construction of this proviso, and while it is not denied that Congress had the power to enact that the next of kin should take irrespective of the legal title to the assets of the estate of the original sufferers, it is important in arriving at a conclusion as to whether and to what extent that was done, to refer to the view taken by Congress in respect of the ground of the appropriations as indicated by its action.

Notwithstanding repeated attempts at legislation, acts in two instances being defeated by the interposition of a veto, no bill had become a law, during more than eighty years, which recognized an obligation to indemnify arising from the treaty of 1800; and the history of the controversy shows that there was a difference of opinion as to the effect of that treaty. (2 Whart. Int. Law, § 248, p. 714; Davis, J., *Gray* v. *United States*, 21 Ct. Cl. 343). Under the act of January 20, 1885, the claims were allowed to be brought before the court of claims, but that court was not permitted to go to judgment. The legislative department reserved the final determination in regard to them to itself, and carefully guarded against any committal of the United States to their payment. And by the act of March 3, 1891, payment was only to be made according to the proviso. We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace, and not of right.

In *Comegys* v. *Vasse*, 26 U.S. 1 Pet. 193 [7: 108], **458**] the United States had *stipulated with Spain that they would assume and pay certain claims of their citizens against Spain, and an award was made in favor of Vasse, one of the claimants, by a commission appointed as stipulated to examine and adjudicate the claims. Vasse had in the meantime become bankrupt, and the assignment in bankruptcy was held to carry the claim with it.

In *Williams* v. *Heard*, 140 U. S. 529 [35: 552], *Comegys* v. *Vasse*, *supra*, was followed, and applied to the awards of the Alabama Claims Commission. The United States had demanded and received indemnity for losses sustained by their citizens, and had recognized as valid the class of claims to which the particular claim belonged, and had created a court to adjudicate thereon. It was held that the claim passed to the assignee in bankruptcy, and that payment of awards so made could not be regarded as a mere gratuity.

In *Emerson* v. *Hall*, 38 U. S. 13 Pet. 409 [10: 223], Chew, the collector, Emerson, the surveyor, and Lorraine, the naval officer, of the port of New Orleans, prosecuted a vessel to condemnation for violation of the laws of the United States prohibiting the slave trade, and the district court allowed their claim to a portion of the proceeds of the sale of the property, but this decree was afterwards reversed, and the whole proceeds adjudged to the United States. *The Josefa Segureda*, 23 U. S. 10 Wheat. 312 [6: 330]. Emerson and Lorraine afterwards died, and March 3, 1831 (6 Stat. at L. 464), Congress passed an act "for the relief of Beverly Chew, the heirs of William Emerson, deceased, and the heirs of Edwin Lorraine, deceased," which directed the portion of the proceeds claimed to be paid over to Chew, "and the legal representatives of the said William Emerson and Edwin Lorraine respectively" and under authority of which the sums which had been adjudged to these officers were paid to them as provided. One of the creditors of Emerson claimed the sum so paid to his legal representatives as assets for the payment of his debt, but it was held that the payment to the heirs was rightfully made, and that the sum could not be considered in their hands as assets for the payment of the debts of their father. *Mr. Justice* McLean, delivering the opinion of the court, said: "A claim having no foundation in *law, but depending [**459** entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government from motives of public policy, or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation. A donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government."

Manifestly the claims involved in these cases do not come within the rule laid down in *Comegys* v. *Vasse*, 26 U. S. 1 Pet. 193 [7: 108], and *Williams* v. *Heard*, 140 U. S. 529 [35: 552], and, without intimating any opinion on their merits, the legislation seems to us plainly to place them within that applied in *Emerson* v. *Hall*, 38 U. S. 13 Pet. 409 [10: 223], though the circumstances are not the same.

The first clause of the proviso relates to cases where the original sufferers were adjudicated bankrupts, and specifically requires the awards to be "made on behalf of the next of kin instead of the assignees in bankruptcy." As we have seen, the court of claims had informed Congress that their view was that the action of the United States came within the constitutional provision as to the taking of private property for public use, and hence that Congress was bound to pay the claimants what was due them by reason of such taking, and further that they had accordingly made awards in favor of assignees in bankruptcy. But Congress declined to accept the views of the court of claims and to treat these claims as property of the original claimants, transferable and transmissible like other property of the nature of choses in action, and expressly provided that the awards should be made to the next of kin instead of the assignees in bankruptcy.

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In *Henry* v. *United States*, 27 Ct. Cl. 142, 145, decided after the act of March 3, 1891, was passed, the court makes a particular explanation as to this part of the proviso, saying:

"Among the claimants were several assignees, or representatives of assignees, of original sufferers who had been declared bankrupts, and the court reported in those 460]cases that *the assignees, or representatives of the assignees, were entitled to receive from the United States the sum found to be the amount of the losses.

"In Congress an appropriation bill was drawn and printed containing appropriations for all the persons named in the reports of the court of claims. From that bill were stricken out all appropriations to assignees in bankruptcy so far as their representative character appeared in the language of the act. This is a decided indication that Congress did not intend to pay assignees in bankruptcy."

It was held that the language used in the first clause was intended to apply to future reports, Congress having disapproved the recommendations in favor of assignees made up to the date of the act. That disapproval practically illustrates the difference of view between Congress and the court of claims as to the basis on which the allowances were made.

The second clause provides, "that the awards in the cases of individual claimants shall not be paid until the court of claims shall certify to the Secretary of the Treasury that the personal representatives in whose behalf the award is made represent the next of kin." Reading the first clause in the light of the second, the meaning is that in case of bankruptcy the award should be made as it would be if the original sufferer had not been declared bankrupt, namely, "on behalf of the next of kin." And the occasion of the introduction of the first clause obviously was to prevent repetition of the action which had proved fatal to some of the recommendations.

The second clause is not limited to the cases named in the first clause, although in a certain sense it may be said to include them by way of anticipation, for it applies to all cases of individual claimants, as contradistinguished from corporations, and requires the certificate as a prerequisite to their payment, "that the personal representatives on whose behalf the award is made represent the next of kin."

It appears to us that Congress intended that the next of kin should be the beneficiaries in every case; that the limitation is express; and that creditors, legatees, and assignees, all strangers to the blood, are excluded.

461] *No reason is suggested for cutting off creditors where the original sufferer became bankrupt, and not cutting them off where, not having gone into bankruptcy, the estate was insolvent; nor for the payment of awards to the original sufferer's next of kin if he were bankrupt, and not, if he were not. The general rule is that so long as the debts of a decedent remain unpaid the assets which come into his estate are to be applied in payment, and these moneys, if they could be treated as assets at all (being paid over, not as in liquidation of pre existing claims thereby acknowledged, but as concessions made on equitable considerations) would partake of the nature of subsequently discovered assets, and be liable to be subjected to the payment of debts. But this cannot be so, for the awards are explicitly required to be made on behalf of the next of kin, and to be paid only to personal representatives representing the next of kin.

The certificate must be that the personal representative does in fact represent the next of kin, and so receives the payment on their behalf. This certificate is as much required with respect of an administrator with the will annexed as of an administrator in case of intestacy, and yet administrators with the will annexed hold adversely to the next of kin and do not represent them, if the fund is to be distributed according to the will as assets of the estate. Congress well understood this in requiring that next of kin must be represented notwithstanding many of the items of appropriation were in favor of administrators with the will annexed. In *Buchanan* v. *United States*, 24 Ct. Cl. 74, 81, the court of claims called the attention of Congress to the fact that notwithstanding its own recommendations it remained for Congress to determine, "first, the measure of the indemnity for which the United States should be held responsible; second, the persons who are equitably entitled to receive it." And Congress thereupon determined the next of kin to be the persons "equitably entitled to receive," and while in the interpretation of wills "next of kin" is sometimes construed to mean other persons than those of the blood or under the statute of distributions, as for instance, *legatees,[462 we see no reason to construe this statute as having that operation.

In *Milligan's Case*, as appears from the opinion of the court of claims in *Durkee* v. *United States*, 28 Ct. Cl. 331, a certificate was refused because there were no blood relations of the original sufferer, and the administrator had really prosecuted the claim for the benefit of the widow's next of kin. Congress then passed the act of August 23, 1894 (28 Stat. at L. 487, § 5), providing that "in the event the court shall find there were no next of kin, and that there was a widow, then that said sum be paid to the executor, personal representative, or next kin of such widow." This made a new disposition of the fund upon the theory that it did not belong to the general assets of the original sufferer's estate, and that where there were no next of kin, in the ordinary signification of the word, new legislation was required.

The events which had given rise to these claims had occurred nearly a century before, and there was nothing unreasonable in the determination of Congress that only the immediate family of the original sufferers should participate in these awards. These sufferers had been in their graves for sixty years. The reasons which might have influenced them in making particular testamentary dispositions had disappeared with time. The claims of creditors had long been outlawed. Equities had become too complicated to be traced. It was enough if the fund passed to persons of the blood of the original sufferers, or who might be entitled under the statutes of distributions, which had been provided in each state, by general legislation, as to the devolution of property in case of intestacy. After all, it

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would then go as the original claimants might have desired if no special reasons operated to the contrary, and as, in frequent instances, it would have finally gone when those reasons, if once existing, had ceased to operate.

And this conclusion is in harmony with the legislation considered in *Emerson* v. *Hall*, 38 U. S. 13 Pet. 409 [10: 223], with U. S. Rev. Stat. § 1981, in reference to recovery of damages by the legal representatives of persons killed **463**] by wrongful act in *violation of the civil rights act of 1871; the act of Congress of February 17, 1885 (23 Stat. at L. 307), providing for actions in the District of Columbia for the death of persons caused by wrongful acts of others; and generally with the statutes of the states giving a right of action for injuries resulting in death. Tiffany, Death by Wrongful Act, appx. 281, 344.

The 3d clause provided that the awards should not be paid until "the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards." It is argued that this implies that the money received by them was to be administered as assets belonging to the estate, but we do not think so. It often happens that administrators receive money which is not to be administered as part of the general assets, but is to be distributed in a particular way. Whether upon his general bond an administrator could be held for the performance of such special duty might depend upon the local statutes of each state, and Congress was not obliged to consider whether the ordinary bond would cover the case, or whether a new bond would be required, or whether additional state legislation would be necessary. At all events, the express language of the act cannot be overcome by the difficulty suggested, if it be such, and the intention of Congress in favor of the next of kin thereby rendered liable to be defeated.

From these considerations and by necessary construction of the language employed, it results that "next of kin" as used in the proviso means next of kin living at the date of the act. The court of claims must certify that the personal representatives "represent the next of kin," and that court has properly held that before there can be a certificate of that fact it must appear that some next of kin are now in existence. *Hooper* v. *United States*, 28 Ct. Cl. 480; *Durkee* v. *United States*, 28 Ct. Cl. 326. This construction is sustained by the legislation of Congress referred to in *Durkee* v. *United States*, where two instances are mentioned of special acts giving the fund to other than blood relations of the original sufferers. The exceptions prove the rule.

464] *And we are of opinion that Congress, in order to reach the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective states of the domicil of the original sufferers. In all the states real estate descends equally to the children of the decedent, and to the issue of deceased children taking *per stirpes*, and in most of them personal estate is distributed in the same manner, the variations being immaterial here. 1 Stimson, Am. Stat. L. §§ 3101, 3102, 3103. The object of Congress was that the blood of the original sufferers should take at the date of the passage of the act, and the statutes of distribution are uniformly framed to secure that result as nearly as possible, the right of representation being recognized. To hold that the meaning is nearest of blood on March 3, 1891, might cut off many of the blood who would otherwise take by descent from those nearest at the ancestors' deaths, and an intention to do this contrary to the general rule cannot be imputed. So that in ascertaining who are to take, the fund, though not part of the estates of the original sufferers, may be treated as if it were, for the purposes of identification merely.

In the construction of wills and settlements, after considerable conflict of opinion, the established rule of interpretation in England is that the phrase "next of kin," when found in ulterior limitations, must be understood to mean nearest of kin without regard to the statutes of distribution. 2 Jarman, Wills (5th ed.) *108, *109. This rule was followed in *Swasey* v. *Jaques*, 144 Mass. 135, where Field, J., speaking for the court, said: "It is certainly difficult to distinguish between the expressions 'next of kin,' 'nearest of kin,' 'nearest kindred,' and 'nearest blood relations,' and primarily the words indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other. What little recent authority there is beyond that of the English courts supports the English view; and, on the whole, we are inclined to adopt it. *Redmond* v. *Burroughs*, 63 *N. C. 242; *Davenport* v. *Hassel*, Busb. [**465** Eq. 29; *Wright* v. *Methodist Episcopal Church Trustees*, Hoff. Ch. 202, 213." But the rule does not appear to have been approved in New York and New Hampshire. *Tillman* v. *Davis*, 95 N. Y. 17, 24, 47 Am. Rep. 1; *Pinkham* v. *Blair*, 57 N. H. 226.

Moreover, it is settled in Massachusetts as well as elsewhere that "where a clause is fairly susceptible of two constructions also, that certainly is to be preferred which inclines to the inheritance of the children of a deceased child." (*Bowker* v. *Bowker*, 148 Mass. 198, 203; *Jackson* v. *Jackson*, 153 Mass. 374, 11 L. R. A. 305); and in Connecticut that, "when the terms of a will leave the intention of the testator in doubt the courts generally incline to adopt that construction which conforms more nearly to the statute of distributions." *Geery* v. *Skelding*, 62 Conn. 499, 501; *Conklin* v. *Davis*, 63 Conn. 377. As put by Rapallo, J., in *Low* v. *Harmony*, 72 N. Y. 408: "When the language of a limitation is capable of two constructions, one of which would operate to disinherit a lineal descendant of the testator, while the other will not produce that effect, the latter should be preferred. An intention to disinherit an heir, even a lineal descendant, when expressed in plain and unambiguous language, must be carried out; but it will not be imputed to a testator by implication, nor when he uses language capable of a construction which will not so operate."

We are not, however, dealing with wills or settlements, but with the words "next of kin,"

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as used in a statute, passed, in acknowledgment of losses incurred by the ancestors, under circumstances rendering conjecture futile as to what their action, if exercising a volition in the matter, might be, and where the act clearly indicates the judgment of Congress that the next of kin for the purposes of succession generally should be the beneficiaries as most in accord with the theory of the appropriations.

The supreme court of the District of Columbia, *Gardner* v. *Clarke*, 9 Mackey, 261; the supreme court of Pennsylvania, *Re Clements's Estate*, 160 Pa. 391; and the circuit court of Baltimore county, Maryland, 49 *Phila. Leg. Int. 147,—have expressed similar views to the foregoing.

466] *The judgments are severally reversed*, and the causes remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Gray** did not sit in these cases or take any part in their decision.

JERRY WALLACE, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 466-478.)

Prior threats, when evidence in a case of homicide—prisoner's belief of intention of the person killed—evidence as to arming.

1. Prior threats by a person killed, against his slayer, are relevant evidence in a homicide case, where from any view the jury can properly take of the circumstances the belief of the accused that he was in imminent danger of death or great bodily harm might excuse his act or reduce the crime from murder to manslaughter.
2. The accused may testify what he believed the person whom he shot was about to do, when it is proved that he had previously made threats against the accused, and immediately before the killing made some demonstration with his hand, declaring that he would kill the accused.
3. The mere fact that a man armed himself with a gun before going to order trespassers from premises is not sufficient ground for excluding evidence of prior threats against him, of one of the trespassers who was killed in the affray which resulted.

[No 731.]

Submitted March 2, 1896. Decided April 20, 1896.

IN ERROR to the District Court of the United States for the District of Kansas to review a judgment of that court convicting Jerry Wallace of the murder of Alexander Zane at the Wyandotte Indian reservation. *Reversed with direction for a new trial.*

Statement by *Mr. Chief Justice* **Fuller:**

Jerry Wallace was convicted, at the May term, 1895, of the district court of the United States for the district of Kansas, of the murder of Alexander Zane, on March 7, 1895, at the Wyandotte Indian reservation, and sentenced to be hanged.

The evidence tended to show that Wallace had lived on that reservation for four years, on a piece of land owned by his wife, Jane, a

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NOTE.—*As to threats by deceased in cases of homicide; when admissible in evidence,*—see note to Wiggins v. Utah, 23: 941.

Prior threats by person killed, when evidence in favor of defendant on trial for the homicide.

Threats of violence made towards defendant by deceased, communicated to defendant before the killing, which tend to show cause for belief that he was in great danger of receiving harm from deceased when he committed the homicide are admissible. Eiland v. State, 52 Ala. 322; Powell v. State, 52 Ala. 1; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Pritchett v. State, 22 Ala. 39, 58 Am. Dec. 250; Palmore v. State, 29 Ark. 248; Atkins v. State, 16 Ark. 568; People v. Anderson, 39 Cal. 703; People v. Lombard, 17 Cal. 316; People v. Williams, 17 Cal. 142; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269; Howell v. State, 5 Ga. 48; Williams v. People, 54 Ill. 422; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; State v. Elliott, 45 Iowa, 485; Cornelius v. Com. 15 B. Mon. 539; Holloway v. Com. 11 Bush, 344; State v. Robertson, 30 La. Ann. 340; State v. McCoy, 29 La. Ann. 593; State v. Spaulding, 34 Minn. 361; Hawthorne v. State, 61 Miss. 749; Johnson v. State, 54 Miss. 430; Long v. State, 52 Miss. 23; State v. Downs, 91 Mo. 19; State v. Harris, 59 Mo. 550; State v. Bryant, 55 Mo. 75; State v. Keene, 50 Mo. 357; State v. Sloan, 47 Mo. 604; State v. Matthews, 78 N. C. 523; State v. Turpin, 77 N. C. 473, 24 Am. Rep. 455; State v. Dodson, 4 Or. 64; Horbach v. State, 43 Tex. 242; Brumley v. State, 21 Tex. App. 222, 57 Am. Rep. 612; State v. Abbott, 8 W. Va. 741; United States v. Rice, 1 Hughes, 560.

Evidence that as justice of the peace the prisoner had prosecuted the deceased for embezzlement of the county school fund, and that in consequence thereof the deceased vowed that the defendant should not be at the trial of said indictment, for that he would kill him, is admissible, in connection with other circumstances, to show that defendant was in fear of his life from the deceased, and that the killing was in self-defense. Monroe v. State, 5 Ga. 85.

Where A called B into his store, and placing himself between B and the door, called him a liar, and with a knife in his hand threatened to cut off his ears, on a trial of B for shooting A maliciously, etc., evidence that a son of A, who was in the store when B entered it, immediately ran up stairs and returned with a pistol in his hand, which he snapped at B, and that the son had had his pistol loaded a few days before, and then made a contingent threat to shoot B of which B was notified before he entered the store, was held to be admissible. Rapp v. Com. 14 B Mon. 614.

Threats of a third person communicated to defendant, and the attempt to kill him on the same day by deceased, are admissible as tending to explain the fact of defendant's being armed and in expectation of an attack, and as bearing on the question of premeditation. State v. Spaulding, 34 Minn. 361.

On a trial for homicide committed by a deadly weapon in the hands of either the accused or his brother, both of whom were engaged in an affray with deceased, who first attacked the brother, it was held that the threats of the deceased which may have referred to the brother, made to a third person immediately preceding the attack though not communciated to defendant or his brother, were competent as part of the *res gestæ*. Dickson v. State, 39 Ohio St. 73.

Upon the trial of an indictment for murder, the

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daughter of Alexander Zane, to whom he was married in 1891. Ill feeling had for a long time existed between Zane and Wallace, growing out of a dispute between them as to the true boundary line of the land owned or claimed by Jane Wallace, and on which she resided and the land of Julia, a minor daughter of Alexander Zane. Surveys had been made and patents had issued, but the true boundary line, if established by the surveys, had not been accepted by the parties. March 7, 1895, about 7 o'clock in the morning, Alexander Zane, accompanied by his son, Noah, who was about fifteen years of age, and three other parties, proceeded with two wagons loaded with posts from his farm to the land on which Wallace resided, and entered the field occupied by Wallace, which he was at that moment engaged in plowing, through a gap in the fence made by Alexander Zane, and went across it to the fence on the eastern side, and there began to unload the posts and to plant or drive them into the ground along the fence line which they proposed to establish. Wallace and one Denmark were engaged in plowing the field, being in different parts and moving in opposite directions. As Zane and his party entered the field and were crossing it, Wallace was plowing towards its eastern side, which he had reached, and was returning when Zane and his party passed about 50 or 60 yards from him, moving in a southeasterly course. Wallace had impaired eyesight and did not see Zane until just before he passed, and then called to him saying,* "Alexander Zane, if [468 that is you, take your force and get out of this field," or, as it was put by one or more of the witnesses, "Alexander Zane, I want you to take your mob and get off these premises." There was evidence tending to show that Zane and those who were with him had been drinking, and that they were boisterous, singing and hallooing. Defendant testified: "They were noisy, hollering, and singing, and acting as if they were drunk to me, and I guess no doubt was." Zane appears to have made no reply to Wallace, but went on his way. Wallace continued on with his plow until he had reached a ravine that ran north and south through the field, where he halted, unhitched his horses from the plow, and took them up to the barn. In about half an hour he returned with a double-barrelled shotgun in his hands, posted within a few feet of a group of persons consisting of Denmark, his daughter, one Lewis, and Wallace's wife, and in passing said to his wife, "Now Janie, I want you to order these gentlemen out of here." Mrs. Wallace then ordered Alexander Zane and those who were with him to leave, but they paid no attention to her. Thereupon Wallace ordered Zane to leave and said to him, "Are you

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accused may prove that a man, then dead, had but a short time before the homicide told him that the deceased had armed himself to kill the accused. Carico v. Com. 7 Bush, 124.

Where defendant was the aggressor, and there is no pretense that deceased was about to carry the threats into execution, or that defendant had reasonable grounds to believe and did believe that such was the case, evidence of such threats by deceased, although they were communicated to defendant, is inadmissible. People v. Taing, 53 Cal. 602; Bond v. State, 21 Fla. 738; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Downs, 91 Mo. 19; Gonzales v. State, 31 Tex. 495; Carter v. State, 18 Tex. App. 573; State v. Spell, 38 La. Ann. 20; State Birdwell, 36 La. Ann. 859; Moriarty v. State, 62 Miss. 654; State v. Guy, 69 Mo. 430; Thomas v. State, 11 Tex. App. 315.

On a trial of P for murder of S, there was evidence that P, having had a quarrel with S, rode off several miles, procured a gun, followed S, attacked him when they met, and shot and killed him, S having no weapon in his possession. Held, that threats made by S two weeks previously, and communicated to P were not competent evidence for P. Payne v. State, 60 Ala. 80.

In a trial for murder, evidence is inadmissible, on the part of the defense, to show that a threat made by the deceased to put to his end "the first nigger that fools with me" was communicated to the defendant about half an hour after it was made. State v. Guy, 69 Mo. 430.

A was seated in B's shop with a pistol in his pocket and a double-barreled shot gun in his lap, while B and C were engaged in angry conversation, C, without speaking to A suddenly threw his hand to his hip pocket, when A fired and killed him. Held, that evidence of antecedent threats by C against A were not admissible, for if there was any overt act it was against B. Moriarty v. State, 62 Miss. 654.

Where the threats had not been communicated to defendant, they are admissible only when the evidence leaves a doubt as to whether the defendant or the deceased was the aggressor at the time of the homicide. Roberts v. State, 68 Ala. 159; Harris v. State, 34 Ark. 469; Palmore v. State, 29 Ark. 248; People v. Travis, 56 Cal. 251; People v. Scoggins, 37 Cal. 676; Lingo v. State, 29 Ga. 470; State v. Brown, 22 Kan. 222; State v. Jackson, 37 La. Ann. 896; State v. Janvier, 37 La. Ann. 645; State v. Labuzan, 37 La. Ann. 489; Turpin v. State, 55 Md. 462; Newcomb v. State, 37 Miss. 383; State v. Hays, 26 Mo. 287; Binfield v. State, 15 Neb. 484; State v. Stewart, 9 Nev. 120; State v. Ferguson, 9 Nev. 106; State v. Hall, 9 Nev. 58; State v. Turpin, 77 N. C. 473, 24 Am. Rep. 455; Little v. State, 6 Baxt. 491; West v. State, 18 Tex. App. 640; Allen v. State, 17 Tex. App. 637; Wiggins v. Utah, 93 U. S. 465 (23: 941); Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492.

Upon a trial for murder, evidence of threats previously made by the deceased, to kill the defendant, it not appearing that they had been communicated to the defendant, is admissible, upon the question of whether the deceased began the affray, thereby attempting to fulfil his threats. People v. Alivtre, 55 Cal. 268.

On the trial of an indictment for murder, where defendant pleaded self-defense, and the existence of a feud between the families of the deceased and accused was shown, statements of the father of deceased, made in the hearing of the latter, that if defendant and his brothers didn't watch they would get hurt, for his son would shoot them, are admissible. Mayfield v. State, 110 Ind. 591.

Threats of deceased, made fifteen minutes before his death, that "he was going to have blood before morning," are properly admitted upon the trial of one charged with his murder, as tending to show that the deceased was the aggressor. State v. McNally, 87 Mo. 644.

On trial of D for murder of B, it was proved that a feud had existed between them for many years, and that repeated threats of B to take D's life had been communicated to D. Held, that evidence was admissible, by way of showing B's attitude to D at the time of the killing, that immediately before the killing B had made threats to kill D, which were not communicated to D. Davidson v. People, 4 Colo. 145.

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going?" Zane was standing with his right hand on a post he had driven in the ground and his left arm hanging by his side.

Wallace testified: "I asked of him whether he was going or not, and about this time I was struck in the back, and Mr. Zane made a grab like this (indicating), and he was standing with his right hand on the post; about the time I was struck in the back he made this motion (indicating), and says, 'Damn you, I will kill you;' and then my wife hollers or least she says, 'Look out, Jerry!' and I fired this gun."

Lafayette Lewis, another witness, testified: "His wife ordered them out, and Jerry also, and he asked Zane if he was going to go, but I never heard Zane say a word, and then he told him the second time, and he looked up towards him, with his left hand on the post, and threw his hand up this way (indicating), and said, 'Damn you, I am going to kill you!' . . . When Jerry ordered him the second time, he turned and kind of looked at him and [469] threw his hand up this *way to his bosom and said, 'Damn you, I will kill you!' and at that moment the boy struck Jerry with the knife and Jerry shot him."

Several other witnesses did not see or hear any word or gesture proceed from Zane, but testified that when Wallace said to Zane, "Are you going?" he immediately raised his gun, aimed it at Zane and fired, shooting Zane in the left breast; that Zane walked off about 30 feet and fell, and when those nearest him reached him he was dead; that when Wallace fired his gun at Zane, Noah Zane ran up and stabbed him in the shoulder with a pocket knife, whereupon Wallace turned and pointed his gun at Noah and the gun snapped. When Zane fell, Noah went to him and took from his person a tomahawk or small hatchet, which was the only thing in the way of a weapon found on him.

There was evidence to the effect that the wound thus inflicted on Wallace penetrated about half an inch, bled considerably, was much swollen and that his stomach was black and blue as though he had been hit with something, as he testified that he was.

Evidence was also adduced that Zane was in the habit of carrying a butcher knife with him in his belt; that he was quarrelsome; and that Wallace had the reputation of being a peaceable and quiet man. In reference to the survey under which Zane claimed, testimony was given tending to show, as was contended, that Zane caused the disputed line to be so run by the chainmen as to gain 4 feet, and that Zane said "when he got through with the land he wouldn't leave Jerry Wallace a garden spot; that he could haul it away in a wagon box."

Defendant offered to prove by R. C. Patterson that the day before the shooting occurred he had a conversation with Zane, "in which Zane said to him that he was going down there to build a fence across this property of Wallace's the next day, and if Jerry Wallace fooled with him he would kill the blind son of a bitch." This was also objected to, the objection sustained and defendant excepted. Also, that in the same conversation Zane stated that he had got some whiskey "for the purpose of [470] *bracing himself up for the purpose of building this fence across the land of this defendant, Jerry Wallace." Plaintiff objected, the court sustained the objection and defendant excepted.

Defendant further offered to prove by Charles Luke that he had a conversation with Zane the day before the killing, and "Alex. Zane said to this witness that he was going down to build a fence across Wallace's land, and that if Jerry Wallace interfered with him that he would kill him, or shoot the blind son of a bitch," and that all these threats were communicated to Wallace. Plaintiff objected, the objection was sustained and defendant excepted.

Defendant offered to prove by Mrs. Alice Sargent that somewhere near the middle of February, 1895, she had a conversation with Zane, on which occasion "Alex. Zane said to this woman and threatened that he would kill Jerry Wallace, and that he had a knife that he was carrying at that time for that purpose, and that these threats were communicated to Jerry Wallace by this witness afterwards." This was objected to, the objection sustained and defendant excepted. A similar offer of proof by one Taylor was made and a similar exception taken. Defendant also offered to prove by Samuel Collins "that at a time shortly before the 7th of March last he met Alexander Zane and had a conversation with Alexander Zane about Jerry Wallace, and that in that conversation he threatened to kill Jerry Wallace, and that he said to this witness that he at one time made him look down the muzzle of a double-barrelled shotgun and he wished he had killed him at that time, and that these threats were communicated to the defendant." An offer to prove similar threats prior to the homicide by Mary Crow was made, excluded and exception taken.

When the defendant was on the stand he testified that he took the gun into the field because he was afraid of the party, and especially of Alexander Zane, and did not feel safe without some protection. The following questions were put and ruling made: "*Q.* You may state, Mr. Wallace, what Zane did at that time, just before you fired the shot. *A.* He just [471] *took his hand something like this (indicating), saying, 'Damn you, I will kill you.' *Q.* You may state to the jury from that demonstration what you believed Zane was about to do." To this question plaintiff objected, the objection was sustained and defendant excepted.

Various errors were assigned in respect of the jurisdiction of the court, the sufficiency of the indictment, the want of due service of the list of jurors, and instructions given and refused.

Messrs. **John D. Hill** and **James H. Pratt** for plaintiff in error.

Mr. **Holmes Conrad,** Solicitor General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

If Jerry Wallace believed and had reasonable ground for the belief that he was in imminent danger of death or great bodily harm from Zane at the moment he fired, and would

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not have fired but for such belief, and if that belief, founded on reasonable ground, might in any view the jury could properly take of the circumstances surrounding the killing, have excused his act or reduced the crime from murder to manslaughter, then the evidence in respect of Zane's threats was relevant and it was error to exclude it; and it was also error to refuse to allow the question to be put to Wallace as to his belief based on the demonstration on Zane's part to which he testified.

Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defense; but where the accused embarks in a quarrel with no felonious intent, or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder. Whart. Hom. § 197; 2 Bishop, Crim. L. §§ 702, 715; 4 Am. & Eng. 472]Enc. Law, 675; *State* v. *Partlow*, 90 Mo. 608 [59 Am. Rep. 31]; *Adams* v. *People*, 47 Ill. 376; *State* v. *Hays*, 23 Mo. 287; *State* v. *McDonnell*, 32 Vt. 491; *Reed* v. *State*, 11 Tex. App. 509 [40 Am. Rep. 795].

In *Adams* v. *People* it was ruled by the supreme court of Illinois, speaking through *Mr. Chief Justice* Breese, that where the accused sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him, in pursuance of his malicious intention, he would be guilty of murder, but if the jury found that the accused voluntarily got into the difficulty or fight with the deceased, not intending to kill at the time, but not declining further fighting before the mortal blow was struck by him, and finally drew his knife and with it killed the deceased, the accused would be guilty of manslaughter, although the cutting and killing were done in order to prevent an assault upon him by the deceased or to prevent the deceased from getting the advantage in the fight.

In *Reed* v. *State*, 11 Tex. App. 509 [40 Am. Rep. 795], the court of appeals of Texas, in treating of the subject of self defense, said: "It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his own wrong was placed in a situation where it became necessary for him to defend himself against an attack made upon himself, which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then, indeed, the law wisely imputes to him his own wrong and its consequences, to the extent that they may and should be considered in determining the grade of offense, *which [473 but for such acts would never have been occasioned. . . . How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slays his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from any assault made upon him, would be manslaughter under the law."

After quoting from these and other cases, Sherwood, *J.*, delivering the opinion of the supreme court of Missouri in *State* v. *Partlow*, 90 Mo. 608, [59 Am. Rep. 31], remarked: "Indeed, the assertion of the doctrine that one who begins a quarrel or brings on a difficulty with the felonious purpose to kill the person assaulted, and accomplishing such purpose is guilty of murder, and cannot avail himself of the doctrine of self-defense, carries with it in its very bosom, the inevitable corollary that if the quarrel be begun without a felonious purpose, then the homicidal act will not be murder. To deny this obvious deduction is equivalent to the anomalous assertion that there can be a felony without a felonious intent: that the act done characterizes the intent, and not the intent the act."

In this case it is evident that Wallace was bent as far as practicable on defending his possession against what he regarded and the evidence on his behalf tended to show was an unwarrantable invasion. But a person cannot repel a mere trespass on his land by the taking of life, or proceed beyond what necessity requires. When he uses in the defense of such property a weapon which is not deadly, and *death accidentally ensues, the killing will [474 not exceed manslaughter, but when a deadly weapon is employed it may be murder or manslaughter, according to the circumstances. 1 Hale, P. C. 473; 1 Hawk. P. C. chap. 31, §§ 34 *et seq.*, Fost C. C. 291; *Davison* v. *People*, 90 Ill. 221; *People* v. *Payne*, 8 Cal. 341; *Carroll* v. *State*, 23 Ala. 28 [58 Am. Dec. 282]; 1 Whart. Crim. L. § 462, and cases cited.

Whether the killing with a deadly weapon may be reduced in any case to manslaughter when it is the result of passion excited by a trespass with force to property, we need not consider, as the question, perhaps in view of the interval of time during which Wallace was seeking his gun, does not seem to have been raised. Conceding, though without intimating any opinion on the facts disclosed, that Jerry Wallace committed a crime, still the inquiry arose as to the grade of the offense, and, in respect of that, the threats offered to be proved had an important, and it might be de-

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cisive, bearing; nor was the mere fact that Wallace procured the gun as stated in itself sufficient ground for their exclusion.

In *Gourko* v. *United States*, 153 U. S. 183 [38:681], this court held that it was error to instruct a jury that preparation by arming, although for self defense only, could not be followed, in any case, by manslaughter, if the killing after such arming was not, in fact, necessarily in self-defense; and that if, under the circumstances on the occasion of the killing, the crime were that of manslaughter, it was not converted into murder by reason of the accused having previously armed himself.

In *Beard* v. *United States*, 158 U. S. 550, 563 [39:1087, 1092], it was said: "In our opinion, the court below erred in holding that the accused, while on his premises, outside of his dwelling house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his pur-[475]pose to attack the accused. The *defendant was where he had a right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

In *Allison* v. *United States*, 160 U. S. 203 [*ante*, 395], it was held that in charging the jury on a capital trial in respect of the possession of a deadly weapon by the accused, it was error to ignore evidence indicating that such possession was for an innocent purpose. The subject of threats was there somewhat considered and authorities cited.

Necessarily it must frequently happen that particular circumstances qualify the character of the offense, and it is thoroughly settled that it is for the jury to determine what effect shall be given to circumstances having that tendency whenever made to appear in the evidence.

In *Stevenson* v. *United States*, 162 U. S. 313 [*ante*, 980], we said:

"The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder. . . . The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder and not manslaughter, or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the *credibility and force[476] of such evidence must be for the jury, and cannot be matter of law for the decision of the court.

"By U. S. Rev. Stat. § 1035, it is enacted that 'in all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, That each attempt be itself a separate offense.' Under this statute the defendant charged in the indictment with the crime of murder may be found guilty of the lower grade of crime, *viz.*, manslaughter. There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect. *Sparf* v. *United States*, 156 U. S. 51 [39:343]. . . . Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied. Whart. Am. Crim. L. 8th ed. § 804. Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, *viz.*, the circumstances leading up to and surrounding the killing. The definition of the crime given by U. S. Rev. Stat. § 5341, is substantially the same. The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter."

Treating the excluded evidence as admitted, and assuming that Wallace would have testified that he believed from Zane's *demonstra[477]tion that Zane intended to kill him, the evidence on defendant's behalf tended to establish bad feeling between Zane and Wallace in reference to the line between Mrs. Wallace's land and that of Julia Zane; an attempt on Zane's part to include a part of Mrs. Wallace's land in the Zane parcel; declarations by Zane the day before the homicide that he was going the next day to run a fence across what Wallace claimed to be his land, and threats that, if Wallace interfered with him in so doing, Zane would kill him, all communicated to Wallace before the homicide; previous threats also communicated that he would kill Wallace; forcible entrance by Zane, accompanied by several others, into the field claimed by Wallace, in which he was plowing, and fencing off part of it commenced;

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boisterous and disorderly manifestations on their part and refusals by Zane to leave when ordered to go,—such demonstrations by Zane at the moment induced Wallace to believe that he was in imminent danger, and action based on that belief. Granting that the jury would have been justified in finding that Wallace's intention in going for the gun and returning with it as he did was to inflict bodily harm on Zane if he did not leave, still the presumption was not an irrebuttable one, and it was for the jury to say whether Wallace's statement that he procured the gun only for self-protection was or was not true. And if they believed from the evidence that this was true, and that the killing was under reasonable apprehension of imminent peril, then it was for the jury to determine under all the facts and circumstances whether Wallace had committed the offense of manslaughter, rather than that of murder, if he could not be excused altogether.

We think that the threats were admissible in evidence, and, this being so, that the question as to Wallace's belief should not have been excluded. It has been often decided that where the intent is a material question, the accused may testify in his own behalf as to what his intent was in doing the act. *People* v. *Baker*, 96 N. Y. 340; *State* v. *Banks*, 73 Mo. 592; *Thurston* v. *Cornell*, 38 N.Y. 281; *Over* v. *Schiffling*, 102 Ind. 191; *People* v. *Quick*, 51 Mich. 478] 547; *Fenwick v. *Maryland*, 63 Md. 239. In the latter case it was held that a person on trial for an assault with intent to commit murder is competent to testify as to the purpose for which he procured the instrument with which he committed the assault.

This rule is not controverted, but it is contended that Wallace's belief was immaterial. For the reasons given we cannot concur in that view and are of opinion that the witness should have been allowed to answer.

It is unnecessary to pass upon any of the other points raised on behalf of plaintiff in error.

Judgment reversed and cause remanded, with a direction to set aside the verdict and grant a new trial.

ELENA CAMPBELL, *Plff. in Err.*,
v.
GEORGEANN PORTER, CARLILE P. PORTER ET AL.

(See S. C. Reporter's ed. 478-489.)

Writ of error, when proper—question of jurisdiction—probate of will.

1. A judgment of the supreme court of the District of Columbia admitting a will to probate may be reviewed by writ of error in this court. The proceeding for the probate of the will is not a suit in equity, but one in which the parties have the right to trial by jury.
2. The question of the jurisdiction of the court below can be raised by either party or by the court on its own motion.
3. The supreme court of the District of Columbia has no power to admit a will or codicil to probate as a devise of real estate.

[No. 137.]

Argued March 10, 11, 1896. Decided April 20, 1896.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment to that court admitting the will and codicil of David D. Porter to probate, as to both real and personal estate. *Reversed, and case remanded for further proceedings.*

See same case below, 9 Mackey, 493.

Statement by *Mr. Justice* **Gray:**

This was a petition by the executors of the will of the late Admiral David D. Porter, who died February 13, 1891, to the special term of the supreme court of the District of Columbia, sitting as an orphans' court, for the admission to probate of his will and of a codicil thereto.

Upon citation to the next of kin, Elena Porter, a daughter of the testator, having become by marriage Elena Campbell, appeared and demanded full proof of the execution of the will and codicil.

The will and the codicil each bore the signature of the testator, and those of the same three persons as witnesses. *At the hearing in [479 special term, it was shown by the examination of the witnesses, that the will was duly executed by the testator, and attested by all three witnesses; and that the codicil was signed by the testator, and attested by two of the witnesses; and the only controverted question was whether the testator did or did not make or acknowledge his signature to the codicil in the presence of the third witness.

Upon the whole evidence (which was set forth in the record, but is unnecessary to the understanding of the points decided by this court) the judge holding the special term ordered the will to be admitted to probate as to both real and personal property, and the codicil to be admitted to probate in respect of personal property, and certified to the general term, for hearing in the first instance, the question of the sufficiency of the codicil to devise or dispose of real estate.

At the hearing in general term, it was ordered and adjudged, for reasons stated in the opinion reported in 9 Mackey, 493, that the codicil was duly executed by the testator, and subscribed and attested by three witnesses, as required by law, and should be admitted to probate as a devise of real estate. A bill of exceptions to this ruling and order was tendered by Mrs. Campbell, and allowed by the court, which certified that the value of the real estate devised to her in the codicil was less than that devised to her in the will by more than the sum of $5,000, a sufficient amount to sustain the appellate jurisdiction of this court under the act of March 3, 1885 (23 Stat. at L. 443, chap. 355), and Mrs. Campbell, on June 22, 1892, sued out this writ of error.

Messrs. **Walter D. Davidge** and **Walter D. Davidge,** *Jr.*, for plaintiff in error:

The record of wills of real estate in the District of Columbia admitted to probate since the passage of the act of 1888 is prima facie evidence as to two matters—contents and due execution.

Barbour v. *Moore*, 4 App. D. C. 535, 544.

Even if the court below was without jurisdiction to render the judgment the fact remains that the plaintiff in error is aggrieved by the judgment and entitled to have it re-

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viewed. Such a judgment, a muniment of title until reversed, and despoiling the plaintiff in error of her estate exceeding in value $5,000 as found by the court below, should surely, if void, as contended, be so declared judicially.

Phillips v. *Negley*, 117 U. S. 665 (29: 1013); *Carter* v. *Cutting*, 12 U. S. 8 Cranch, 251 (3: 558); *Windsor* v. *McVeigh*, 93 U. S. 274 (23:915).

This case was rightly brought here by writ of error.

Ormsby v. *Webb*, 134 U. S. 47 (33: 805).

A proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity.

The controversy is one which by law is triable by the court without the intervention of a jury.

The trial was allowed to proceed before the court, which had a perfect right to try and determine the case without either a plenary proceeding or issues. There are no facts to be tried but merely a question as to the conclusion of law from undisputed facts. There must be affirmative evidence that the testator knew the paper was a will or codicil, and that evidence cannot be deduced from the face of the paper alone.

Osborn v. *Cook*, 11 Cush. 532, 59 Am. Dec. 155; *White* v. *British Museum*, 6 Bing. 310; *Ilott* v. *Genge*, 3 Curt. Eccl. Rep. 160; *Gerrish* v. *Nason*, 22 Me. 438, 39 Am. Dec. 589; *Wright* v. *Wright*, 7 Bing. 459; *Hogan* v. *Grosvenor*, 10 Met. 54, 43 Am. Dec. 414.

It is incumbent on the party asking for the probate of a will affirmatively to establish that the testator at the time of executing it knew that it was his will.

2 Greenl. Ev. § 675.

Mr. **Chapin Brown**, for defendants in error:

This case is not properly before this court for review.

The case should have been brought here by appeal and not by writ of error.

The proceedings under which this case was tried below are provided for in the Maryland act of 1798, chap. 101, subchap. 15, §§ 16, 17.

2 Kilty, p. 852; Dennis, Prob. Law, D. C. pp. 101, 105.

The case of *Ormsby* v. *Webb*, decided by this court and reported in 134 U. S. 47 (33: 805), does not apply to the case at bar.

There is no provision of law or of practice for framing a bill of exceptions in this case (*Stewart* v. *Pattison*, 8 Gill, 46, 54), and the law relating to trial and appeal, where the facts are tried by the court on depositions in writing, is different from that relating to trial by jury.

Dennis, Prob. Law D. C. 108.

The orphans' court has no power whatever to admit a will or codicil to record and probate as a devise of real estate.

Warford v. *Colvin*, 14 Md. 532; *Robertson* v. *Pickrell*, 109 U. S. 608 (27: 1049); *Re McIntire's Estate*, 5 Mackey, 293; *Barbour* v. *Moore*, 22 Wash. L. Rep. 792.

Mr. Justice **Gray** delivered the opinion of the court:

It was contended, in behalf of the defendants in error, that the case should have been brought to this court by appeal, and not by writ of error. But we consider this point as settled by the decision made six years ago in *Ormsby* v. *Webb*, 134 U. S. 47, 64, 65 [33: 805, 812, 813], in which a motion to dismiss, for the same reason, a writ of error to review a judgment of the supreme court of the District of Columbia, admitting a will to probate, was denied by this court, not merely because in that case a trial by jury had been actually had, but upon the more general ground that a proceeding for the probate of a will in the District of Columbia was not a suit in equity, and was a case in which the parties had the right to claim a trial by jury, and in which there might be adversary parties, and a final judgment affecting rights of property. See *Price* v. *Taylor*, 21 Md. 356, 363. The decision in *Ormsby* v. *Webb*, *supra*, has since been understood as governing the practice in the District, and evidently guided the course of the plaintiff in error in the present case. Under these circumstances, the question whether the form of bringing up a probate case shall be by writ of error or by appeal does not appear to us to be so important in its consequences that it should now be reconsidered.

*A more serious question of jurisdic-[482 tion, presented by this record, is whether the supreme court of the District of Columbia had power to admit a will or codicil to probate as a devise of real estate. Curiously enough, it is the plaintiff in error who contends that it had, and the defendants in error who insist that it had not. But it is immaterial by which party the question is made, for, being a question of jurisdiction, it would be the duty of this court of its own motion to take notice of it.

This question depends upon the act of Congress of July 9, 1888, chap. 597, entitled "An Act Relating to the Record of Wills in the District of Columbia," and the whole of the rest of which is as follows: "The record of any will or codicil, heretofore or hereafter recorded in the office of the register of wills of the District of Columbia, which shall have been admitted to probate by the supreme court of the District of Columbia, or by the late orphans' court of said District, or the record of the transcript of the record and probate of any will or codicil elsewhere, or of any certified copy thereof, heretofore or hereafter filed in the office of said register of wills, shall be prima facie evidence of the contents and due execution of such wills and codicils: Provided, that this act shall not apply in any cause now pending in any of the courts of the District of Columbia." 25 Stat. at L. 246.

In order to determine the scope and effect of this act, it is necessary to consider what the law upon the subject was in the District of Columbia before its passage.

The law of wills and of probate, as existing in Maryland on February 27, 1801, is the law of the District of Columbia, except as since altered by Congress; and the supreme court of the District of Columbia, in special and general term respectively, has, by virtue of successive acts of Congress the probate jurisdiction formerly exercised by the orphans' court and the court of chancery of the state of Maryland, and by the orphans' court and the

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circuit court of the United States for the District of Columbia; with authority, also, at a special term, to order any matter to be heard in the first instance at a general term. Acts **483**]February 27, 1801 (2 *Stat. at L. 103, 107, chap. 15, §§ 1, 12); March 3, 1863 (12 Stat. at L. 763, 764, chap. 91, §§ 3, 5, 16); June 21, 1870 (16 Stat. at L. 161, chap. 141, §§ 4, 5); D. C. Rev. Stat. §§ 772, 800, 930

The older laws of the state of Maryland concerning wills, executors, and guardians were amended and codified by the statute of 1798, chap. 101, drawn up by Chancellor Hanson, and published in 2 Kilty, Laws, and containing the following provisions:

By subchap. 1, § 4 (following the English statute of frauds of 29 Car. II., chap. 3, § 5), it was enacted that "all devises and bequests of any lands or tenements devisable by law shall be in writing and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

Subchap. 2, §§ 1-3, made various provisions for securing the prompt delivery of "a will or codicil" after the death of the testator, to the register of wills for safekeeping until probate; and in § 4 enacted that "an attested copy, under the seal of office, of any will, testament, or codicil recorded in any office authorized to record the same shall be admitted as evidence in any court of law or equity, provided that the execution of the original will or codicil be subject to be contested until a probate hath been had according to this act."

That statute did not authorize the probate of wills of real estate. But in subchap. 2, §§ 5-13, and subchap. 15, §§ 16-18, it made full and minute provisions for the probate in the orphans' court of "any will or codicil, containing any disposition relative to goods, chattels, or personal estate;" by which such a will might, if uncontested, be admitted to probate at once; or, if contested, be dealt with according to the testimony produced on both sides," and be admitted to probate "on such proof as shall be sufficient to give efficacy to a will or codicil for passing personal property;" or, at the request of either party, by a plenary proceeding, upon bill or petition, answer under oath and depositions, and, it might be, the **484**]*findings of a jury upon issues sent to a court of law for trial; with a right of appeal from the orphans' court to the court of chancery or general court.

By the law of Maryland, and consequently of the District of Columbia, in accordance with what was the law of England until the statute of 1 Vict. chap. 26, a will of personal property need not be attested by subscribing witnesses, but might be established, when offered for probate, by the testimony of any two witnesses or by equivalent proof. 1 Williams, Executors (7th ed.) 85, 343; Dorsey, Testamentary Law, 57; *McIntire* v. *McIntire*, 162 U. S. 1009 [*ante*, 388], and 8 Mackey, 482, 489. A will of personal property, until admitted to probate, was not competent evidence in another suit. *Armstrong* v. *Lear*, 25 U. S. 12 Wheat. 169, 176 [6: 589, 592]. And in Maryland, under the statute of 1798, an order granting or refusing probate of a will, as to personalty, has been considered not merely prima facie, but conclusive, evidence in a subsequent suit. *Warford* v. *Colvin*, 14 Md. 532, 554: *Johns* v. *Hodges*, 62 Md. 525, 534.

In *Darby* v. *Mayer* (1825) this court recognized that by a probate under that statute the will was conclusively established as to personalty; but decided that the clause of subchap. 2, § 4, above quoted, by which "an attested copy, under the seal of office, of any will, testament, or codicil recorded in any office authorized to record the same, shall be admitted as evidence in any court of law or equity," did not make such a copy of the recorded probate of a will evidence of title to real estate; and the reasons of the court were stated by Mr. Justice Johnson as follows:

"It is true that the generality of the terms in the first lines of this clause is such as would, if unrestricted by the context, embrace wills of lands. It is also true that the previous chapter in the same article prescribes the formalities necessary to give validity to devisees of real estate; it is further true that the previous sections of the second chapter indicate the means, and impose the duty of delivering up wills of all descriptions to the register of the court of probates, for safe keeping, after the death of the testator, and until they shall be demanded *by some person authorized to [**485** demand them for the purpose of proving them.

"But it is equally true that the act does not authorize the registering of any will without probate. Nor does it in any one of its provisions, relate to the probate of any wills, except wills of goods and chattels.

"The clause recited makes evidence of such wills only as are recorded in the offices of courts authorized to record them. But when the power of taking probate is expressly limited to the probate of wills of goods and chattels, we see not with what propriety the meaning of the clause in question can be extended to wills of any other description. The orphans, court may take probates of wills, though they affect lands, provided they also affect goods and chattels; but the will, nevertheless, is conclusively established only as to the personalty.

"Unless the words be explicit and imperative to the contrary, the construction must necessarily conform to the existing laws of the state on the subject of wills of real estate. And when the power of taking probates is confined to wills of personalty, we think the construction of the clause recited must be limited by the context.

"We are therefore of opinion that there was nothing in the law of Maryland which could, under the Constitution, make the document offered to prove this will *per se* evidence in a land cause." 23 U. S. 10 Wheat. 465, 471, 472 [6: 367-369].

In *Robertson* v. *Pickrell* (1883) this court held that an exemplified copy of the probate of a will of real estate in a court of Virginia, authorized by the law of that state to take probate of wills, as well of real estate as of personal property, was incompetent evidence in the courts of the District of Columbia, of title to real estate in the District, and, speaking by *Mr. Justice* Field, said: "In most of the states

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in the Union a will of real property must be admitted to probate in some one of their courts, before it can be received elsewhere as a conveyance of such property. But by the law of Maryland, which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The 486] *common-law rule prevails on that subject. The orphans' court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also; but the probate is evidence of the validity of the will, only so far as the personal property is concerned. As an instrument conveying real property, the probate is not evidence of its execution. That must be shown by a production of the instrument itself, and proof by the subscribing witnesses; or, if they be not living, by proof of their handwriting." 109 U. S. 608, 610 [27: 1049, 1050].

In the state of Maryland, the statute of 1798 continued to be in force until the legislature of Maryland, by the supplemental statute of 1831, chap. 315, § 1, authorized the orphans' courts to take the probate of "any will, testament, or codicil, whether the same has relation to real or personal estate, or to both real and personal estate," in the same manner as, under the original statute, they might of wills disposing of personal estate; "which said probate, as concerns real estate, shall be deemed and taken only as prima facie evidence of such will, testament, or codicil;" and, in § 16, provided that any will admitted to probate should be kept in the register's office, except that it might, at the trial of an issue of *devisavit vel non*, "be adduced in evidence under care of such register, or of any person in that behalf by him deputed, under a *subpœna duces tecum* issued on special order of the court holding such trial."

The statute of Maryland of 1854, chap. 140, authorized copies of wills and probates made in other states to be filed and recorded in the office of the register of wills in any county in Maryland; and provided that a copy of the record, under the hand of the register and the seal of his office, should "be evidence in all suits or actions, at law and in equity, in any court in this state, wherein the title of any property, real or personal, thereby devised or given, shall be in question, with the same force and effect as if the original will had been admitted to probate in this state, according to the laws thereof." Before that statute, the record of a probate in another state was inadmissible in evidence in the courts of Maryland. *Budd* v. *Brooke*, 3 Gill, 198, 232 [43 Am. Dec. 321]; *Beatty* v. *Mason*, 30 Md. 409, 412.

487] *Congress never legislated upon the subject mentioned in either of the last two statutes of Maryland, until it passed the act of July 9, 1888, chap. 597, now in question, entitled "An Act Relating to the Record of Wills in the District of Columbia," and the whole enacting part of which is so brief that it may well be quoted once more, as follows: "The record of any will or codicil, heretofore or hereafter recorded in the office of the register of wills of the District of Columbia, which shall have been admitted to probate by the supreme court of the District of Columbia, or by the late orphans' court of said district, or the record of the transcript of the record and probate of any will or codicil elsewhere, or of any certified copy thereof, heretofore or hereafter filed in the office of said register of wills, shall be prima facie evidence of the contents and due execution of such wills and codicils: Provided, that this act shall not apply in any cause now pending in any of the courts of the District of Columbia."

Before the passage of this act, as has been seen, neither the supreme court of the District of Columbia nor its predecessor, the orphans' court, had any jurisdiction to admit to probate a will of real estate only; and consequently no record in any court of the District of a probate of a will, would be any evidence whatever of title to real estate; but, as personal property, the probate of a will would seem to have been regarded as conclusive evidence; and there was no statute law in the District concerning the record or the proof of wills made and probated elsewhere.

The act of 1888 is a statute of evidence, and not of jurisdiction. It does not purport to confer any jurisdiction whatever. Its title describes it as "relating to the record of wills." The body of it is, in terms, a simple declaration that records of probates of wills or codicils in the District of Columbia "shall be prima facie evidence of the contents and due execution of such wills and codicils." And the concluding proviso, that it shall not apply to pending causes, treats it as a mere rule of evidence.

The records thus made evidence include those of wills and codicils admitted to probate by the courts of the District, *whether [488 before or after the passage of the act, and also records of probates made elsewhere and filed in the register's office here. The act assumes the probates to have been lawfully made; and it no more undertakes to define or to regulate the jurisdiction of the courts of probate of the District for the future, than it does the jurisdiction of those courts in the past, or the jurisdiction of the courts elsewhere whose proceedings filed here are equally made evidence.

The act gives no greater weight to future than it does to past probates and records. But if it made the record of a will, admitted to probate in the District of Columbia before the act, evidence of title to real estate, it would not only give the probate an effect which could not have been in the mind of the court which granted it, but it would, in many cases, make a will effective to pass real estate, which had never been attested as required by law to constitute a valid will for that purpose.

For example, take the case now before the court, supposing it to have arisen before the passage of the act. The codicil disposed of both real and personal property, and bore the names of three witnesses. To prove it as a testamentary disposition of personal property, two witnesses were ample. Therefore, if the court of probate was satisfied that two only of the witnesses whose names were on the paper saw the testator sign or acknowledge it, the court would be bound to admit it to probate, although, for want of a third witness, there was no sufficient attestation or proof to make it a good will of real estate; and yet the record of the probate would be evidence of

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title to real estate under the devise therein contained.

The act not only does not (as did the statute of Maryland of 1831, above cited) contain an express grant of jurisdiction to take probate of wills of real estate, but it does not mention such wills at all. The leading words, "The record of any will or codicil," in the first line of this act, are no more general than the corresponding words, "An attested copy of any will, testament, or codicil," in the similar provision of the statute of Maryland of 1798, which were held by this court, in *Darby* v. *Mayer*, 23 U. S. 10 Wheat. 465, 471, 472 [6: 367, 368, 369], not to embrace wills of real estate, 489] which *the courts had no authority to admit to probate, although that statute in other clauses (as this act does not) applied by necessary implication, and even by express words, to such wills.

Congress, when framing the act of 1889, cannot be supposed to have been ignorant of the provision relating to evidence in the statute of 1798, which had been part of the law of the District of Columbia for nearly ninety years; nor of the construction which this court had given to that provision; nor yet of the want of any statute concerning records of wills admitted to probate elsewhere.

There may be some difficulty in ascertaining the motive of Congress in passing the act of 1888. But difficulty in ascertaining the motive of Congress is but a slight foundation for attributing to it an intention, unexpressed, to confer upon the courts of probate within the District of Columbia an authority over wills of real estate which they never had before since the District was first organized.

We regret to be compelled to differ in opinion from the court of appeals of the District of Columbia, which, since the decision below in the present case, has held that the record of a will admitted to probate in the District before the passage of the act of 1888 was competent evidence of the title to real estate in an action brought since its passage. But the question appears by the report not to have been argued by counsel or much discussed by the court. *Barbour* v. *Moore*, 4 App. D. C. 535, 543, 544.

The result is that the supreme court of the District of Columbia, upon the application for probate of the codicil in question, had no authority to determine upon its sufficiency to pass real estate; and that its order in this respect must be modified.

That the codicil was sufficiently proved to pass personal property was not controverted at the bar.

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

Mr. Chief Justice **Fuller** took no part in the consideration and decision of this case.

OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Plf. in Err.*, [490

v.

JANE SKOTTOWE.

(See S. C. Reporter's ed. 490-498.)

Removal of cause—complaint—corporation.

1. A complaint in a state court describing defendant as a corporation duly organized, existing, and doing business in the state, does not show that any of its corporate powers depend upon legislation of Congress so as to give it a right of removal to a Federal court, although acts of Congress may have made the defendant a corporation in certain territories.
2. The Federal question, or the Federal character of the defendant company, must appear from the complaint in the action in order to justify a removal.
3. An act of Congress conferring on a state corporation powers or rights in certain territories does not give it corporate powers outside of such territories, so as to entitle it when operating a railroad in the state of its original incorporation to remove a cause against it to a Federal court.

[No. 147.]

Argued March 17, 1896. Decided April 20, 1896.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment of that court affirming the judgment of the Circuit Court for Wasco County in that State in favor of the plaintiff, Jane Skottowe, against the Oregon Short Line & Utah Northern Railway Company for damages for personal injuries caused by the negligence of that company. *Affirmed.*

See same case below, 22 Or. 430, 16 L. R. A. 593.

Statement by *Mr. Justice* **Shiras:**

This was an action brought in the circuit court of the state of Oregon for Wasco county, by Jane Skottowe, against the Oregon Short Line & Utah Northern Railway Company, for personal injuries alleged to have been caused by the negligence of defendant company. The complaint was filed on October 31, 1890, and on November 10, 1890, the defendant filed a petition for the removal of the cause from the state court into the circuit court of the United States. This petition was denied; to which ruling the defendant excepted.

The case was proceeded in, and trial on the merits in the state court resulted in a verdict and judgment in favor of the plaintiff in the sum of $10,000. To this judgment a writ of

NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies,—see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudices, see note to Gaines v. Fuentes, 23: 524, and Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question,—see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes; when denied,—see note to Civil Rights Cases, 27: 835.

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error was sued out to the supreme court of the state of Oregon, assigning as error, among others, the action of the trial court in denying the defendant's petition for the removal of the cause into the circuit court of the United States.

The supreme court of the state affirmed the judgment of the trial court, and a writ of error was allowed to this court.

Messrs. **John M. Thurston and John F. Dillon,** for plaintiff in error:

The corporate existence of the defendant can only be shown by its charter or articles of incorporation and by reference to the statute or statutes authorizing it to become a corporation. A corporation cannot exist as such except by authority of law.

The power of Congress to create a corporation or to take a corporation already existing and to confer additional corporate franchises, rights, and privileges upon it, is undoubted.

California v. *Central P. R. Co.* 127 U. S. 39 (32: 157), 2 Inters. Com. Rep. 153.

The consolidated corporation is created by the action of each of the sovereignties by which its constituents were created.

Nashua & L. R. Corp. v. *Boston & L. R. Corp.* 136 U. S. 356 (34: 363).

If the right of consolidation or if any of the corporate powers of the plaintiff in error depend upon the legislation of Congress, and cannot be wholly determined without reference to and construction of the laws of the United States, then the cause must be one arising under the laws of the United States.

Union P. R. Co. v. *Myers* ("*Pacific R. Removal Cases*"), 115 U. 11 (29: 323).

Mr. **Alfred S. Bennett,** for defendant in error:

This case comes within the rule that the Federal question must appear from the complaint in the action in order to justify a removal.

Tennessee v. *Union & P. Bank*, 152 U. S. 454 (38: 512); *Chappell* v. *Waterworth*, 155 U. S. 102 (39: 85); *East Lake Land Co.* v. *Brown*, 155 U. S. 482 (39: 231); *Postal Teleg. Cable Co.* v. *United States* ("*Postal Teleg. Cable Co.* v. *Alabama*"), 155 U. S. 482 (39: 231); *Caples* v. *Texas & P. R. Co.* 67 Fed. Rep. 9; *Haggin* v. *Lewis*, 66 Fed. Rep. 199.

The doctrine of these cases has become the settled law in this court, and has since been followed generally by the Federal circuit courts and the state courts.

Caples v. *Texas & P. R. Co.* and *Haggin* v. *Lewis*, *supra*.

The petition for removal nowhere directly alleges an abandonment of the corporate existence under the territorial laws or an acceptance of the grants conferred by the acts of Congress.

St. Louis, A. & T. H. R. Co. v. *Indianapolis & St. L. R. Co.* 9 Biss. 144.

And the allegation of facts showing a Federal question must be clear and explicit and not depend upon inference or conclusion of law.

Little York Gold Wash. & W. Co. v. *Keyes*, 96 U. S. 199 (24: 656); *Carson* v. *Dunham*, 121 U. S. 421 (30: 992); *Trafton* v. *Nougues*, 4 Sawy. 178.

Mr. Justice **Shiras** delivered the opinion of the court:

In the complaint the defendant was described as "a corporation duly organized, existing, and doing business in the state of Oregon." The accident which caused plaintiff's injuries was alleged to have taken place at The Dalles on the Columbia river, and within the state of Oregon.

In the removal petition the defendant was alleged to be a consolidated company composed of several railway corporations severally organized and created under the laws of the territories of Utah and Wyoming and of the state of Nevada, and under an act of Congress, approved August 2, 1882, entitled "An Act Creating the Oregon Short Line Railway Company, a Corporation in the Territories of Utah, Idaho, and Wyoming, and for Other Purposes," and an act of Congress, approved June 20, 1878, making the Utah & Northern Railway Company a railway corporation in the territories of Utah, Idaho, and Montana.

It was not claimed, either in the petition for removal or in the answer subsequently filed, that the defendant company had any special defense arising under the acts of Congress, which *constituted a Federal question over [494 which the courts of the United States had exclusive jurisdiction; but the contention is that, if any of the corporate powers of a railroad company depend upon the legislation of Congress, the right of removal exists.

Congress has frequently conferred upon railway companies existing under territorial or state laws additional corporate franchises, rights, and privileges, and its right to do so cannot be doubted. Thus it was held, in *California* v. *Central P. R. Co.* 127 U. S. 39 [32: 157, 2 Inters. Com. Rep. 153], that Congress possessed and validly exercised the power to create a system of railroads connecting the east with the Pacific coast, traversing states as well as territories, and to employ the agency of state as well as Federal corporations.

And it must also be conceded that it was decided in the *Pacific Railroad Removal Cases*, 115 U. S. 1 [29: 319], that where corporations created by acts of Congress have become consolidated with state corporations, and where "the whole being, capacities, authority, and obligations of companies so consolidated are so based upon, permeated by, and enveloped in the acts of Congress that it is impracticable, so far as the operations and transactions of the companies are concerned, to disentangle their qualities and capacities which have their source and foundation in these acts upon those which are derived from state or territorial authority," that suits by and against such corporations are "suits arising under the laws of the United States," and removal as such from state courts into circuit courts of the United States.

Even if the acts of Congress of June 20, 1878, and August 2, 1882, so far conferred substantial rights and privileges upon the territorial and state corporations, consolidated as the Oregon Short Line & Utah Northern Railway Company, as to bring that company within the doctrine of the *Pacific Railroad Removal Cases*, yet we think that the present case comes within the rule that the Federal question or the Federal character of the defendant

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company must appear from the complaint in the action in order to justify a removal, and that such Federal question or character does not so appear.

495] *There is no propriety in further considering that rule, because the reasons of it were fully set forth in the case of *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 [38: 511], and again in the very recent cases of *Chappell* v. *Waterworth*, 155 U. S. 102 [39: 85]; *East Lake Land Co.* v. *Brown*, 155 U. S. 488 [39: 233]; and *Postal Teleg. Cable Co.* v. *United States* ("*Postal Teleg. Cable Co.* v. *Alabama*"), 155 U. S. 482 [39: 231].

The conclusion reached in those cases may be briefly stated thus: Under the acts of March 3, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 866), a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the circuit court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

The counsel for the plaintiff in error do not seek, as we understand them, to obtain a reconsideration of this question, but they advance an ingenious argument to distinguish the present from those cases. It is claimed that when a bill of complaint or declaration alleges that the defendant is an incorporated company it thereby tenders, or implicitly alleges, the charter or articles of incorporation of the corporation, including all these statutes and grants of power under and by virtue of which is acquired the right to become a corporation and to exercise corporate powers and privileges. In the words of the plaintiff's brief: "It must be held that the complaint alleges all these facts which it would be necessary for the plaintiff to prove were each and every allegation of the complaint denied by answer. For the purposes of determining as to whether or not the defendant could remove on the ground that the suit was one arising under the Constitution and laws of the United States (as the petition for removal must be filed on or before the answer day) it must be assumed that the cause of action upon which the suit is brought arises upon all the facts which it would be necessary for the plaintiff to prove to maintain his cause of action, and among the 496] most *important of those facts are the corporate existence, the corporate character, and the corporate powers of the defendant company."

Applying these propositions to the case in hand, it is contended that, when the plaintiff alleged in her complaint that "the defendant is a corporation duly organized, existing, and doing business in the state of Oregon, and as such corporation is and was, at all the times and dates hereinafter mentioned and long prior thereto, in the operation of a railroad running from Portland, Oregon, to The Dalles and Pendleton, Oregon, and other places further east, generally known as the Oregon Railway & Navigation Company's line of road, and in connection therewith and incident thereto has been for such time and now is in the possession of and operating a line of boats running from The Dalles, Oregon, to Portland, Oregon, together with all the bridges, wharf boats, ways, etc., used in getting to and from the landings of the aforesaid line of boats, and had been and was and still is carrying passengers for hire thereon as a common carrier for hire," she must be deemed to have thus alleged and brought to the knowledge of the court the entire legal history of the defendant company, its various component parts, with their several acts of incorporation, and particularly the two acts of Congress before referred to, and that, with this information thus spread before it, the court was obliged to perceive that the defendant company was within the rule laid down in the *Pacific Railroad Removal Cases*, 115 U. S. 1 [29: 319], and entitled to remove the case into the circuit court of the United States.

We think the unsoundness of the proposition relied on by the plaintiff in error may be sufficiently shown by the very test which its counsel suggest, namely: What facts would it be necessary for the plaintiff to prove to maintain her action? Suppose the complaint in the present case to have been traversed by a plea of the general issue, would it have been necessary for the plaintiff to prove any other facts than those alleged? Evidence tending to show that a company, styled the Oregon Short Line & Utah Northern Railway Company was operating and conducting a line of railroad between *Portland, Oregon, and The [497 Dalles, Oregon, as a common carrier for hire; that the plaintiff, as a passenger for hire, was injured while in the lawful use of such railroad; that the injuries were caused by the defendant's negligence; and the nature and extent of the injuries thus caused,—would, if believed by the jury, have clearly sustained the material allegations of the complaint. To justify a recovery in such a case it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendant's corporate powers. The defendant's liability did not arise out of its grants of rights and privileges from the several territories or from the United States. It grew out of its negligence and misconduct in the management of a railroad in the state of Oregon, into which state it is not pretended that it entered by reason of anything contained in any act of Congress.

It is urged that, as the plaintiff alleged that the defendant was "a corporation duly organized, existing, and doing business in the state of Oregon," there would have been a fatal failure in the proof if no evidence was adduced to show the nature and character of the plaintiff's charter. We do not think so. As already said, those allegations were sufficiently sustained by evidence of the defendant's actual operation and management of the railroad. Whether the defendant was a corporation *de jure* or *de facto* was, in a case like the present, of no importance. If the plaintiff had actually undertaken to show the true character and extent of the defendant's corporate power as a lawfully organized company and had failed to show such an organization, such failure would not have defeated her recovery if her other allegations had been made good.

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But even if the court was obliged, under the allegations of the plaintiff's complaint, to take judicial notice of the defendant company's charter, no act of Congress was pointed out under which it was acting when operating the railroad in the state of Oregon. So far as appears, the defendant company existed and was doing business in the state of Oregon, solely under the authority of that state, whether express or permissive. The two acts of Congress referred to do not disclose any in-
498] tention *on the part of Congress to confer powers or rights to be exercised outside of the territory named therein.

The supreme court of Oregon committed no error in affirming the action of the trial court, denying the petition for removal, and *its judgment is affirmed.*

OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Plff. in Err.*,

v.

T. J. MULLAN, Administrator of NICHOLAS SKOTTOWE.

(See S. C. Reporter's ed. 498.)

Oregon Short Line & Utah Northern R. Co v *Skottowe*, 162 U. S. 490 [*ante*, 1048], followed.

[No. 148.]

Argued March 17, 1896. Decided April 20, 1896.

IN ERROR to the Supreme Court of the State of Oregon.

Messrs. **John M. Thurston** and *John F. Dillon* for plaintiff in error.

Mr. **Alfred S. Bennett** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

The facts of this case are similar to those of the case of *Oregon Short Line & Utah Northern Railway Company* v. *Skottowe*, just decided, and for the reasons there given *the judgment of the supreme court of Oregon is affirmed.*

OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Plff. in Err.*,

v.

FRANCIS CONLIN.

(See S. C. Reporter's ed. 498, 499.)

Removal of cause.

The facts and allegations in this case being similar to those in Oregon Short Line & Utah Northern R. Co. v. Skottowe, 162 U. S. 490, *ante*, 1048, the state court committed no error in denying the petition for removal of the cause into the United States circuit court.

[No. 229.]

Argued March 17, 1896. Decided April 20, 1896.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment of that court affirming the judgment of the Circuit Court of Washington County in that State, in favor of Francis Conlin, plaintiff, against the Oregon Short Line & Utah Northern Railway Company, defendant, for damages for personal injuries caused by the negligence of that company. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John M. Thurston** and *John F. Dillon* for plaintiff in error.

Mr. **Alfred S. Bennett** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

*This is a writ of error to the supreme [**499** court of the state of Oregon, alleging error in the judgment of that court in affirming a judgment of the circuit court of Washington county in that state, wherein Francis Conlin, the defendant in error in this court, recovered damages for personal injuries alleged to have been caused by the negligence of the Oregon Short Line & Northern Railway Company, plaintiff in error.

The only question presented for our consideration is whether there was error in denying the petition of the defendant company for removal of the cause into the circuit court of the United States. The record discloses a similar state of facts and allegations to that considered in the case, just decided, of *Oregon Short Line & Utah Northern Railway Company* v. *Jane Skottowe.* For the reasons there given, we find no error in the judgment of the supreme court of the state of Oregon, and it is accordingly *affirmed.*

ED. ALBERTY, *alias* CHARLES BURNS, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 499-511.)

Indian, who is—member of Cherokee Nation—jurisdiction of Indian tribunals—jurisdiction of Federal court of murder in Indian territory—erroneous instruction—flight as evidence of guilt.

1. One who was not a native Indian, but a negro born in slavery, and who became a member of the Cherokee Nation under the treaty of 1866, which gave him the rights of a native Cherokee,

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NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware H. Const. Co. 25: 593.

As to removal by one of two or more defendants, separable controversies,—see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 23: 524, and Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes; when denied,—see note to Civil Rights Cases, 27: 835.

NOTE.—*As to Indians and Indian tribes; their status and rights; jurisdiction and control over them,*—see note to Worcester v. Georgia, 8: 483.

As to parties in error, who necessary, see note to Owings v. Kincannon, 8: 727.

As to construction and operation of treaties, see note to United States v. The Amistad, 10: 826.

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is not an Indian within the meaning of U. S. Rev. Stat. § 2146, and is not absolved from responsibility to the criminal laws of the United States.

2. The illegitimate son of a negro slave woman and a Choctaw Indian takes the status of his mother, and is, for the purpose of jurisdiction of Federal courts, to be regarded as a colored citizen of the United States, and not as a member of the Cherokee Nation, in which he has the right to reside and hold personal property by virtue of his marriage with a Cherokee woman.

3. The word "parties," in the Cherokee treaty of July 19, 1866, art. 13, and the act of Congress of May 2, 1890, giving exclusive jurisdiction to the Indian tribunals of civil and criminal cases in which members of the nation shall be the only parties, means parties to the crime, and not simply to the prosecution.

4. The murder of a colored citizen of the United States residing in the Indian territory as the husband of an Indian woman, by another negro who is an adopted citizen of the Cherokee Nation, is not a crime to which the only parties are members of that nation by nativity or adoption, within the meaning of the Cherokee treaty of July 19, 1866, art. 13, and the act of Congress of May 2, 1890, giving exclusive jurisdiction of such crimes to the Indian tribes, but is within the jurisdiction of a Federal court.

5. A man who finds another trying to obtain access to his wife's room in the night-time by opening a window may not only remonstrate with him, but may employ such force as may be necessary to prevent his doing so; and if the other threatens to kill him, and makes a motion as if to do so, and puts him in fear of his life or of great bodily harm, he is not bound to retreat, but may use such force as is necessary to repel the assault.

6. An instruction that flight "is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong, as the case may be, a confession,"—is erroneous as laying too much stress upon the fact of flight, and allowing the jury to infer that this fact alone is sufficient to create a presumption of guilt.

7. It is matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses.

[No. 853.]

Submitted March 4, 1896. Decided April 20, 1896.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of that court convicting

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As to threats by deceased in cases of homicide; when admissible in evidence,—see note to Wiggins v. Utah, 23: 941.

Homicide in defense of property; when justifiable or excusable.

Where a dwelling house is assailed with the intent to take life or inflict great bodily harm, the owner or occupant may lawfully use such fatal means to protect himself and family as would be necessary if met by his assailant face to face in any other place. He is not bound to retreat, but may kill his assailant if it reasonably appears to be necessary, for the protection of the dwelling. McPherson v. State, 22 Ga. 478; Hudgins v. State, 2 Ga. 173; State v. Horskin, 1 Houst. Crim. Rep. 116; Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508; Pond v. People, 8 Mich. 150; State v. Peacock, 40 Ohio St. 333; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200.

On the trial of S for the murder of E, held,—that if S shot E under a reasonable apprehension that the deceased intended to burn the dwelling house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into execution, he was justified in so doing, though such danger was unreal. Stoneman v. Com. 25 Gratt. 887.

Under the California crimes act, § 29, killing another is justifiable only when entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of offering violence to some person therein, or for the purpose of committing a felony by violence. People v. Walsh, 43 Cal. 447.

Where a person, after using gentle means to expel another from his house, resorts to violence and is resisted, he may use force enough to overcome such resistance. State v. Dugan, 1 Houst. Crim. Rep. 568.

The fact that the deceased was a mere trespasser in the house of another, having entered with the consent of one who had no right to give it will not justify a homicide. People v. Horton, 4 Mich. 67.

A building 36 feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence. Pond v. People, 8 Mich. 150.

The killing of another to prevent a mere trespass upon the property other than a habitation, and not to prevent a forcible felony, is not justifiable or excusable. Story v. State, 71 Ala. 329; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; Carroll v. State, 23 Ala. 29, 58 Am. Dec. 282; Johnson v. State, 17 Ala. 618; People v. Honshell, 10 Cal. 83; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Monroe v. State, 5 Ga. 85; Davison v. People, 90 Ill. 221; McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93; State v. Forsyth, 89 Mo. 367; People v. Divine, 1 Edm. Sel. Cas. 594; State v. Brandon, 8 Jones, L. 463; State v. McDonald, 4 Jones, L. 19.

But the owner of property is justified in using force to eject a trespasser, and in killing him if necessary to protect his own life or person against an assault by the trespasser in resistance of the attempt to eject him. Ayers v. State, 60 Miss. 709.

Homicide in defense of property is excusable when necessary to defeat or prevent the commission of a forcible or atrocious felony thereon. People v. Flanagan, 60 Cal. 2, 44 Am. Rep. 52; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; People v. Payne, 8 Cal. 341; Roach v. People, 77 Ill. 25; Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508; Lilly v. State, 20 Tex. App. 1.

A violent and forcible attempt on A's part to break into defendant's tobacco house in the night-time to remove a crop claimed by A, but which had not been divided, defendant denying A's right to any of it, was met by defendant shooting and killing A with a single barreled fowling piece, loaded with small shot. Held, that the case was one of justifiable homicide. Parrish v. Com. 81 Va. 1.

A party has the right to use a deadly weapon in defense of his office, even to the extent of taking his assailant's life. Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508.

The larceny of a horse, though made a felony by statute, does not justify the killing of the felon, though necessary to the recapture of the horse. Storey v. State, 71 Ala. 329.

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Ed. Alberty, *alias* Charles Burns, of the murder of Phil Duncan in the Indian territory. *Reversed, and case remanded for a new trial.*

Statement by *Mr. Justice* **Brown**:

Defendant, a Cherokee negro, who was known both by his father's name of Burns and that of his former master, Alberty, was convicted of the murder of one Phil Duncan, at the Cherokee Nation, in the Indian territory. The indictment alleged the crime to have been committed May 15, 1879, but it appeared by the evidence to have been committed in 1880.

Upon judgment of death being pronounced, defendant sued out a writ of error from this court, assigning a want of jurisdiction in the court below and various errors in the charge to the jury connected with the law of homicide, and the inference to be drawn from the flight of the accused.

Mr. **William M. Cravens** for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

1. The question of jurisdiction in this case demands a primary consideration. Although the prisoner Alberty was not a native Indian, but a negro born in slavery, it was not disputed that he became a citizen of the Cherokee Nation under the 9th article of the treaty of 1866 (14 Stat. at L. 799, 801), by which the Cherokee Nation agreed to abolish slavery, and further agreed "that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein or who may return within six months, and their descendants, shall have all the rights of native Cherokees." While this article of the treaty 501]*gave him the rights of a native Cherokee, it did not, standing alone, make him an Indian within the meaning of U. S. Rev. Stat. § 2146, or absolve him from responsibility to the criminal laws of the United States, as was held in *United States* v. *Rogers*, 45 U. S. 4 How. 567-573 [11: 1105-1107], and *Westmoreland* v. *United States*, 155 U. S. 545 [39: 255].

Duncan, the deceased, was the illegitimate child of a Choctaw Indian, by a colored woman, who was not his wife, but a slave in the Cherokee Nation. As his mother was a negro slave, under the rule *partus sequitur ventrem*, he must be treated as a negro by birth, and not as a Choctaw Indian. There is an additional reason for this in the fact that he was an illegitimate child, and took the status of his mother. *Williamson* v. *Daniel*, 25 U. S. 12 Wheat. 568 [6: 731]; *Fowler* v. *Merrill*, 52 U. S. 11 How. 375 [13: 736].

He came, however, to the Cherokee Nation when he was about seventeen years of age, and married a freed woman and a citizen of that nation. It would seem, however, from such information as we have been able to obtain of the Cherokee laws, that such marriage would not confer upon him the rights and privileges of Cherokee citizenship beyond that of residing and holding personal property in the nation; that the courts of the nation do not claim jurisdiction over such persons, either in criminal or civil suits, and they are not permitted to vote at any elections.

For the purposes of jurisdiction, then, Alberty must be treated as a member of the Cherokee Nation, but not an Indian; and Duncan as a colored citizen of the United States.

By U. S. Rev. Stat. § 2145, except as to certain crimes, "the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country;" and by § 2146 "the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe; or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian *tribes respectively." Obviously this case [502 is not within the first class, because the crime was not committed by one Indian against the person of another Indian; nor within the second class, because there was no evidence that Alberty had been punished by the local law of the tribe; and the only remaining question is whether, by treaty stipulations, the exclusive jurisdiction over this offense has been secured to the Cherokee tribe.

By article 13 of the Cherokee treaty of July 19, 1866 (14 Stat. at L. 779-803), the establishment of a court of the United States in the Cherokee territory is provided for, "with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the *only parties*, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." It is admitted that the present case is not within the last exception.

By the act of May 2, 1890, to provide a temporary government for the territory of Oklahoma and to enlarge the jurisdiction of the United States court in the Indian territory (26 Stat. at L. 81), it is provided, § 30, "that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members or the nation, by nativity or by adoption, shall be the *only parties;*" and by § 31, that "nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the *sole parties;* nor so as to interfere with the right and power of said civilized nations to punish said parties for violation of the statutes and laws enacted by their national councils, where such laws are not contrary to the treaties and laws of the United States."

It will be observed that while this act follows the treaty so far as recognizing the jurisdiction of the Cherokee Nation as to all cases arising

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in the country, in which members of the nation 503]*by nativity, or by adoption, are the sole or only parties, it omits that portion of the 13th article of the treaty, wherein is reserved to the judicial tribunals of the nation exclusive jurisdiction "where the cause of action shall arise in the Cherokee Nation," and to that extent apparently supersedes the treaty.

The real question as respects the jurisdiction in this case is as to the meaning of the words "sole" or "only parties." These words are obviously susceptible of two interpretations. They may mean a class of actions as to which there is but one party; but as these actions, if they exist at all, are very rare, it can hardly be supposed that Congress intended to legislate with respect to them to the exclusion of the much more numerous actions to which there are two parties. They may mean actions to which members of the nations are the sole or only parties, to the exclusion of white men, or persons other than members of the nation; and as respects civil cases at least, this seems the more probable construction.

But the difficulty is with regard to criminal cases, to which the defendant may be said to be the only party; and, if not, as to who is the other party, the sovereignty in whose name the prosecution is conducted—in this case, the United States, or the prosecuting witness, or, in a homicide case, the person who was killed. Some light is thrown upon this by the 7th article of the same treaty, wherein a special provision is made for the jurisdiction of the United States court to be created in the Indian territory; and until such court was created therein, the United States district court, nearest to the Cherokee Nation, was given "exclusive original jurisdiction of all cases, civil and criminal, wherein an inhabitant of the district hereinbefore described" (meaning the Canadian district of the Cherokee Nation) "shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case." It is true that the homicide in this case was not committed within the Canadian district, and, therefore, that this 7th article has no direct application, but it has an indi-504]rect *bearing upon the 13th section as in dicating an intention on the part of Congress to treat the prosecutor in a criminal case as the other party to the cause, and so long as the party injured is alive, it may be proper to speak of him as such; and this we understand to have been the construction generally given. While it is impossible to speak of the deceased in a murder case as a party, in any proper sense, to a criminal prosecution against his assailant, it can scarcely have been the intention of Congress to vest jurisdiction in the Federal courts of cases in which the accused, an Indian, was guilty of a felonious assault upon a white man, not resulting in death, and deny it in case of a fatal termination, upon the ground that the accused is the only party to the cause.

In construing these statutes in their application to criminal cases, and in connection with the treaty, there are but three alternative courses.

(1) To treat the defendant as the *sole* party; in which case the Indian courts would have jurisdiction, whether the victim of the crime were an Indian or a white man. In *Re Mayfield*, 141 U. S. 107 [35: 636], which was a case of adultery, in which the name of the prosecuting witness did not appear, we held that as there was no adverse party, the woman being a consenting party, the defendant was to be regarded as the sole party to the proceeding.

(2) To treat the United States as the *other* party to the cause; in which case the Federal courts would have jurisdiction of all criminal cases, except as they might be limited by the clause of U. S. Rev. Stat. § 2146, providing that such jurisdiction "shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian."

(3) To treat the victim of the crime, whose person or property has been invaded, as the *other* party; in which case the Federal courts would have jurisdiction in all cases in which the victim was a white man, or other than an Indian. Under this construction the word "parties" would really mean parties to the crime and not simply to the prosecution of the crime.

The last proposition harmonizes better with what seems *to have been the intention of[505 Congress, as evinced in that clause of U. S. Rev. Stat. § 2146, which reserves to the courts of the nation jurisdiction of "crimes committed by one Indian against the person or property of another Indian," and at the same time avoids the anomaly of holding a murdered man to be a party to the prosecution of his slayer. Upon the whole we think it affords the most reasonable solution of the problem. For the purposes of this case, therefore, we hold the court below had jurisdiction.

There were a number of exceptions taken to the charge of the court, only two of which it will be necessary to discuss.

2. The 8th assignment of error is to the following instruction:

"When he" (the defendant) "is in that condition, if he was in that condition in this case, and was then attacked by Duncan, the deceased, in such a way as to denote an intention upon the part of the deceased to take away his, the defendant's, life, or to do him some enormous bodily injury, he could kill Duncan —when?—provided he use all the means in his power otherwise to save his own life from the attack of Duncan, or preventing the intending harm, such as retreating as far as he could, or disabling his adversary without killing him. That is still a duty."

In the case of *Beard* v. *United States*, 158 U. S. 550 [39: 1087], the doctrine of the necessity of retreating was considered by this court at very considerable length, and it was held, upon a review of the authorities upon the subject, that a man assailed upon his own premises, without provocation, by a person armed with a deadly weapon, and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control; and so long as there is no intent on his part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his own life, is not guilty of murder or manslaughter if death result to his antagonist from the blow

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given him under such circumstances. In delivering the opinion it was said (p. 559 [1090]):

"But we cannot agree that the accused was under any greater obligation, when on his own [506] premises, near his *dwelling house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling house. The accused being where he had a right to be, on his own premises, constituing a part of his residence and home, at the time the deceased approached him in a threatening manner, and not having by language or by conduct provoked the deceased to assault him, the question for the jury was whether, without fleeing from his adversary, he had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did, namely, strike the deceased with his gun, and thus prevent his further advance upon him."

In the case under consideration it appeared that Duncan, the deceased, had been paying such attention to the defendant's wife, that it caused them to separate, the wife living at a Mr. Lipe's, where the killing occurred, and defendant making his home with some colored people by the name of Graves. Defendant himself worked during the day at Lipe's, was frequently with his wife, and upon the evening in question had been to church with her and taken her home to Lipe's after the service. She went into the house and defendant went back into the lot, where the stock was, as it was a part of his duty to look after the stock. His version of the facts was that while he was in the lot he saw a window in the house, which opened into his wife's room, raised, walked out into the yard and found the deceased at the window, and said to him: "Who is that?" To which the deceased replied, with an oath: "You will find out who it is;" "and then made at me at that time. That is the first time I had seen him there. And then I knew his voice and he made at me as if he had something and was going to kill me, and I had this little pistol in my pocket and I ran backwards toward the front yard and told him to stand off, . . . and I called Mr. Lipe, who got up and came to the door and asked what was the matter;" to which defendant replied: "This man here was trying to get up in your window where my wife sleeps . . . and then I moved away—I started to [507] move and this fellow says *to me, he says, 'I will kill you, God damn you,' and made for me. He was between me and the house and I was next to the gate, and I broke for the gate to try to get out of his way, and as I broke for the gate he was coming at me, seemed like he was going to cut me with something; I couldn't tell what it was and I threw myself around that way (illustrating) and fired."

It was in this connection that the court gave the charge covered by the 8th assignment, adding thereto:

"If a man attacks us wrongfully, if he is seeking then and there to make an attack upon us in such a way as to jeopardize life, and we can turn aside that attack without destroying his life, it is our duty to do it. It is our duty, in the first place, to get out of the way of the attack, and that is a duty springing from our own self-interest, because if a man can avoid a deadly result with due regard to his own safety, is it not better for him to do it than to rush rashly into a conflict where he may lose his life? He is doing it in the interest of his own life. And, then, aside from that, in the interest of the life of the party who attacks him, he is required to do it. Then, under this proposition, to give the defendant the benefit of it, he must have been doing what he had a right to do at the time, and while so situated he must have been attacked by Phil Duncan, the deceased, in such a way as to indicate from the nature of that attack, and the way he was executing it, a purpose upon the part of Duncan then and there by that conduct to take his life, or to inflict upon him some great violence; and he must have been so situated, so surrounded by danger, that he could not get out of the way of it, or he could not turn it aside by an act of less violence than what he did do. He must have exercised reasonable means, in other words, to avoid the dreadful necessity of taking human life, because the law says that he could kill, provided he use all the means in his power otherwise to save his own life."

We think the charge of the court in this connection is open to the same objection that was made to the charge in the case of *Beard* v. *United States*, 158 U. S. 550 [39: 1087, 1090]. The only difference suggested is that in that case the attack was made with firearms, and in this *case it would appear that the defendant [508] supposed that the deceased was about to attack him with a knife. Defendant, however, was working at Lipe's, where his wife was staying, and if, as he claims, he saw a man in the act of raising a window which led to his wife's room, it was perfectly natural that he should wish to investigate, and to ascertain for what purpose the man was there. It appears to have been so dark at the time that defendant did not recognize deceased except by his voice; that the deceased threatened, with an oath, to kill him, and as he says, "made for him" with a knife. Under such circumstances we think that a charge to the jury that he was bound to retreat as far as he could, or disable his adversary without killing him, was misleading. We think that a man who finds another trying to obtain access to his wife's room in the night-time, by opening a window may not only remonstrate with him, but may employ such force as may be necessary to prevent his doing so, and if the other threatens to kill him, and makes a motion as if to do so, and puts him in fear of his life, or of great bodily harm, he is not bound to retreat, but may use such force as is necessary to repel the assault. Of course it is not intended to intimate that these were the facts, but what the facts were was a question for the jury, who had a right to believe the defendant's version, if it seemed probable to them. Upon the assumption that the jury did believe him, we think the charge imposed upon the defendant a responsibility and duty which he could not justly be called upon to bear.

3. The 14th assignment of error was to the following instructions upon the subject of the flight of the accused after the homicide:

"You take into consideration, in other words,

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the facts and circumstances which led up to the killing, the facts and circumstances that transpired at the time of the killing, and you do not stop there, but you take into consideration the facts and circumstances as affecting the defendant subsequent to the killing. For instance, you take into consideration the defendant's flight from the country—his going into another part of the country—as evidence; 509]and you are to pass upon the *question as to whether or not he has sufficiently explained away the presumption which the law says arises from flight when a man has taken human life. It is a principle of human nature—and every man is conscious of it, I apprehend—that if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right, and proper. The truth is—and it is an old scriptural adage that—' the wicked flee when no man pursueth, but the righteous are bold as a lion.' Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury of their country, because that jury will protect them; it will shield them, and the more light there is let in upon their case the better it is for them. We are all conscious of that condition, and it is therefore a proposition of the law that, when a man flees, the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his guilt.

"A man accused of crime hides himself and then absconds. From this fact of absconding we may infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact."

Again upon that subject:

" . . . Flight by a defendant is always relevant evidence when offered by the prosecution; and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong, as the case may be, a confession; and it comes in with the other incidents, the *corpus delicti* being proved from which guilt may be cumulatively inferred."

Now, that is the figure that flight cuts in a case. It is a question in this case whether this defendant has sufficiently explained it here to take away the effect of the presumption arising from flight.

In this connection the evidence tended to show that a day or two after the crime the defendant fled from the jurisdiction of the court, went to St. Louis, and there resumed his father's 510]*name instead of that of his master, which he had previously borne. Defendant gave his reason for fleeing as follows: "My heart was broke, and I just did not care to stay; I thought I would just go away from the country where I would never hear from my people any more, because my heart was broke, and my children was all young and they had just commenced to love me and my heart was broke at that time, and that was the reason I went away."

The weight which the jury is entitled to give to the flight of a prisoner immediately after the commission of a homicide was carefully considered by this court in the case of *Hickory* v. *United States*, 160 U. S. 408 [*ante*, 369], in which a charge, substantially in the language of the instruction assigned as erroneous in this case, was held to be tantamount to saying to the jury that flight created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as axiomatic truth, and as such that it was error.

We do not find it necessary to repeat the argument that was made in that case, but we think it was especially misleading for the court to charge the jury that, from the fact of absconding, they might infer the fact of guilt, and that flight "is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong, as the case may be, a confession; and it comes in with the other incidents, the *corpus delicti* being proved from which guilt may be cumulatively inferred." While undoubtedly the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt; at the same time, as was observed in *Ryan* v. *People*, 79 N. Y. 593, "there are so many reasons for such conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances."

While there is no objection to that part of the charge which permits the jury to take into consideration the defendant's flight from the country as evidence bearing upon *the [511 question of his guilt, it is not universally true that a man, who is conscious that he has done wrong, "will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper;" since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth; but the righteous are bold as a lion." Innocent men sometimes hesitate to confront a jury,—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves. The criticism to be made upon this charge is, that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt. It certainly would not be contended as a universal rule that the fact that a person, who chanced to be present on the scene of a murder, shortly thereafter left the city, would, in the absence of all other testimony, be sufficient in itself to justify his conviction of the murder.

We have found it impossible to reconcile these instructions with the ruling of this court in the two cases above cited, and are therefore

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compelled to *reverse the judgment of the court below*, and remand the case, with instructions to grant a new trial.

512] CENTRAL PACIFIC RAILROAD COMPANY, *Plff. in Err.*, *v.* STATE OF NEVADA.

(See S. C. Reporter's ed. 512-528.)

Tax on unsurveyed land—action on part of state—re-enactment of statute—right of possession.

1. The validity of a tax on unsurveyed lands held under a railroad grant, in pursuance of a state statute for the taxation of a possessory claim to public lands, is not a Federal question, but only a question as to the proper construction of the state statute, where Congress has expressly authorized state taxation of the lands.
2. No action on the part of a state or its legislature is necessary to signify its acceptance of the authority conferred by a Federal statute for the taxation of interests in public lands.
3. A re-enactment of state statutes is not necessary to make them operative for the taxation of interests in public lands after an act of Congress has authorized such taxation, although the statutes when enacted, while comprehensive enough to include such lands, were inoperative as to them.
4. The possibility that public lands included in a grant to a railroad company may turn out to be mineral lands cannot be a defense to a claim for taxes applicable to the entire grant, so long as the grantee claims the right of possession of such lands.

[Nos. 170, 171.]

Argued March 20, 1896. Decided April 20, 1896.

IN ERROR to the Supreme Court of the State of Nevada to review a judgment of that court affirming the judgment of the District Court of Lander County, in that State, in favor of the State of Nevada, plaintiff, against the Central Pacific Railroad Company for the amount of a state tax and a county tax. *Affirmed.*

See same case below, 30 Pac. 686.

Statement by *Mr. Justice* **Brown:**

This (No. 170) was an action originally begun in the district court of Lander county by the state of Nevada against the Central Pacific Railroad Company and its property within such county, as well as the county's proportion of its rolling stock, to recover a state tax of $5,545.92, and a county tax of $17,870.19, levied upon such road and its property for the year 1888. The petition prayed for judgment against the road for the amount of the tax and penalties for nonpayment, and attorneys' fees, and "for such other judgment as to justice belongs."

The suit was both *in rem* and *in personam*, a statute of Nevada providing for bringing a suit against the person to whom the property is alleged to belong, and also against the property itself, and that the judgment rendered shall be against both, and be a lien upon the property.

The railroad company answered the complaint; denied that it owned or possessed any land subject to taxation by the state, and disclaimed any interest in the lands described in the complaint, other than that derived by and through the *statutes of the United States [513 of 1862 and 1864, granting lands to the Pacific railroads; and by an amendment to its answer alleged that the costs of surveying, selecting, and patenting said lands had never been paid to the United States, and that the same were due and unpaid.

The suit was tried upon a stipulation as to the facts in the following language:

"It is hereby stipulated and agreed that of the land described in the amended complaint on file herein 131,386 acres are surveyed, but unpatented, and the same were assessed for the year 1888 at 50 cents per acre by the assessor of said county.

"That the patented lands embraced in said complaint amounted to 24,123 acres, and the same were assessed at $1.25 per acre for the said year by the said assessor.

"That of the lands described in said complaint 195,200 acres are unsurveyed, 2,080 acres were sold and conveyed by defendant, and 960 acres were beyond the limits of the grants to said defendant and were not its property, and the said lands were assessed for said year by said assessor at 50 cents per acre.

"That the tax levy for said year was $3.80 on each $100.

"That the costs of surveying, selecting, and conveying 122,824 acres of said surveyed, unpatented lands above mentioned have not been paid.

"That said defendant has heretofore mortgaged said lands described in said complaint, and has at divers times leased various portions thereof.

"That said defendant has never had any other possession of any part of said lands than such as may be inferred from executing said mortgages and leases and by virtue of the land grants to it of 1862 and 1864."

The district court held that the state was entitled to recover for the taxes levied upon the patented lands, also for the taxes levied upon the unpatented, but surveyed lands, on which the cost of surveying had not been paid; bu

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NOTE.—*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

As to sale of lands for taxes; strict compliance with statute necessary,—see note to Williams v. Peyton, 4: 518.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,—see note to Hamblin v. Western Land Co. 37: 267.

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that it was not entitled to recover for the taxes levied upon unsurveyed lands.

To that judgment the defendant excepted, stating as one of its reasons for such exception 514] that the decision and judgment *showed that the same were based upon the taxability of 131,886 acres of surveyed, but unpatented, lands, at an assessed valuation of 50 cents per acre; while the evidence, as contained in the agreed statement of facts, showed that said 131,886 acres of surveyed, unpatented lands contained and were made up in part of 122,824 acres of land upon which the costs due to the government of the United States for surveying, selecting, and patenting the same had never been paid.

Both parties appealed to the supreme court of the state from the judgment of the district court, upon the hearing of which appeals the judgment was affirmed. 30 Pac. 686. From that judgment of affirmance the railroad company sued out a writ of error from this court, assigning for error that the supreme court awarded judgment to the plaintiff below for the taxes assessed upon 122,384 acres of surveyed, unpatented lands, upon which the costs of surveying, selecting, and conveying had not, at the time of such assignment, or since, been paid, and of which the plaintiff in error had never been in possession.

The state, being bound by the decision of its supreme court that the 195,200 acres of unsurveyed lands were not taxable, was not entitled, and did not attempt to sue out a writ of error.

Another action (No. 171) in all respects similar to the first, except in the amounts claimed, was subsequently begun to recover the taxes upon the same property for the year 1889, and was carried to a similar conclusion.

Mr. **Wheeler H. Peckham,** for plaintiff in error:

The pleadings present a direct issue as to whether the defendant below had a "possessory claim" in these lands which could be taxed or assessed by the state of Nevada.

The defendant here has never had any actual possession of the land. So far as shown there is no actual possession in any one to which it can make any claim, nor does it make any. The fact that the defendant had mortgaged the land or leased it neither constitutes actual possession or any claim to such possession; under these circumstances, the title to the land not being subject to taxation, there is nothing else to tax.

State v. *Central P. R. Co.* 20 Nev. 372.

This construction of the meaning of the "possessory claim," etc., in the Nevada statute by the highest court of that state, it is well settled, is binding on and will be followed by this court; and it is the judgment in this case.

Nesmith v. *Sheldon*, 48 U. S. 7 How. 812 (12: 925); *Fairfield* v. *Gallatin County*, 100 U. S. 47 (25: 544); *Sydam* v. *Williamson*, 65 U. S. 24 How. 427 (16: 742); *Ridings* v. *Johnson*, 128 U. S. 224 (32: 405); *New York* v. *Weaver*, 100 U. S. 539 (25: 705).

The title to surveyed, unpatented lands on which the costs of survey have not been paid is not subject to taxation.

Kansas P. R. Co. v. *Prescott*, 83 U. S. 16 Wall. 603 (21: 373); *Union P. R. Co.* v *McShane*, 89 U. S. 22 Wall. 444 (22: 747); *Northern P. R. Co.* v. *Rockne* ("*Northern P. R. Co.* v. *Traill County*"), 115 U. S. 600 (29: 477); *Ankeny* v. *Clark*, 148 U. S. 345 (37: 475).

It appearing, then, that the state of Nevada has taxed lands which, but for the act of Congress of 1886, are not taxable, such act of Congress has not made such lands taxable under the Nevada statutes.

The opinion of the court below devotes some space to an attempt to show that this act of Congress was accepted by the state of Nevada, or that the act of Congress, together with the state law, formed a sort of composite tax law under which these lands could be taxed and sold. The assessment is under old laws and of a possessory claim, and is made by ministerial officers. These officers had no power to accept any act of Congress.

Ratification of acts or contracts can only be made by the same power that could originally have done or made them.

Marsh v. *Fulton County Supers.* 77 U. S. 10 Wall. 676 (19: 1040).

In the series of decisions on the validity of state laws taxing shares in national banks this court has definitely settled the rule as to what is required to make valid state tax laws taxing property subject to taxation only by act of Congress.

New York v. *Tax Comrs.* ("*Bank Tax Cases*"), 67 U. S. 2 Black, 620 (17: 451). 69 U. S. 2 Wall. 200 (17: 793); *Churchill* v. *Utica* ("*Van Allen* v. *The Assessors*"), 70 U. S. 3 Wall. 573 (18: 229); *New York* v. *Weaver*, 100 U. S. 539 (25: 705).

The state tax laws, so far as these lands are concerned, must conform to the act of Congress, must tax pursuant to and in the manner pointed out by that act.

Northern P. R. Co. v. *Rockne* ("*Northern P. R. Co.* v. *Traill County*"), 115 U. S. 610 (29: 480).

The act of Congress does not and cannot modify or amend the state law. The state law must have the same meaning and effect before and after the act of Congress. No lands granted to the Central Pacific Railroad Company can be taxed by a state prior to the issue of a patent.

Barden v. *Northern P. R. Co.* 154 U. S. 288 (38: 992); *Adams* v. *Reed* (Utah) 40 Pac. 720.

Messrs. **John C. Chaney,** *Robert M. Beatty,* Attorney General of Nevada, and *Henry Mayenbaum,* for defendant in error:

It is only the possessory claim to this land that is assessed; the thing attempted to be taxed is something less than the fee.

McGoon v. *Scales*, 76 U. S. 9 Wall. 23 (19: 545); Black, Tax Titles, § 129.

Against such assessment, whatever may be said of its validity otherwise, no objection could be made on the ground that it was an attempt to subject the property of the United States to taxation. Nothing but the defendant's interest in the land can be reached by such an assessment. It cannot possibly affect the government title or lien, any more than a voluntary sale by the defendant would do so.

Wright v. *Cradlebaugh*, 3 Nev. 341; *Forbes* v. *Gracey*, 94 U. S. 762 (24: 313).

The state supreme court was right in deciding that the possessory claim of the C. P. R. R. Co. to said surveyed land is taxable under the state

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statute. Whether the court was right or wrong upon this point, its decision thereon cannot be reviewed here upon writ of error because it does not contain a Federal question.

Under the statutes of Nevada possessory claims to lands must be taxed.

Wright v. *Cradlebaugh* and *Forbes* v. *Gracey*, *supra*.

The Federal question is not necessary to sustain the decision of the state court. For, strike out or disregard that part of the decision, and there still remains a solid foundation upon which the decision and judgment of the state supreme court may safely rest.

Sayward v. *Denny*, 158 U. S. 181 (39: 942); *Beatty* v. *Benton*, 135 U. S. 244 (34: 124); *Hale* v. *Akers*, 132 U. S. 554 (33: 442); *Michigan* v. *Flint & P. M. R. Co.* 152 U. S. 363 (38: 478); *Adams County* v. *Burlington & M. R. R. Co.* 112 U. S. 123 (28: 678); *Hagar* v. *California*, 154 U. S. 639 (24: 1044); *Eustis* v. *Bolles*, 150 U. S. 361 (37: 1111); *Powell* v. *Brunswick County Supers.* 150 U. S. 433 (37: 1134); *McLaughlin* v. *Fowler*, 154 U. S. 663 (26: 176); *Chapman* v. *Crane* ("*Chapman* v. *Goodnow*"), 123 U. S. 540 (31: 235); *Chouteau* v. *Gibson*, 111 U. S. 200 (28: 400); *Miller* v. *Anderson*, 150 U. S. 132 (37: 1028); *Rutland R. Co.* v. *Central Vermont R. Co.* 159 U. S. 630 (*ante*, 284); *Gillis* v. *Stinchfield*, 159 U. S. 658 (*ante*, 295).

The decision of the state supreme court, that the tax is on the possessory claim of the C. P. R. R. Co. to this land, is conclusive.

Dower v. *Richards*, 151 U. S. 658 (38: 305).

This court will look into the case to see if the decision can be sustained outside of the Federal question.

Gray v. *Coan*, 154 U. S. 589 (38: 1088).

To give this court jurisdiction it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, and that the judgment as rendered could not have been given without deciding it.

Davis v. *Texas*, 139 U. S. 651 (35: 300); *Cook County* v. *Calumet & C Canal & D. Co.* 138 U. S. 635 (34: 1110); *Johnson* v. *Risk*, 137 U. S. 300 (34: 684).

The title of the said surveyed land is taxable under the act of Congress of July 10, 1886.

Northern P. R. Co. v. *Rockne* ("*Northern P. R. Co.* v. *Traill County*"), 115 U. S. 607 (29: 479); *Kansas P. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 603 (21: 373); *Union P. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444 (22: 747).

Congress has full power to dispose of the public lands, upon such terms and under such conditions as it may deem proper.

Irvine v. *Marshall*, 61 U. S. 20 How. 561 (15: 996); *Vansickle* v. *Haines*, 7 Nev. 261; *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525 (29: 264), 27 Kan. 749.

Acceptance of conditions by state not a Federal question.

Marrow v. *Brinkley*, 129 U. S. 178 (32: 654); *Powell* v. *Brunswick County Supers.* 150 U. S. 433 (37: 1134); *Michigan* v. *Flint & P. M. R. Co.* 152 U. S. 363 (38: 478).

No room for construction or Federal question.

2 Just. Inst. 533; Dwarris, Maxims, 16; Broom, Legal Maxims, 551; Lieber, Hermeneutics, 119.

A statute cannot be interpreted to mean what it does not express.

State, Wall, v. *Blasdel*, 4 Nev. 241.

Mr. Justice **Brown** delivered the opinion of the court:

There appear to be within the county of Lander four classes of lands embraced within the Pacific land grants of 1862 and 1864:

(1) Patented lands to the amount of 24,123 acres, assessed at $1.25 per acre, concerning the taxability of which there is no dispute. *Union P. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444 [22: 747].

(2) Unsurveyed lands to the amount of 195,200 acres, assessed at 50 cents per acre, and held, both by the district court and by the supreme court of the state not to be *subject [520] to taxation. See also 24 Stat. at L. 143, chap. 764, § 1. No question is made with regard to the propriety of this ruling.

(3) Surveyed but unpatented lands, upon which the costs of survey have been paid,—8,562 acres. These would, of course, be subject to taxation if the following class was adjudged to be so subject.

(4) Surveyed but unpatented lands, upon which the costs of survey have not been paid,—122,824 acres.

The principal dispute is with regard to the fourth class, that is, unpatented lands which have been surveyed, but the costs of which survey have not been paid. As to lands of this class it was held by this court in *Kansas P. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 603 [21: 373], that, although lands sold by the United States may be taxed before the government has parted with the legal title by issuing the patent, this principle was to be understood as applicable only to cases where the right to the patent is complete, and the equitable title fully vested, without anything more to be paid, or any act done going to the foundation of the right; and hence, where there had been a large grant to a railroad company, if prepayment by the grantee of the cost of surveying the lands granted be required by the statute making the grant, before any of the lands shall be conveyed, no title vested in the grantee, and the state could not levy taxes on the land, and under such levy sell and make a title which might defeat the lien of the United States. In this particular this case was affirmed in *Union P. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444, 462 [22: 747, 751], and *Northern P. R. Co.* v. *Rockne* ("*Northern P. R. Co.* v. *Traill County*"), 115 U. S. 600 [29: 477].

Apparently to provide for this contingency and to render these lands subject to state taxation, Congress, on July 10, 1886 (24 Stat. at L. 143), passed an act to provide for the taxation of railroad grant lands and for other purposes, the 1st section of which enacted "that no lands granted to any railroad corporation by any act of Congress shall be exempted from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or *be- [521] cause no patent has been issued therefor; but this provision shall not apply to lands unsurveyed:

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Provided, That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect to such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties: *Provided further*, That at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto."

In view of this statute it is difficult to see how these lands, which are the very ones provided for by the statute, can escape taxation, if the state chooses to tax them. The argument of the railroad company in this connection is that, by the General Statutes of Nevada upon the subject of taxation, § 1080, "nothing . . . shall be so construed as to exempt from taxation possessory claims to the public lands of the United States, or of this state: . . . *and provided further*, that nothing herein shall be so construed as to interfere with the primary title to the lands belonging to the United States;" that by § 1081 "the term 'real estate,' when used in this act, shall be deemed and taken to mean and include . . . the ownership of, or claim to, or possession of, or right of possession to, any lands within the state, and the claim by or the possession of any person, firm, corporation, association, or company to any land, and the same shall be listed under the head of real estate;" that, by § 1088 "it is the duty of the assessor to prepare a tax list, or assessment roll, . . . in which . . . shall be listed . . . all real estate, including the ownership or claim to, or possession of, or right of possession to, any land and improvements," etc.; that this action was brought by the state of Nevada to subject these lands to taxation upon the ground that the railroad company 522]*had a "possessory claim" to them, which the proper officers of the state had assessed for taxes; that the railroad company, in its answer, denied that it had any possessory claim in or to said lands, and alleged that its only interest was that derived from the land grant acts of Congress of 1862 and 1864, and that as to said lands a portion were unsurveyed and unpatented, a portion surveyed but unpatented and costs of survey unpaid, and but a small portion patented; that the pleadings thus presented a direct issue as to whether the company had a "possessory claim" in these lands, which could be taxed by the state; that the only evidence upon such issue was the stipulation above recited, to the effect that the defendant never had any other possession of any part of said lands than such as may be inferred from executing said mortgages and leases, and by virtue of the land grants; that the supreme court of the state, in considering the taxing statute above recited, held, in respect to the *unsurveyed* lands, that the terms "possessory claims," "claim to possession or right to possession" to any lands did not mean such right or claim when not accompanied by actual possession, and hence that unsurveyed lands were not subject to taxation; that such construction of the term "possessory claims" applies to *surveyed* as well as unsurveyed lands; and hence it must follow that there is nothing to tax, unless the title is subject to taxation, and that this court has held in the three cases above cited that the title to surveyed, patented lands, upon which the costs of survey have not been paid, is not subject to taxation.

It is a sufficient answer to this argument to say that, whether the inclusion of these lands in the land grant acts of 1862 and 1864, and the subsequent mortgaging and leasing of them by the railroad company, constituted a "possessory claim" to the lands under the taxing laws of Nevada, is not a Federal question, but a question as to the proper construction of the words "possessory claim," used in the state statute. It is true that, with respect to the unsurveyed lands, the supreme court held that the railroad company had no such actual and substantial possession as would justify their taxation under the statute, and that it does not expressly appear from the opinion that *the[523 court put the right of the state to recover its taxes upon the surveyed lands upon the ground that the railroad did have a possessory claim thereto; but it does not necessarily follow that any Federal question was thereby raised, or that any right, title, privilege, or immunity set up under a statute of the United States was denied to it. It does explicitly appear that authority was given by Congress to the states to tax these lands; but whether, under the state laws, the railroad had any taxable interest therein, or whether the decision of the court that it had no such interest in the unsurveyed lands is consistent with its opinion that it had such interest in the surveyed lands, is immaterial, so long as no Federal right was denied to it. It is perfectly obvious that no attempt was made to tax the title of the government, and that the subjection of these lands to taxation by the state must have rested upon some theory that the railroad had a taxable interest in them. What that interest was does not concern us, so long as it appears that, so far as Congress is concerned, express authority was given to tax the lands.

No action on the part of the state or its legislature was necessary to signify its acceptance of the authority conferred by the Federal statute. Where a grant of lands is made by Congress to a state for the purpose of building a railroad, it has been customary for the state to accept such grant as authority for the conveyance of the lands to a designated railway company; but where a simple power is given, no acceptance of such power by the state is necessary as a preliminary to its exercise.

Nor, conceding that the General Statutes of Nevada were inoperative to authorize the taxation of these lands prior to the act of Congress of July, 1886, was any re-enactment of those statutes necessary, since the effect of this act was merely to remove the only obstacle to their enforcement. As was said by this court with respect to an act of Congress declaring intoxicating liquors to be subject to the laws of each state, upon their arrival therein, "Congress did not use terms of permission to the state to act,

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but simply removed an impediment to the enforcement of the state laws with respect to imported packages in their original condition, 524] created by the absence of a *specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within local jurisdiction." *Wilkerson* v. *Rahrer* ("*Re Rahrer*"), 140 U. S. 545, 564 [35: 572, 578]. See also *Butler* v. *Goreley*, 146 U. S. 303, 314 [36: 981, 986].

While, as above stated, it does not clearly appear from the opinion of the supreme court of Nevada, in this particular case, what the distinction is as to a possessory claim between surveyed and unsurveyed lands, there is a clear distinction in the fact that, until lands are surveyed, it is impracticable to identify them for the purposes of taxation. This question had theretofore been considered by the supreme court of Nevada in the case of the *State* v. *Central P. R. Co.* 21 Nev. 94, and probably the court, in delivering its opinion in this case, did not deem it necessary to restate the distinction there made. In the opinion of the court in that case it was said: "A reason for withholding the right to tax unsurveyed lands may be found in the fact that it is impracticable to assess them. It is a well-established principle of law that land assessed for the purpose of taxation must be so described that it may be identified. . . . The lands granted to the railroad company were the odd-numbered sections within the limits of 20 miles on each side of the railroad, except such as had been sold or otherwise disposed of by the United States, or to which a homestead or preemption claim had attached, or mineral lands. Until the surveys are made it cannot be known what parts of the lands are within the enumerated exceptions, or what sections or parts of sections will belong to the company, nor until then, can the locality of the lands be determined so that a description may identify them. . . . It must be borne in mind that the unsurveyed lands are not described by metes and bounds, or by common designation or name, but as sections and parts of sections, and, as alleged by the complaint, 'as their designation will appear when the surveys of the United States are extended over them.' It is plain that this is not a description by which the identity of the lands can be established, and it is equally plain that possession of the lands so 525] described *cannot be established until the surveys are made." See also *Robinson* v. *Forrest*, 29 Cal. 325; *Middleton* v. *Low*, 30 Cal. 605; *Bullock* v. *Rouse*, 81 Cal. 590; *People* v. *Mahoney*, 55 Cal. 286; *Keane* v. *Cannovan*, 21 Cal. 302 [82 Am. Dec. 738]. Evidently this course of reasoning does not apply to lands which have been surveyed.

2. It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excludes mineral lands; not only minerals but mineral lands; that the right and power to ascertain which of the lands are mineral and which nonmineral is vested exclusively in the officers of the government, and can be proved only by the issue of a patent, as held by this court in *Barden* v. *Northern P. R. Co.* 154 U. S. 288 [38: 992]. It is argued that, if the railroad company paid taxes upon these lands, it might never own or acquire them, and the tax would consequently be paid on property it never owned or could own; and that, upon the other hand, if the company should not pay the taxes, and the lands be sold under the judgment appealed from, the title to the lands, if the assessment were valid, would pass to the purchaser, whether they were mineral or not.

But if the railroad has a possessory claim to these lands they are taxable under the statute of Nevada, and it is this, and this only, which the state has assumed to tax. If it has no possessory claim, because the lands are mineral, it certainly cannot be injured by a sale of the lands to pay the tax, and whether the sale of such lands would pass the title or not is a question in which the railroad company is not interested. The company has an enormous land grant, embracing every alternate section of land within 20 miles on each side of the road, with a reservation of mineral lands from the operation of the act. Can it possibly have been intended that these lands should remain wholly untaxed, until the mineral lands, which it may be assumed represent but a very small portion of the total grant, have been identified and excepted? Clearly not. There is no presumption that the land is mineral, and if it be so, and the railroad company disclaims title to it for that reason, it would probably be a good defense to a suit for *taxes. But the pos- [526 sibility that certain lands may turn out to be mineral lands surely cannot be a defense to a claim for taxes applicable to the entire grant, so long as the railroad company lays claim to the right of the possession of such lands.

It is true that in the *Barden Case* we held that mineral lands were excluded from the operation of the Pacific Railroad land grants, whether such minerals were known or unknown at the date of the grant, because the statutes had excepted them in the most unequivocal terms; but nothing was said in that case to impugn the authority of previous cases which had held that these grants were *in præsenti* of lands to be afterwards located. They became so located when they were surveyed. "Then the grants attached to them, subject to certain specified exceptions" (p. 313 [997]), one of which was that minerals should be discovered upon them before the issue of a patent, when as to such lands the title of the company failed. The possibility, however, that minerals might be discovered upon certain sections of these lands, as to which the title of the railway company might be defeasible, would not impair their title to the great bulk of the grant, or enable the company with respect thereto to evade its just obligations to the state. Should the company disclaim a right to the possession of any portion of these lands by reason of the discovery of minerals thereon, there would remain no right to tax them under the statutes of Nevada, but so long as the company asserts a possessory claim to them it implies a corresponding obligation to pay the taxes upon them. *State* v. *Central P. R. Co.* 20 Nev. 372.

The company has had possession of these lands for some thirty years, has offered them for sale, and sold them as its own, and, whenever it has been for its advantage to do so,

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has claimed possession of them and dealt with them as its private property. To assert all the rights of ownership, and at the same time to repudiate all its obligations, consists neither with the terms of the grant nor with the dictates of natural justice.

The act of Congress in providing that such lands shall not be exempted from taxation, impliedly assents to their sale, but also guards its own right to them by providing that they shall 527]*be taken by the purchaser subject to the lien for costs for surveying, to be paid in such manner as the Secretary of the Interior may provide; and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect to such lands; and also by providing that at any such sale the government may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto. The rights of the government with respect to such lands are thus carefully preserved and protected.

If the company is liable for taxes upon lands which have been surveyed, but the cost of which survey has not been paid, *a fortiori* it is liable if the cost has been paid.

The decree of the court below is therefore, in each case, affirmed.

Mr. Justice **Brewer** and *Mr. Justice* **Peckham** took no part in the consideration and decision of these cases.

Mr. Justice **Field** dissenting:

I am unable to concur with my associates in affirming the judgment of the supreme court of Nevada in this case, and will state as briefly as possible the grounds of my dissent.

The case comes before us on a writ of error to the supreme court of the state, alleging error in its decision against the Central Pacific Railroad Company, a corporation organized under the laws of California, but doing business and possessed of property, real and personal, in Nevada.

That state commenced an action in December, 1888, in the district court for Lander county in Nevada, against the Central Pacific Railroad Company, and certain described real estate and improvements thereon, situated within the state, belonging to that company. By the laws of Nevada, an action against a railroad company doing business and holding property therein may be brought against the company to recover a money judgment against it, and at the same time against a property to obtain a judgment establishing a lien thereon for the amount recovered against the company.

The question in the present case is whether the lands taxed by the state are, in fact, subject to taxation. It does not appear to me that they are thus subject, for they are not free 528]*from the lien of the government or from its control and disposition. Until they are thus freed and the right of the Central Pacific Railroad Company to the lands has accrued beyond question, they are not, in my judgment, open to taxation as the property of such company. So long as the government retains, as it now does, the legal title to the lands, and the control thereof with a substantial interest therein, the lands cannot properly be treated as private property and be subjected to taxation on that account. By the acts of Congress of July 1, 1862, and July 2, 1864, the Central Pacific Railroad Company was invested with similar powers, conferred by them upon the Union Pacific Railroad Company, and like grants of land were made to it to aid in the construction of its railroad and telegraph lines, and it was subjected to the same conditions. The property taxed by Nevada as that of the Central Pacific Railroad Company was granted to it by Congress as above stated, and consists largely of mineral lands. But a joint resolution was passed by Congress in January, 1864, declaring "that no act passed at the first session of the Thirty-eighth Congress [that being of the year 1864], granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grants." 13 Stat. at L. 567. Attempts to subject lands, thus reserved and controlled by the government, to taxation on private account until the government is released of all interest in the property appears to me only as a wanton invasion upon its rights. I therefore dissent from the judgment herein, and from the opinion of the court pronouncing it.

GIRARD LIFE INSURANCE, ANNUITY, & TRUST COMPANY, Trustee, ET AL., *Appts.*, [529

v.

WILLIAM H. COOPER ET AL.

(See S. C. "*Girard Ins. & T. Co.* v. *Cooper*," Reporter's ed. 529-546.)

Liability of receiver—findings of master—contract—order of court—discretion of receiver—preferred claim.

1. Receivers who permit work on a building which was in course of erection when the receivership commenced, to continue without interruption, may be liable for the work so done according to the terms of the contract under which it was done.

2. Findings of a master are not absolutely binding upon the court, but there is a presumption in their favor, and they will not be set aside or modified in the absence of some clear error or mistake.

3. Actually signing a building contract is not necessary to render it binding, when the terms thereof are agreed upon and understood between

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NOTE.—*As to powers and duties of receiver*, see note to Davis v. Gray, 21: 447.

As to contracts, their interpretation and validity, see note to Bell v. Bruen, 11: 89.

As to contracts; performance, when excused by nonperformance of other party or his prevention of performance,—see note to United States v. Peck, 20: 46.

As to builder's contract; alterations and modifications in; extra work, see note to Ingle v. Jones, 17: 762.

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the parties, and the work done in pursuance thereof.

4. The failure to obtain an order of the court for a contract by a receiver will not defeat liability on the contract, where the work under it is directed to be done by the court without any formal order, and the validity of a claim thereon subsequently declared by the court, with full knowledge of the facts.

5. The court may leave to the discretion of its receiver the price to be paid for work which he is authorized to contract for.

6. A preferred claim against a building in the hands of a receiver may be sustained for work in completing it which was commenced before the receivership, and completed in good faith for the benefit of the property in the receiver's hands in order to prevent the building from becoming a total loss,—especially when a mortgage on the property in his hands does not cover the building.

[No. 164.]

Argued March 23, 1896. Decided April 20, 1896.

APPEAL from a decree of the Court of Appeals for the Eighth Circuit affirming the decree of the United States Court for the Indian Territory in favor of Wm. A. Cooper *et al.* against the Girard Life Insurance, Annuity, & Trust Company as trustees, *et al.*, for the amount due them for work done by them upon a certain building. *Affirmed.*

See same case below, 4 U. S. App. 631.

Statement by *Mr. Justice* **Brown:**

This was a petition by the firm of W. H. Cooper & Son, originally filed in the United **530**] States court for the Indian *territory against Edwin D. Chadick and Francis I. Gowen, receivers of the Choctaw Coal & Railway Company, a corporation created under the laws of the state of Minnesota, with a right, among other things, to build and operate railways and to own and develop coal mines, and which had been authorized by acts of Congress approved February 18, 1888, and February 13, 1889, to construct a railway within the Indian territory.

The company having become embarrassed, Chadick and Gowen were, on January 8, 1891, appointed coreceivers, and continued to act as such until August 28, 1891, when an order was made giving said Chadick a leave of absence for one year, and in the meantime vesting all the power of both receivers in Gowen for the period named. In connection with the building and operation of its railway and the development of its mining industries, the company in May, 1890, undertook the erection at South McAlester, in the Indian territory, of a building to be used as a hotel and offices for the company; and on May 23, 1890, Chadick entered into a contract with Cooper & Son for the furnishing of the greater part of the work and material needed in the erection of the building, which was called the Kali-Inla Hotel. This contract was signed by W. H. Cooper & Son, and by H. W. Cox, architect, for E. D. Chadick.

It seems that Chadick, at the instance of the board of directors, had gone before the judiciary committee in Congress, and said that, if Congree would locate a United States court at South McAlester, the company would provide accommodations for the court and its officers, free of cost to the United States, and that Congress, accepting the proposition thus made, designated South McAlester as one of the points for holding court in the territory.

At the beginning of the receivership (January 8) Cooper & Son were settled with in full, and all work was to be stopped, except such as was necessary to protect the building, which work was to be carried on under the order of the court. Shortly thereafter, a petition was presented to the court for permission to enter into a contract for the roofing of *the [**531** building, to protect it from the weather, and an order to that effect was obtained from the court before the work was begun. This appears to have been the only order obtained for any further work upon the building, but after this job had been finished, Cooper & Son continued their work without further authority from the court.

In June, 1891, Mr. Gowen, learning that Cooper & Son had continued working upon the building, wrote Mr. Cooper the following letter, addressed to Cooper & Son, and signed by both receivers:

South McAlester, Ind. Ter., June 3, 1891.
Messrs. W. H. Cooper & Son,
South McAlester, I. T.

Gentlemen: Under direction of the court we notify you to stop all work on the Kali-Inla Hotel from this date, and make out your bill for the work done up to and including today.

We will then furnish you with designs and directions as to the work to be done, and you will name a gross sum for the performance of the same, which we will submit to the court for their approval or disapproval.

Edwin D. Chadick,
Francis I. Gowen,
Receivers Choctaw Coal & Railway Co.

Upon receipt of this letter Cooper & Son ceased work upon the building, and made out a bill or statement of the sum then due them, which was approved by the auditor.

On or about June 7, H. W. Cox, who acted for the receivers as supervising architect, furnished Cooper & Son with details and specifications of the work required to be done to fit the building for occupancy by the court and officers of the company, which Cooper & Son agreed to do, by letter written to Mr. Chadick June 24, 1891, for the sum of $10,250, allowing the company $2,500 for the value of material on hand. Their proposition was not formally accepted by the receivers, and no *order of court was obtained authorizing [**532** it, but on July 7, 1891, a contract was prepared by Cox, to which were attached certain plans and specifications. The contract was not signed by any one, but the plans and specifications were signed by W. H. Cooper & Son and by "H. W. Cox, supervising architect," and the contractors proceeded to the work therein called for, with the knowledge and approval of Chadick, the receiver who then had immediate charge of the work being done on the railway line.

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At the hearing the master, who was also clerk of the court, stated that the plans and specifications were submitted to him and to the judge of the court to see if the court apartments suited them, and whether they had any suggestions as to the arrangement of the rooms, but no order was made by the court as to the price to be paid for the work, or as to the manner of payment; and that neither he nor the court knew anything as to what the price of them was. The contract of July 7 was not signed, accepted, or approved by either receiver, and was not submitted to Mr. Gowen until the 29th day of August, 1891, which was the first knowledge he had that any such contract was in existence. Cooper then presented his contract to Mr. Gowen, as a prerequisite to his permitting the marshal to take possession of the rooms which had been fitted up for the clerk and marshal's offices. At this time Cooper did not ask for any pay and was not promised any payment, and all that he insisted upon was that his contract should be signed. Mr. Gowen refused to sign the contract because the work had not been authorized by the court, and because he was not satisfied that the price named in the contract was proper and reasonable, but promised Mr. Cooper that he would undertake to ascertain whether the price named was a proper one; and to this end he secured the services of an architect and had him make a thorough examination of the building with a view of determining the value of the work done and materials furnished.

Cooper & Son made out their bills for the amount claimed to be due them for work done since June 3, which was certified as correct by the architect having supervision of the work **533**] done in remodeling the building. For the purpose of securing payment of the sums claimed to be due them, the contractors filed a petition in the foreclosure proceedings, setting forth the facts and praying for an order upon the receivers, directing them to make payment of the sums claimed to be due, and further praying that a lien in their favor be put upon the building, and for other relief. To this petition Gowen as receiver, and the Girard Life Insurance, Annuity, & Trust Company as trustee, filed answers, and thereupon the court, on October 13, 1891, entered an order, which was drawn and consented to by the receivers and the trustee of the bondholders, "that the claim of W. H. Cooper & Son be referred to the master to take testimony thereon, and to ascertain the amount justly and equitably due, as the true value of the work done and the materials furnished by them upon and for the Kali-Inla Hotel building at South McAlester, and that receiver's certificates bearing 7 per cent interest be issued and delivered to them for one third of the amount so found to be due, and to sell and deliver in settlement thereof lumber at the market price thereof for one third of said amount and the balance in cash to be borrowed on certificates, as hereinafter authorized."

Upon a hearing by the master in pursuance of this order he made a report finding a balance due Cooper & Son of $14,919.37, and also made certain findings of fact and law printed in the margin,† to which report appellants filed exceptions. *Cooper & Son thereupon [**534** moved the court to strike out these exceptions upon the ground that the report of the special master was conclusive upon the facts involved, and binding upon the receiver, and also because the Girard Life Insurance, etc., Company was not a party to the proceeding and had no interest therein.

Upon the hearing of this motion to strike the exceptions *from the files, the court held [**535** that the order of October 13, 1891, was conclusive as to the validity of the claim of Cooper & Son, and the court, having referred the claim to a special master with instructions to find the amount due, and having further ordered that the receiver should pay the amount so found to be due, granted the motion and entered a final decree in favor of Cooper & Son against the receivers in the sum of $14,749.45, costs and interest.

A rehearing having been demanded by the receivers and also by the Girard Life Insurance, etc., Company and denied, they appealed to the circuit court of appeals for the eighth circuit, by which court the case was heard and the decree of the court below affirmed, with costs, in so far as it awarded judgment for the sum therein named, and the case was remanded with directions "to enter an order directing the mode and time of payment, such as the court may be advised is required by the equities of the case, in conformity with the opinion of this court." 4 U. S. App. 631.

Whereupon the life insurance company and the acting receiver appealed to this court.

Messrs. **Samuel Dickson** and *J. W. McLeod*, for appellants:

Before receivers can involve the trust estate in such a liability, full and deliberate approval by the court before action is indispensable; and a precedent order is indispensable.

Cowdrey v. *Galveston, H. & H. R. Co.* 93 U. S. 352 (23: 950); *Union Trust I. Co.* v. *Illinois M. R. Co.* 117 U. S. 434 (29: 963).

No attempt was made to throw out the claim altogether, and all that was asked was that only so much should be charged upon the trust estate as was justly and equitably due, or, in other words, that the recovery should be upon the basis of *quantum meruit*.

Vanderbilt v. *Central R. Co.* 43 N. J. Eq.

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† FINDINGS OF FACT.

1. I find that the vouchers above mentioned are valid, and were issued in good faith by agents of the receivers, having authority so to do; and that W. H. Cooper & Son were given credit upon the books of said company for the amounts so vouchered, and were charged with such vouchers; and that said amounts constituted and became a debt from the receivers to W. H. Cooper & Son, due and payable upon date of issuance.

2. I find that the contract under and by virtue of which all work was done and materials furnished upon Kali-Inla Hotel from and after June 3, 1891, and the specifications, plans, and drawings furnished therewith, were executed, furnished, and delivered by agents of the receivers having authority so to do, and under the special direction and approval of the receivers themselves and this honorable court.

3. That the work performed and material furnished were so furnished and performed by W. H. Cooper & Son under and by virtue of and in reliance upon the contract aforesaid, and that the

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669; *Chicago Deposit Vault Co.* v. *McNulta*, 153 U. S. 554 (38: 819).

The ruling in *Fosdick* v. *Schall*, 99 U. S. 235 (25: 339), which displaced liens of record in favor of certain equitable claimants, was avowedly made as an innovation, and was justified upon the score of necessity.

The language of *Mr. Justice* Brewer in *Kneeland* v. *American Loan & T. Co.* 136 U. S. 89, 97 (34: 379, 383), of *Mr. Justice* Blatchford in *Union Trust Co.* v. *Illinois M. R. Co.* 117 U. S. 434, 477 (29: 963, 978), and of *Mr. Justice* Jackson in *Chicago Deposit Vault Co.* v. *McNulta*, 153 U. S. 554 (38: 819), has been understood to mean that mortgage securities are not to be postponed or confiscated except in cases of overruling necessity, ascertained and adjudicated after careful examination and patient hearing. No such necessity did, in fact, exist in the present case.

Mr. **Arthur G. Moseley,** for appellees:

The master's statements rendered and certified became accounts stated and could only be impeached for fraud or mistake.

Standard Oil Co. v. *Van Etten*, 107 U. S. 325 (27: 319); *Lawrence* v. *Ellsworth*, 41 Ark. 502; *Weed* v. *Dyer*, 53 Ark. 160.

The evidence is conclusively binding upon the receivers for work done prior to June 3, 1891. The old contract was recognized by both parties as extending to the new work. After having so recognized the old contract and received the full benefit of the faithful performance by appellees of their part thereof, appellants cannot evade the obligation thereunder.

Sunflower Oil Co. v. *Wilson*, 142 U. S. 313 (35: 1025); *Ellis* v. *Boston, H. & E. R. Co.* 107 Mass. 1; *Easton* v. *Houston & T. C. R. Co.* 38 Fed. Rep. 788; *Vanderbilt* v. *Central R. Co.* 43 N. J. Eq. 669; *Kerr* v. *Little*, 42 N. J. Eq. 528; *Central Trust Co.* v. *Ohio C. R. Co.* 23 Fed. Rep. 306; *Howe* v. *Harding*, 76 Tex. 17; Beach, Receivers, § 862.

Within the scope of his authority, the receiver has power to make contracts subject to the power of the court, to forbid extravagant and improvident contracts while executory, or reform those fraudulently made.

Vilas v. *Paye*, 106 N. Y. 439.

When within the scope of his powers he has made a contract in good faith, and the other party relying on it has performed his part, the receiver should be required to perform his undertaking, although it was improvident.

Wabash, St. L. & P. R. Co. v. *Central Trust Co.* 22 Fed. Rep. 269.

When the receiver has entered into a contract by direction of the court or with its knowledge or approval, it is the duty of the court to see that the contract is enforced.

Farmers' Loan & T. Co. v. *Burlington & S. W. R. Co.* 32 Fed. Rep. 805; *McNulta* v. *Lochridge*, 141 U. S. 327 (35: 796).

No receiver should be permitted to hold the results of an executed contract and ask a court of equity to help him to defraud the party who performed the work.

Sparhawk v. *Yerkes*, 142 U. S. 1, 13 (35: 915, 918); *United States Trust Co.* v. *Wabash W. R. Co.* 150 U. S. 287 (37: 1085); *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Woodruff* v. *Erie R. Co.* 93 N. Y. 609; *Re Otis*, 101 N. Y. 580; *Quincy, M. & P. R. Co.* v. *Humphreys*, 145 U. S. 82 (36: 632); *St. Joseph & St. L. R. Co.* v. *Humphreys*, 145 U. S. 105 (36: 640); *Barton* v. *Barbour*, 104 U. S. 126 (26: 672); *Wallace* v. *Loomis*, 97 U. S. 146 (24: 895); *Fosdick* v. *Schall*, 99 U. S. 235 (25: 339); *Cowdrey* v. *Galveston, H. & H. R. Co.* 1 Woods, 334.

Mr. Justice **Brown** delivered the opinion of the court:

There can be no doubt of the correctness of the master's finding with regard to the work done by Cooper & Son prior to June 3, 1891. This work was done under a contract made May 23, 1890, between Cooper & Son and Chadick, who was at the time general manager of the Choctaw Coal & Railway Company, and who, by authority of the board of directors, had arranged with the judiciary committees of Congress for the location of the United States court at South McAlester, upon condition that the company would provide the officers of the court, free of all cost, with suitable quarters. While the contract was not signed by Chadick, but by Cox, the architect, it was so signed under special authority from Chadick, and it provided that the work was to be done to the satisfaction and under the supervision of the architect. Bills were rendered for this work, which were certified by the chief engineer and assistant manager of the company. Mr. Chadick *testified that the appellee's claim for [538

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receivers knew that said W. H. Cooper & Son were so performing work and furnishing materials under and by virtue of said contract, and in full reliance thereon; and with such knowledge approved of the work of said Cooper & Son, and managed and directed said Cooper & Son in the progress of said work, and have now received the benefit of said work, and are in the possession of said hotel.

4. I find that said W. H. Cooper & Son did all of the work done under the contract of July 7, 1891, in strict accordance with the details, plans, and specifications furnished them with said contract by said receivers, and are entitled to the contract price.

5 Further, that the extra work charged for was done under and by virtue of a provision in said contract, and at the suggestion of the supervising architect, furnished by the receivers, and with his approval; and that the prices charged for such extra work and materials furnished are reasonable and true.

FINDINGS OF LAW.

1. I find, as a matter of law, that the vouchers hereinbefore mentioned are in the nature of accounts stated, and having been acquiesced in by both parties cannot now be impeached by either party except through allegation and proof of fraud or mistake.

2. I find, as a matter of law, that the receivers having had full knowledge of the fact that W. H. Cooper & Son were doing work and furnishing materials on Kali-Inla Hotel, in reliance upon contract of July 7, 1891, and that the receivers having encouraged and countenanced their work thereunder and furnished them with a supervising architect to superintend the same, and that the receivers having received and gone into possession thereof, are now estopped from denying their obligations to said Cooper & Son under said contract, and that their only defense to that part of the claim of said Cooper & Son is in showing that the work performed by said Cooper & Son and materials furnished by them were not in accordance with the details, plans, and specifications attached to said contract.

William Nelson,
Special Master.

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this work is just and correct, and in a letter of June 19 he says that he is unable to settle the amount due, but expects to be able to do so early in July. It is true that the company, in December, 1890, was put into the hands of receivers; but, with full knowledge of all that was being done, they allowed the work to continue without interruption, until June 3, 1891, and were justly held to be liable for what had been done up to that time, according to the terms of the contract. A settlement appears to have been had on January 8, and some of the subsequent work was done without a prior order of the court, but no objection was ever made to it by the receivers upon that ground prior to June 3, when the work was stopped.

The principal matter in dispute relates to the proper interpretation of the order of October 13, 1891, referring the claim of Cooper & Son to the master "to ascertain the amount justly and equitably due as the true value of the work done and materials furnished," and to the refusal of the master, under the terms of this order, to permit the appellants to prove the cost and value of the building, without reference to any contract. In this connection, the master found that the contract under which the work was done was executed by agents of the receivers, having authority so to do, and under special direction and approval of the receivers themselves, and of the court; that the work was performed and materials furnished in reliance upon this contract; that the receivers knew of this, and with such knowledge approved of this work, received the benefit of it, and took possession of the hotel; and also that the work was done in strict accordance with the plans and specifications. While the findings of the master in this particular are not absolutely binding upon the court, there is a presumption in their favor, and they will not be set aside or modified in the absence of some clear error or mistake. *Camden* v. *Stuart*, 144 U. S. 104, 118 [36: 363, 368].

On June 3 the receivers ordered the work to be stopped, and a bill to be rendered for what had been done up to that time, saying that the receivers would "then furnish you with designs and directions as to the work to be done, **539**] and you *will name a gross sum for the performance of the same, which we will submit to the court for their approval or disapproval." The matter rested here until June 23, when, as a result of a conference between Mr. Cox, the architect, and Major Nelson, the master in chancery, the receiver addressed the following letter to Cooper & Son:

Gentlemen: We have been advised by Maj. William Nelson, master, of the following order of the United States court: "You are hereby directed to finish up court room, all the offices on lower floor of hotel building, and also such rooms on second floor as may be necessary, in accordance with estimates to be hereafter furnished."

In the meantime, and in consequence of the same conference, Chadick instructed the architect, Mr. Cox, to make the plans and specifications of what was required for the accommodation of the court, and send them up to Muscogee for the inspection of Major Nelson, the master. He sent them there on June 6. The master appears to have submitted them to the judge and marshal, who approved of them, and directed the work to be done, though no order of court was entered to that effect, and no question of price was considered, this matter being left to the receivers. Upon the return of these plans and specifications to Mr. Cox, the architect, he drew up a contract in compliance with them, and sent one copy to Mr. Cooper, with specifications annexed, and another copy to Mr. Chadick's office. Cooper & Son, who appear to have already seen the plans and specifications, addressed Mr. Chadick a letter under date of June 24, agreeing to do the work for $10,250. Chadick testified that his recollection was that the receivers accepted the proposition, though he never seems to have formally answered the letter. But however this may be, a contract was drawn up bearing date July 7, and signed by Cooper & Son, and by Cox as supervising architect, not at the foot of the contract itself, but at the end of the specifications, which followed the contract. Mr. Cox testified that Chadick ordered the work to go ahead, and, knowing the amount, he inserted it in the contract; that Mr. Chadick came to *the building after this, told him what [**540** the court wanted and approved of, and ordered him to go ahead with it. In the same connection, Chadick testified that the contract was drawn up by Cox and submitted to him; that he approved it, not formally, because Mr. Gowen was not there, but looked it over and thought it was just and right. Mr. Cox was the supervising architect, appointed first by the manager and continued by the receivers, and all the contracts for buildings and specifications for building before this had been drawn by him. This was in the ordinary line of his business and duty. "I knew that Mr. Cooper was working upon this building in reliance on this contract and in accordance with its terms; I supposed these specifications would govern the settlement of it; Mr. Gowen knew of this contract at the time; he was present when it was given to me in the early part of July." Mr. Cooper also testified that he made his bid in compliance with directions from Mr. Chadick; that he, Chadick, accepted it and told him to go to work, which he did, and completed the work according to the contract, plans, and specifications furnished him by Mr. Cox. It further appears that after the contract was completed a bill was made out showing an amount due of $11,092.74, and that Mr. Cox certified to the correctness of the account.

In this connection Mr. Gowen, the principal witness for the appellants, states that shortly after his appointment, permission was asked of the court to enter into a contract for the roofing of the building, and an order procured to that effect, and that he concurred in the making of a contract for this work; that he gave the matter no further consideration until March, when his attention was called to the fact that the inside work was still going on; that he then called Mr. Chadick's attention to the matter, who said that nothing was being done beyond making the building weathertight, and undertook to have authority procured to do the necessary work in closing the

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building. Subsequently, upon Chadick's representations that their offices were so cramped as to greatly interfere with the efficient transaction of business, he agreed to the fitting up of quarters in the hotel building, and after con- [541] sulting *as to the amount of room required, Chadick undertook to secure the necessary order of the court.

Upon the occasion of his next visit, which was in the latter part of May, he learned that the work was still progressing, and had an altercation with Mr. Chadick upon the subject, in which he reminded him that he had undertaken to have the work entirely stopped, to which Mr. Chadick stated that he thought he would be able to make an advantageous use of the building upon its completion, and that he had assumed the responsibility for the continuance of the work, although against Mr. Gowen's wish. The result of this conversation was the stoppage order of June 3, which was designed to prevent Cooper entering into any further arrangement without his concurrence and the prior approval of the court. He further stated that he never saw or heard of the letter of June 24 of Cooper & Son, proposing to do the work for $10,250, although he knew and saw that work upon the court-rooms and offices was going on, and was informed by Mr. Chadick that this was being done by direction of the court; and that he believed that Cooper was going on with the work without furnishing an estimate or making any contract, as had been the case heretofore, and felt certain that Mr. Cooper would not be allowed any excessive sum; that the first intimation he had of the existence of the contract was on August 29, when he was asked to sign such contract as a prerequisite to Mr. Cooper allowing the marshal to take possession of the rooms fitted up for the court and its officers; he declined to sign the contract; never promised to pay Mr. Cooper the amount claimed, because he was not satisfied that the price named therein was a proper one and that he subsequently obtained an appraisement by builders of his own employment, who reported that the charges were grossly excessive. He further stated that he never gave Mr. Cox authority to bind the receivers by estimates or contracts such as this.

It seems that near the end of August, when Mr. Cooper had this conversation with Mr. Gowen, he was told there was going to be a change in the administration; that Gowen was going to take charge as managing receiver; that [542] he was *reluctant to turn over the building until he had some assurances of his money, and so notified the receivers; but, as he says, upon the assurance of Mr. Gowen that it would be only a matter of a few days when he would have his money, he allowed them to take possession of the building. The statement in this particular is confirmed by McLoud, the attorney of the Insurance Company, who advised Mr. Cooper that he would lose no right by giving up possession of the building.

On October 8, this petition was filed, alleging that the work subsequent to June 3 was done by virtue of direct authority from Messrs. Chadick and Gowen and Major Nelson, the master in chancery, and in compliance with the specifications signed by Cooper & Son and Cox. The answer of Gowen denied the contract of July 7, though it admitted an arrangement made with Mr. Chadick, with the approval of the judge and special master, to make certain alterations and additions to the hotel building, to fit it up for a court-room and the rooms necessary for the officers of the court.

In this state of the case, and on October 13, Mr. Gowen as receiver, and the life insurance company by its attorney, appeared before the court and submitted to it the so-called Ardmore order, which was entered by the court with the consent of all the parties. This order, upon its face, is undoubtedly susceptible of the interpretation put upon it by the appellants, and authorized the master to receive testimony as to the actual value of the work done and materials furnished, irrespective of any contract between the parties; and yet in view of the antecedent facts it does not seem probable that the court thereby intended to rule out all evidence of the contract. The petition of Cooper & Son relied upon their arrangement with Chadick as a contract. The answer denied the contract, and under these allegations it can scarcely have been intended by Cooper & Son to waive entirely the benefit of such contract, if it existed. In fact, it would appear that, prior to this order, it had been determined by the court that such contract was made, since in the final decree, which was entered on January 19, 1892, it is said "that in the order there made October 13, 1891, the court, *upon the evidence then* [543] **adduced*, recognized and declared the validity of the claim of W. H. Cooper & Son," and that it was not the intention of the court to confine Cooper & Son to a *quantum meruit* is patent from the further clause of such decree, "that it being stated by receivers that they were entitled to certain credits upon said account, the court referred the said claim to the special master, with instructions to ascertain the amount due upon said claim, *the validity of which had been adjudged by the court.*"

If such contract existed, was within the competency of the parties, and was proved to the satisfaction of the court, it superseded the necessity of introducing testimony as to the actual value of the work done.

We think the testimony fully justified the master in his finding that a contract had been made with Mr. Chadick for the work. The stoppage order of June 3 indicated an intention on the part of the receivers to furnish Cooper & Son with further designs and directions as to the work to be done, for which work they anticipated a bid, and agreed to submit the same to the court for its approval or disapproval. Within a few days thereafter, plans and specifications furnished by the architect of the receivers with a notice that the court had ordered the court-room, all the offices on the lower floor of the hotel building, and also such rooms on the second floor as might be needed, to be finished up, were sent to Cooper & Son; and after an examination of the plans and specifications, they made a bid for a certain amount, which Chadick, acting for the receivers, accepted verbally. Cooper & Son thereupon signed the plans and specifications, with the architect, and proceeded to do the work in reliance upon the contract.

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Whether the contract was actually signed by the receivers was quite immaterial, so long as the terms of the contract were agreed upon and understood between the parties, and, as observed by the court below, "when Cooper & Son were directed to proceed with the work called for by the plans, the contract between the parties was closed, and the preparation and signing of a formal writing would only have called into existence additional evidence of the fact."

544] *It is said, however, that the contract being for the construction of a large building, not necessary to the company in the conduct of its regular business, and upon land which did not belong to the company, and was not covered by the lien of the mortgage, was such a one as required a prior order of the court, and that no such order was given in this case. Assuming this to be so, the objection is a purely technical one. It appears that the plans and specifications were laid before the judge and other officers of the court, were approved by them, and the work directed to be done, though no order of the court was formally entered. Subsequently the court, with full knowledge of the facts, and "upon evidence then adduced," declared the validity of the claim and referred it to the master to ascertain the amount due. We think this is a sufficient ratification of the act of Mr. Chadick in directing the work to be done; and, so far as the price is concerned, his action, or that of his authorized agent, Cox, is binding in the absence of fraud or mistake. It certainly would have been more satisfactory if the court had been fully informed of the terms of the contract, and especially of the price to be paid, and had given the receiver the requisite authority before he entered into it, but it was a question for the court whether it should not leave the price to be determined by the discretion of the receiver.

In the very case of *Vanderbilt* v. *Central R. Co.* 43 N. J. Eq. 669, so strongly relied upon by appellants, it was remarked in the opinion of the court, p. 684:

"It must have been contemplated that in the performance of these multifarious duties some degree of discretion might be accorded to the receiver. Whether a power to exercise such discretion would not be assumed to exist in every case without a special order need not be considered, for it is clear that the chancellor may accord such discretionary power to a receiver by a general order,—such as was made in this cause. . . .

"If the contract has been completely performed and its performance accepted by the receiver, and the claim is merely for compensation, relief of that nature would seem necessarily 545] *to be awarded, unless the applicant should appear to have dealt fraudulently or collusively with the receiver to the detriment of the trust. Even if, in the judgment of the chancellor, the contract was improvident and unreasonable, unless the contractor should appear to have contracted with notice of the improper character of the contract, no just reason could be given for debarring him from the agreed-on compensation which the receiver might, for his negligence or misconduct, be required to repay to the fund."

The work done having thus received the sanction and approval of the court, it can make no difference, so far as the legal aspect of the case is concerned, whether the contract was executed by one or both of the receivers. Indeed, in view of the fact that two or more receivers of a railway are frequently appointed who sometimes reside at considerable distances from each other, we are unwilling to say that a contract may not lawfully be made by one of such receivers, which shall be binding upon the estate. The necessities of the case may sometimes require that contracts of a local character shall be made, where it is inconvenient, or perhaps impossible, to obtain the consent of the other receiver. So, if by arrangement between themselves one is constituted managing receiver, his authority may have a broader scope and may approximate to that of a sole receiver. Mr. Chadick may have made an injudicious bargain in agreeing to pay $10,250 for the job, but so long as no bad faith is imputed to him and no fraud or mistake is charged, it is difficult to see how the company can escape payment. The contract having been fully performed, evidence of the actual value of the work and materials was irrelevant, and in this view of the case the master did not err in ruling it out and holding the receivers to the contract. "The true value of the work done and materials furnished" may be, with entire appropriateness, said to be the value which the parties have deliberately and knowingly put upon them, and "the amount justly and equitably due" the contractor under such circumstances is the amount which the receiver has promised to pay him. In addition to this, there was extra work *performed by Cooper & Son, the [546 amount of which was to be determined upon the principles of *quantum meruit*, as to which work this language was especially applicable.

The fact that the court did not direct the computation to be made irrespective of the contract, and that it subsequently recognized the validity of the claim and directed it to be paid, is inconsistent with the idea that it did not intend that the contract should be respected. If Mr. Gowen, who appears to represent more particularly the interests of the bondholders and knew the work was being done, had desired to know the terms upon which Cooper & Son were doing the work, he might easily have informed himself, as he had done before, and called the attention of the court to the matter, when it may be assumed the court would have protected his rights. His testimony that he did not suppose the work was being done under contract is somewhat inconsistent with his stoppage order of June 3, which plainly contemplated a contract for future work.

There was no error in the court ordering the bill of Cooper & Son to be paid as a preferred claim. The work had been commenced before the receivership and was done in good faith, for the benefit of the company and the receivers. The building must either have been finished, or the work already done become a total loss to the company. It appears to have been constructed for the accommodation of the officers of the road, and in other respects in furtherance of the interests of the

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road, and is an asset in the hands of the receivers which may be sold and the money realized therefrom applied to the payment of the claim. The fact that it is not covered by the mortgage renders it the more equitable that the proceeds of this sale shall be applied to the payment of the cost of its construction.

The decree of the court below is therefore affirmed.

547] W. A. HARWOOD, *Appt.*,
v.
A. WENTWORTH, *Appellee.*

(See S. C. Reporter's ed. 547-565.)

Statute, when not impeached by legislative journals—local or special law.

1. A territorial statute officially attested by the presiding officers of the territorial council and house of representatives, when approved by the governor and committed to the custody of the secretary of the territory, cannot be impeached by legislative journals which the fundamental laws of the territory do not require to show everything done in both branches of the legislature while engaged in the consideration of bills.
2. A territorial statute fixing the compensation of county officers at different sums, according to the classification of the counties based on the equalized assessed value of property, is not a local or special law, within the meaning of the act of Congress of July 30, 1866.

[No. 756.]

Submitted March 9, 1896. Decided April 13, 1896.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona to review a judgment of that court affirming the judgment of the District Court of the First Judicial District of that Territory in favor of the plaintiff, A. Wentworth, against the defendant, W. A. Harwood, adjudging that plaintiff is the county recorder of the county of Cochise, in that territory, and enjoining the defendant from exercising the duties of that office, etc. *Affirmed.*

See same case below, 42 Pac. 1025.

Statement by *Mr. Justice* **Harlan:**

This is a contest as to the right to exercise the functions of the office of county recorder of Cochise county, territory of Arizona.

The defendant in error filed in the district court of the first judicial district of that territory, holden in Cochise county, a petition alleging that, at a general election held in Arizona on the 6th day of November, 1894, he was duly elected to the office of county recorder of Cochise county, and thereafter, having first duly qualified, entered upon the discharge of his duties as such officer; that that county, at the time of such election, was what is denominated as a first-class county of the territory; that at a regular meeting of the board of supervisors of the county he was duly elected and appointed to the office of clerk of that board, 548] and, having *qualified, entered upon the duties of the office; that thereafter, on or about March 21, 1895, the legislative assembly of Arizona, for the purpose of classifying the counties of the territory and fixing the compensation of county officers, passed an act entitled "An Act Classifying the Counties of the Territory and Fixing the Compensation of the Officers therein," which was approved March 21, 1895, by the governor of the territory, and went into effect thirty days after its passage, namely, on the 21st day of April, 1895; and that, according to the provisions of the act, Cochise county became and is a county of the third class, and its recorder clerk *ex officio* of the board of supervisors.

The plaintiff averred in his petition that as recorder he was, and had been since April 21, 1895, *ex officio* clerk of the board of supervisors, and as such entitled to the possession of the books, papers, records, seals, and documents pertaining to that office, but the same were in the hands of the defendant Harwood, who, upon demand duly made, refused to deliver them to the plaintiff.

The prayer of the petition was that a writ of mandamus be issued, commanding the defendant to forthwith deliver all of said books, papers, records, seal, and other documents to the plaintiff as recorder of Cochise county and *ex officio* clerk of said board of supervisors; that plaintiff be adjudged to be such recorder and clerk; and that the defendant be enjoined and restrained from exercising or performing any of the duties of that office.

The petition having been supported by the plaintiff's affidavit, an alternative mandamus was directed to be issued commanding the defendant to deliver to the plaintiff all the books, papers, etc., pertaining to the office of clerk of the board of supervisors of Cochise county, or to show cause, by a day named, why the writ should not be made final and peremptory in the premises.

The defendant Harwood averred that the act referred to in the plaintiff's petition, referred to in the record as house bill No. 9, was not a law; that the same did not pass the legislative assembly as alleged; that that act, "as the same passed both houses of said legislative assembly," contained a clause that it should [549 not take effect and be in force before January 1, 1897; that that clause or section was stricken out, omitted, and taken from the act after the same had passed both houses of the assembly, but is a part of the act; that there was also a clause that "all acts or parts of acts in conflict with this act are hereby repealed," and that that clause was also omitted and stricken out in the same way; and that "the said alleged act was not duly passed by the legislative assembly or by either house thereof, and that the same is not a law."

By consent of the parties the case was tried by the court upon a stipulation as to the facts, and without a jury.

It was agreed by the parties that the act of March 21, 1895, as it appears in the printed laws of Arizona for 1895, is filed with and is in the custody of the secretary of the territory, and is signed as it appears in those laws to be signed, namely, by the governor, the speaker of the house, and the president of the council.

The affidavits of A. J. Doran and J. H.

NOTE.—*As to extra pay or compensation to officers,* see note to United States v. Macdaniel, 8: 587.

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Carpenter, and also the affidavits of Charles D. Reppy and Charles F. Hoff, with the exhibits attached thereto, were read in evidence and were treated as containing a true statement of the journals and proceedings of both houses, and of the facts stated in them, subject to the objection by the plaintiff that the enrolled bill, signed by the governor and lodged with the secretary of the territory, could not be attacked by any evidence.

The witness Doran stated that he was president of the council of the legislative assembly of the territory; that the session terminated March 21st; that it was his custom as president to sign bills when presented to him by the chairman of the enrolling and engrossing committee of either house; that it had been the practice to so sign bills when presented, whether the council was in session or not, though ordinarily it would be done when the council was in session; that if signed when the council was in session there was no formality gone through with; that the attention of the council was not called to the fact that the president was about to sign the bill, nor was its business interrupted for the purpose of signing the bill, nor was a member who was 550] speaking interrupted; and *that it was simply handed up to the president and he would sign his name and hand it back.

The witness Carpenter, who was speaker of the house of representatives of the legislative assembly of the territory, testified "that the session terminated on March 21st. It was the universal custom for him as such speaker to sign bills when presented to affiant by the chairman of the enrolling and engrossing committee of either house; that affiant so signed them without reading them or without comparing them in any manner; and that as matter of fact he did not compare any one bill signed by him before he signed it. It was his custom, and it has been the practice, to sign bills when presented, whether the house was in session or not. If signed when the house was in session, there was no formality gone through with. The attention of the house was not called to the fact that the speaker was about to sign a bill, nor was the business of the house interrupted for the purpose of signing bills, nor was a member who was speaking interrupted. The facts are that a bill was simply handed up to the speaker and he would simply sign his name and hand it back." He also stated that "he is certain that house bill No. 9, when it passed the house, contained a clause that it should go into effect January 1, 1897."

Hoff and Reppy were chief clerks, respectively, of the council and house of representatives of the territorial legislative assembly, by which the said act of March 21, 1895, purported to have been passed. Referring to the original bill and to the numerous indorsements or minutes thereon made by them respectively, each witness stated that the bill, as it passed the body of which he was an officer, and therefore as it passed both houses, contained the clause: "This act shall take effect and be in force from and after January 1, 1897;" consequently, according to their evidence, the omission of that clause from the bill occurred after it passed both houses, and while it was in the hands of the committee on enrollment.

Upon these facts the court found the issues for the plaintiff, and its judgment was affirmed in the supreme court of the territory.

*The statutes of the United States, as [551 well as the statutes of the territory of Arizona, which bear more or less upon the present controversy, are, for convenience, given in the margin.†

Mr. **William H. Barnes,** for appellant: It is a question of law purely for the court, and not an issue of fact for a jury, whether a bill has become and is a law.

Sutherland, Stat. Const. §§ 52, 54, and cases cited; *South Ottawa* v. *Perkins*, 94 U. S. 260 (24: 154); *Gardner* v. *Barney*, 73 U. S. 6 Wall. 508 (18:893); Cooley, Const. Law, 135.

The bill signed by the presiding officers, to be valid, must be the bill actually passed by the legislature.

23 Am. & Eng. Enc. Law, 176, and cases cited; *Field* v *Clark*, 143 U. S. 661 (36: 294); *Osborne* v. *Staley*, 5 W. Va. 85, 13 Am. Rep. 648; *Berry* v. *Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69.

The court takes judicial notice of the public statutes and the proceedings leading up to

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† STATUTES OF UNITED STATES.

Sec. 1841. The executive power of each territory shall be vested in a governor, who shall hold his office for four years, and until his successor is appointed and qualified, unless sooner removed by the President. . . .

Sec. 1842. Every bill which has passed the legislative assembly of any territory shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it originated, and that house shall enter the objections at large on its journal, and proceed to reconsider it. If after such reconsideration two thirds of that house agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall be likewise reconsidered; and, if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journal of each house. If any bill is not returned by the governor within three days, Sundays excluded, except in Washington and Wyoming, where the term is five days, Sundays excluded, after it has been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislative assembly, by adjournment *sine die*, prevents its return, in which case it shall not be a law: *Provided*, That so much of this section as provides for making any bill passed by the legislative assembly of a territory a law, without the approval of the governor, shall not apply to the territories of Utah and Arizona.

Sec. 1843. There shall be appointed a secretary for each territory, who shall reside within the territory for which he is appointed, and shall hold his office for four years, and until his successor is appointed and qualified, unless sooner removed by the President. . . .

Sec. 1844. The secretary shall record and preserve all the laws and proceedings of the legislative assembly and all the acts and proceedings of the governor in the executive department; he shall transmit one copy of the laws and journals of the legislative assembly, within thirty days after the end of each session thereof, to the President, and two copies of the laws, within like time, to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress. He shall transmit one copy of the executive proceedings and official correspondence semi-annually, on the 1st day of January and July in each year, to the President. He shall prepare the acts passed by the legislative assembly for publication, and furnish a copy thereof to the public printer of the ter-

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their enactment and authentication; and the judges inform themselves from the best sources available.

Purdy v. *People*, 4 Hill, 384; *DeBow* v. *People*, 1 Denio, 9; *Spangler* v. *Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Young* v. *Thompson*, 14 Ill. 380; *Speer* v. *Allegheny & M. Pl. Road Co.* 22 Pa. 376; *Re Welman*, 20 Vt. 656; *Ramsey County Supers* v. *Heenan*, 2 Minn. 330; *Fowler* v. *Pierce*, 2 Cal. 165.

The court may go into the journals and proceedings to see if the act became a law at all.

Lapeyre v. *United States*, 84 U. S. 17 Wall. 191 (21: 606); *South Ottawa* v. *Perkins*, 94 U. S. 260 (24: 154); *Amoskeag Nat. Bank* v. *Ottawa*, 105 U. S. 667 (26: 1204); *Illinois C. R. Co.* v. *Wren*, 43 Ill. 79; *Jones* v. *United States*, 137 U. S. 216 (34: 697); *Duncan* v. *McCall*, 139 U. S. 456 (35: 223); *Lyons* v. *Woods*, 153 U. S. 663 (38:859).

ritory within ten days after the passage of each act.

Sec. 1846. The legislative power in each territory shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. . . .

Sec. 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . .

Sec. 1861. The subordinate officers of each branch of every legislative assembly shall consist of one chief clerk, who shall receive a compensation of $8 per day, and of one assistant clerk, one enrolling clerk, one engrossing clerk, one sergeant-at-arms, one doorkeeper, one messenger, and one watchman, who shall receive a compensation of $5 per day during the sessions, and no charge for a greater number of officers and attendants, or any larger *per diem*, shall be allowed or paid by the United States to any territory.

By an act of Congress approved July 19, 1876, entitled "An Act Relating to the Approval of Bills in the Territory of Arizona," Rev. Stat. Supp. 112, chap. 212, it was provided:

"*Be it enacted, etc.*, That every bill which shall have passed the legislative council and house of representatives of the territory of Arizona shall, before it becomes a law, be presented to the governor of the territory; if he approve it, he shall sign it, but if he do not approve it, he shall return it, with his objections, to the house in which it originated, who shall enter the objections at large upon their journal and proceed to reconsider it. If after such reconsideration, two thirds of that house shall pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law, the governor's objection to the contrary notwithstanding; but in such case, the votes of both houses shall be determined by yeas and nays, and be entered upon the journal of each house respectively. And if the governor shall not return any bill presented to him for approval, after its passage by both houses of the legislative assembly within ten days (Sundays excepted) after such presentation, the same shall become a law, in like manner as if the governor had approved it: *Provided, however*, That the assembly shall not have adjourned *sine die* during the ten days prescribed as above, in which case it shall not become a law: *And provided further*, That acts so becoming laws as aforesaid shall have the same force and effect, and no other, as other laws passed by the legislature of said territory."

STATUTES OF ARIZONA.

Sec. 2940. All official acts of the governor, his approval of the laws excepted, shall be authenticated by the great seal of the territory, which shall be kept by the secretary thereof. Sec. 2878. The legislative assembly shall consist of: (1) Twenty-four members of the house of representatives; (2) Twelve members of the council. Sec. 2889. The chief clerks of each house must attend each day, call the roll, read the journals and bills, and superintend any matters required of them. Sec. 2890. The enrolling and engrossing clerk of each house must enroll and engross such bills or resolutions as may be required of him by the house to which he is attached. Sec. 2895. Each house shall keep a journal of its proceedings and publish the same, except such parts as may require secrecy. The yeas and nays of the members of either house, on any question, shall be entered on the journal at the request of one fifth of the members elected. Any member of either house may dissent from and protest against any act, proceeding, or resolution which he may deem injurious to any person or the public, and have the reason of his dissent entered on the journal. Sec. 2899. Every bill and joint resolution, except of adjournment, passed by the legislature, shall be presented to the governor before it becomes a law. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the objections at large upon their journal. Sec. 2901. Every bill and joint resolution shall be read three times in each house before the final passage thereof. No bill or joint resolution shall become a law without the concurrence of a majority of all the members present and constituting a quorum of each house. On the final passage of all bills, and all joint resolutions having the effect of law, the vote shall be by yeas and nays, and entered on the journal. Sec. 2921. Every bill must, as soon as delivered to the governor, be indorsed as follows: "This bill was received by the governor this — day of ——, eighteen ——." The indorsement must be signed by the private secretary of the governor. Sec. 2928. The original acts of the legislature shall be deposited with and kept by the secretary of the territory. Sec. 2929. All acts of the legislature and joint resolutions having the effect of law shall take effect and be in force on the thirtieth day after being approved by the governor and deposited in the office of the secretary of the territory, unless otherwise ordered by the legislature. Sec. 2947. The secretary of the territory has such powers and shall perform such duties as are prescribed by the laws of the United States, and in addition thereto it is the duty of the secretary of the territory:—(1) To attend at every session of the legislature for the purpose of receiving bills and resolutions thereof, and to perform such other duties as may be devolved upon him by resolution of the two houses, or either of them. . . . (9) To deliver to the printer, at the earliest day practicable after the final adjournment of each session of the legislature, copies of all laws, resolutions (with marginal notes), and journals, kept, passed, or adopted at such session; to superintend the printing thereof, and have proof sheets of the same compared with the originals and corrected. (10) To cause to be published annually such laws, reports, and documents, in addition to those required by the laws of the United States, as the legislature may direct. Sec. 2948. He shall secure and safely keep in his office all original acts and joint resolutions of the legislature, and cause the same to be substantially bound in suitable and convenient volumes. Sec. 2949. He is charged with the custody of:—(1) All acts and resolutions passed by the legislature. (2) The journals of the legislature. (3) All books, records, deeds, parchments, maps, and papers kept or deposited in his office pursuant to law. Sec. 2950. He shall immediately after the publication of the statutes distribute volumes thereof as follows:—(1) To the President of the United States one copy. (2) To the President of the United States Senate one. (3) To the Speaker of the House of Representatives of the United States, one copy. (4) To each department of the government at Washington, D. C., and of the government of this territory, one copy. (5) To the library of Congress, one copy. (6) One copy each to the governor, members of the legislature by which such laws were enacted, the delegate in Congress, the secretary of the territory, each judge of a court of record in the territory, the attorney general, territorial treasurer, territorial auditor, clerk of the supreme and district courts, county treasurers, sheriffs, district attorneys, and boards of supervisors, court or public libraries, the Attorney General of the United States, and the governor of each of the states and territories of the United States for the use of such state or territory. Sec. 2951. He shall distribute the journals of the legislature in the manner provided by the law of the United States, and also one copy each to the persons mentioned in subdivision 6 of the preceding section. Sec. 2952. He shall deposit in the territorial library forty copies of the statutes and twenty copies of the journals.

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The question whether a seeming act of the legislature has become a law in accordance with the fundamental law is a judicial one to be tested by the courts and judges, and not a question of fact to be tried by a jury.

Clough v. *Curtis*, 134 U. S. 361 (33: 945).

Cases may arise when a law must be declared void, even though authenticated.

People v. *Dunn*, 80 Cal. 213.

The question arises as to which is to have the greater weight, the signed bill with the secretary, or the journals of the houses, as a question of evidence. It is at this point that the authorities differ.

29 Am. L. Rev. 734; 30 Am. L. Rev. 115.

This law is unconstitutional and void because in violation of that provision of the so-called "Harrison act" which prohibits the passage of local or special laws creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

This act, for the purpose of fixing the compensation of county officers of the counties of the territory, divides them into six classes, based upon the assessment of property. This classification violates the principle of uniformity, and is void.

Com. Fertig, v. *Patton*, 88 Pa. 258; *Wheeler* v. *Philadelphia*, 77 Pa. 338; *Kilgore* v. *Magee*, 85 Pa. 401; *People, Miller*, v. *Cooper*, 83 Ill. 585; *State* v. *Trenton*, 42 N. J. L. 486; *State, Van Riper*, v. *Parsons*, 40 N. J. L. 2; *Earle* v. *San Francisco Board of Edu.* 55 Cal. 489.

Mr. **A. Wentworth**, appellee, for himself:

As the case at bar seems to me to be on all fours with *Field* v. *Clark*, 143 U. S. 649 (36: 294), I am content to submit the case upon the authority of that decision.

I cite also the case of *Lyons* v. *Woods*, 153 U. S. 663 (38: 859).

Mr. Justice **Harlan** delivered the opinion of the court:

That which purports to be an act of the legislature of the territory of Arizona, entitled "An Act Classifying the Counties of the Territory and Fixing the Compensation of Officers therein," and to have been approved by the governor on the 21st day of March, 1895, not only appears in the published laws of the territory, but is filed with and in the custody of the secretary of the territory, and is signed, the parties agree, by the governor, the president of the territorial legislative council, and the speaker of the territorial house of representatives.

Is it competent to show, by evidence derived from the journals of the council and house of representatives, as kept by their respective chief clerks, from the indorsements or minutes made by those clerks on the original bill while it was in the possession of the two branches of the legislature, and from the recollection of the officers of each body, that this act, thus in the custody of the territorial secretary, and authenticated by the signatures of the governor, president of the council, and speaker of the house [558] of representatives, *contained, at the time of its final passage, provisions that were omitted from it without authority of the council or the house, before it was presented to the governor for his approval?

Upon the authority of *Field* v. *Clark*, 143 U. S. 649, 671 *et seq.* [36: 294, 303], this question must be answered in the negative. That case in its essential features does not differ from the one now before the court. It was claimed in that case that a certain provision or section was in the act of Congress of October 1, 1890 (26 Stat. at L. 567, chap. 1244), as it passed, but was omitted without authority from the bill or act authenticated by the signatures of the presiding officers of the two houses of Congress and approved by the President. What was said in that case is directly applicable in principle to the present case. After observing that the Constitution expressly required certain matters to be entered on the journal, and waiving any expression of opinion as to the validity of a legislative enactment passed in disregard of that requirement, the court said: "But it is clear that, in respect to the particular mode in which or with what fullness, shall be kept the proceedings of either house relating to matters not expressly required to be entered upon the journals; whether bills, orders, resolutions, reports, and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signature of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication." Again: "The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled *bill, is an official attesta- [559 tion by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested receives his approval and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged respectively with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial

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department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

It is said that, although an enrolled act properly authenticated is sufficient, nothing to the contrary appearing on its face, to show that it was passed by the territorial legislature, it cannot possibly be—that public policy forbids—that the judiciary should be required to accept as a statute of the territory that which may be shown not to have been passed in the form in which it was when authenticated by the signatures of the presiding officers of the territorial legislature and of the governor. This, it is contended, makes it possible for these officers to impose upon the people, as a law, something that never in fact received legislative sanction. Considering a similar contention in *Field* v. *Clark*, 143 U. S. 649, 671 [36: 294 303], the court said: "But this possibility is too remote 560 to be seriously considered in the *present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the secretary of the state, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them." These observations are entirely applicable to the present case.

But it may be added that, if the principle announced in *Field* v. *Clark*, 143 U. S. 649, 671 [36: 294, 303], involves any element of danger to the public, it is competent for Congress to meet that danger by declaring under what circumstances or by what kind of evidence an enrolled act of Congress or of a territorial legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it is committed by statute, may be shown not to be in the form in which it was when passed by Congress or by the territorial legislature.

It is difficult to imagine a case that would more clearly demonstrate the soundness of the rule recognized in *Field* v. *Clark*, *supra*, than the case now under examination. The president of the council and the speaker of the house of representatives state that it was not "the custom," when an enrolled bill was presented for signature, to call the attention of their respective bodies to the fact that such bill was about to be signed; that the bill was simply handed up, when it would be signed and handed back, without formality and without interrupting legislative proceedings. The speaker of the house of representatives, in addition, stated that he was certain that the original *bill when it passed that body contained a 561 clause that it should go into effect on the 1st day of January, 1897. But what made him so certain of, or how he was able to recall, that fact, is not stated.

Equally unsatisfactory, as proof of what occurred in the territorial legislature, are the indorsements made by the chief clerks of the council and the house upon the original bill. The indorsements made by the chief clerk of the house are as follows: "Introduced by Mr. Fish January 28, 1895; read 1st time; rules suspended; read 2d time by title; 100 copies ordered printed and referred to committee on judiciary. Reported printed, 2, 5, '95.—Reported by committee amended and recommended that it do pass as amended. Referred to committee of whole with report of committee and its amendments. 2, 7, '95.—Considered in committee of whole, amended, and reported back with recommendation that it do pass as amended. 2, 15, '95.—Amendments adopted and 100 copies ordered printed. 2, 21, '95.—Reported, printed, and ordered engrossed and to have third reading. 2, 28, '95.—Rep'd engrossed, read 3d time, placed on final passage, and passed—ayes, 17; noes, 6; absent, Brown, sick." The indorsements made by the chief clerk of the council were these: "Rec'd from house; read first time; rule suspended; read 2d time by title: referred to com. on ways and means, 2, 28, '95.—Rep't back that it be referred to a com. of the whole, rep'd adopted and made sp'c'l order for Tuesday, March the 12th, at 2 P. M., 3, 7, '95. Made sp'c'l order for 4 P. M. this day, 3, 16. '95. Considered in com. of whole; rep't back; progress. 3, 18, '95. Considered in committee of the whole; amendment No. 1 and No. 2 offered and adopted. Ordered to have third reading, 3, 19. '95. Read third time; placed upon its final passage and passed council. Taken to house, 3, 20, '95." Again: "3, 20, '95, house. Rec'd by message; amended in council; amendments concurred by house; ordered enrolled. 3, 21, '95.—Rep't enr'd and in hands of governor." These indorsements, in themselves, throw no light upon the inquiry as to whether the particular clause alleged to have been omitted was, in fact, stricken out by the direction of the council and house. *They show, it is 562 true, that amendments of the original bill were made, but not what were the nature of those amendments. If it be said that certain amendments are attached to the original bill, and are attested by one of the clerks, the answer is, that other amendments may have been made that were not thus preserved. It was not required that each amendment should be entered at large on the journal.

If there be danger, under the principles announced in *Field* v. *Clark*, 143 U. S. 649, 671 [36: 294, 303], that the governor and the presiding officers of the two houses of a territorial legislature may impose upon the people an act that was never passed in the form in which it is preserved by the secretary of the territory, and as it appears in the published statutes, how much greater is the danger of permitting the validity of a legislative enactment to be

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questioned by evidence furnished by the general indorsements made by clerks upon bills previous to their final passage and enrolment,—indorsements usually so expressed as not to be intelligible to any one except those who made them, and the scope and effect of which cannot in many cases be understood unless supplemented by the recollection of clerks as to what occurred in the hurry and confusion often attendant upon legislative proceedings.

We see no reason to modify the principles announced in *Field* v. *Clark*, *supra*, and therefore hold that, having been officially attested by the presiding officers of the territorial council and house of representatives, having been approved by the governor, and having been committed to the custody of the secretary of the territory, as an act passed by the territorial legislature, the act of March 21, 1895, is to be taken to have been enacted in the mode required by law, and to be unimpeachable by the recitals or omission of recitals in the journals of legislative proceedings which are not required by the fundamental law of the territory to be so kept as to show everything done in both branches of the legislature while engaged in the consideration of bills presented for their action.

It remains to consider whether that act is repugnant to the act of Congress of July 30, 1886, **563**]chap. 818, entitled *"An Act to Prohibit the Passage of Local or Special Laws in the Territories of the United States to Limit Territorial Indebtedness, and for Other Purposes." 24 Stat. at L. 170.

That act declares that the legislatures of the territories of the United States shall not pass local or special laws in any of the following, among other, enumerated cases: "Regulating county and township affairs;" "for the assessment and collection of taxes for territorial, county, township, or road purposes;" "creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected."

The territorial act alleged to be repugnant to the act of Congress is declared to be "for the purpose of fixing the compensation of county officers" of the territory, and to that end all the counties of the territory are classified according to the equalized assessed valuation of property in each county. County treasurers, district attorneys, county recorders, assessors, and probate judges are to receive salaries of specified amounts, as the counties of which they are officers are in one or the other of the six classes established. In other words, the salaries of officers in each class are specified, the largest salary that each can receive being that named for a county of the first class having an equalized assessed valuation of property of $3,000,000 or more, and the smallest that each can receive being that named for counties of the sixth class, having an equalized assessed valuation of property of less than $1,000,000. Arizona Laws 1895, p. 68.

We are of the opinion that the territorial act is not a local or special law within the meaning of the act of Congress. It is true that the practical effect of the former is to establish higher salaries for the particular officers named, in some counties, than for the same class of officers in other counties. But that does not make it a local or special law. The act is general in its operation; it applies to all counties in the territory; it prescribes a rule for the stated compensation of certain public officers; no officer of the classes named is exempted from its operation; and there is such a relation *between the salaries fixed for [**564** each class of counties, and the equalized assessed valuation of property in them, respectively, as to show that the act is not local and special in any just sense, but is general in its application to the whole territory and designed to establish a system for compensating county officers that is not intrinsically unjust, nor capable of being applied for purposes merely local or special. It is not always easy to fix a basis for the salaries of county officers, so as to compensate them fairly for their services, and yet be just to taxpayers. Certainly those named in the territorial act of 1895 ought not to receive as much compensation for services in a county having a few people and in which a small amount of taxes is collectible, as in a populous county in which a large amount of taxes is collectible. The services performed by such officers in the latter class of counties would necessarily be greater than those required in the former. The assessed valuation of property in a county furnishes a reasonable test of the character of the services required at the hands of county officers; at any rate, the adoption of such a test does not show that the act was designed to defeat the objects of Congress, nor that it is local or special legislation. If the territorial act is embraced by the act of Congress, and if the territory by legislation of that kind cannot fix the salaries of county officers, and thereby displace the system of fees, percentages, and allowances, it would follow that many county officers would receive compensation out of all proportion to the labor performed and the responsibility incurred by them. It seems to us that the act in question cannot be characterized as local or special any more than an act which did not create, increase, or diminish fees, percentages, or allowances of public officers during the term for which they were elected or appointed, but which, prospectively, fixed their compensation upon the basis of a named per cent of all the public moneys that passed through their hands. Could an act of the latter kind be regarded as local or special because, under its operation, officers in some counties would receive less than like officers would receive in other counties whose population was larger, and where business *was heavier and property of larger [**565** value? We think not. And yet we should be obliged to hold otherwise, if we approved the suggestion that the territorial act of March 21, 1895, was local or special, simply because, under its operation, county treasurers, district attorneys, county recorders, assessors, and probate judges will receive larger salaries in some counties than like officers will receive in other counties.

In support of the appellant's contention numerous adjudged cases have been cited. We have examined them, but do not find that they are in conflict with the conclusions reached by us in this case.

The judgment of the supreme court of the territory is affirmed.

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JOHN GIBSON, *Plff. in Err.*,
v.
STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 565-592.)

Removal of criminal prosecution—organization of grand jury—statute as to jurors—error in summoning juror.

1. The removal of a prosecution of a colored person from a state court to a Federal court cannot be had because jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the state, excluded colored citizens from juries because of their race.
2. The organization of a grand jury under a state statute which is not applicable to the case furnishes no ground for removing the cause into a Federal court, unless the statutes whose provisions were followed either expressly or by necessary operation denied the accused some Federal right.
3. A state statute requiring jurors to be persons of good intelligence, sound judgment, and fair character is not an *ex post facto* law, though made applicable to prosecutions for crimes committed before its passage.
4. Error in summoning jurors in a state court cannot be reviewed by the Supreme Court of the United States if no Federal right was invaded or denied.

[No. 711.]

Argued and Submitted December 13, 1895. Decided April 13, 1896.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment of that court affirming the judgment of the Circuit Court of Washington County, Mississippi, convicting John Gibson of murder. *Affirmed.*

See same case below, 17 So. 892.

Statement by *Mr. Justice* **Harlan:**

The plaintiff in error was indicted in the circuit court of Washington county, Mississippi, for the crime of having, in that county and on the 12th day of December, 1892, killed and murdered one Stinson.

When the case was called for trial the accused presented a petition for its removal to the circuit court of the United States for the western division of the southern district of Mississippi. The petition was verified by the oath of the accused to the effect that the facts set forth in it were true and correct to the best of his knowledge and belief, and was as follows:

"This petition respectfully shows unto this court that John Gibson, a citizen of said state and of the United States of America, is a negro of the African descent and color black. That under the Constitution of the state of Mississippi, which was adopted in the constitutional convention in November, 1890, it prescribes that the qualification for persons to serve as jurors in said state shall be that the ability of said citizens, qualified electors of the county and state, male, being citizens thereof, not having [been] convicted of specified crimes, shall be able to read and write; but the legislature shall provide by law for procuring a list of persons so qualified to draw therefrom of grand and petit jurors for each term of the circuit court. Miss. Const. § 264. Section 2358 *of the Code of Mississippi for [568 1892, adopted 1st day of April, 1892, and in force at the time of the finding of the bill of indictment filed herein against relator, provides that at the first meeting of each year, or as soon as practicable thereafter, the board of supervisors shall make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them, as nearly as it can conveniently, from the several districts in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors. Relator states that under § 283 of the new Constitution of Mississippi the indictment returned against him should have been by a jury of the grand inquest of the said county, under the laws of the Code of said state, adopted in 1880, because the crime for which this indictment was returned is alleged to have been committed January, 1892, before the statute of 1892 took effect.

"Relator states that under the laws of said state, provided by the Code of 1880 thereof, the only qualifications required as shown by § 1661 of said Code, to wit, 'All male citizens of the United States and not being under the age of twenty-one years nor over the age of sixty years, and not having been convicted of any infamous crime, shall be qualified to serve as jurors within the county of their residence.' Section 1664 of Code of 1880 also provides that the board of supervisors of each county shall, at least twenty days before every term of the circuit court, select twenty persons competent to serve as jurors in said county, to be taken, as nearly as conveniently may be, in equal numbers from each supervisor's district of the county, who shall serve as grand jurors for the next ensuing term of said court.

"Relator states that at the time the said grand jury of said county was elected, impaneled, and charged by this court at the December term, 1892, a great Federal [right] of his was *abridged, *viz.*, the civil right guaran- [569 teed to him under the 14th Amendment to the

NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies,—see note to Sloane v. Anderson, 29: 896.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 23: 524, and Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes, when denied,—see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers; U. S. Rev. Stat. § 643,—see note to Davis v. South Carolina, 27: 574.

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Constitution of the United States, particularly, to wit, no state shall deny to any person within its jurisdiction the protection of the laws.

"Relator states that on the 9th day of January, 1892, Robert Stinson, a white man, was killed at Refuge plantation in the said county, and that he was accused of the homicide; that prosecution against him had been commenced before the adoption of the Code of 1892; that by reason of the great prejudice against him by the officers charged with the selection of the said jury of grand inquest for the said December term of the said circuit court, which officers so charged are all members of the white race, and the relator herein being a member of the black race,—black in color,—although at the time of selecting the grand jurors for the said December term, 1892, there were in the five supervisor districts of the said county of Washington 7,000 colored citizens competent for jury service of the county of Washington, state of Mississippi, and 1,500 whites qualified to serve as jurors in said county, there had not been for a number of years any colored man ever summoned on the grand jury of said county court; and that the colored citizens were purposely, on account of their color, excluded from jury service by the officers of the law charged with the selection of said jurors. Relator states that by reason of the great prejudice against him in this matter that the said officers of the law charged with the selection of the said grand jurors for the December term, 1892, on account of his color, being that of a negro, black, and the deceased being that of a white man of the white race, in selecting persons to serve as grand jurors at said term, all colored men were purposely, on account of their color, excluded by said officers; and that the said grand jury did then and there, being all white men purposely selected on account of their color, present the bill of indictment against relator for the murder of Robert Stinson aforesaid, on account of his color, and pray summons for witnesses to prove same. Relator avers that by reason of the great prejudice against him on account of his color, he could not secure a fair and impar-[570]tial trial by an impartial *petit jury of the county of Washington, state aforesaid, and prays an opportunity to subpœna witnesses to prove the same, and therefore after hearing same, doth pray the removal of his case from this court to the United States circuit court for the western division of the southern district of Mississippi, and that record hereof be properly certified to said court by an order from this court."

The petition for removal was denied, and the defendant excepted to the action of the court.

Thereupon the accused demanded that a special venire be summoned to try his case. The regular jury box for the court having been produced for the purpose of drawing therefrom the special venire, the defendant moved "to quash said jury box" upon the ground that it was illegal and had but few names therein. That motion was sustained, and a writ of special venire facias was directed to be issued for summoning fifty good and lawful men and qualified jurors to appear on a named day to serve as jurors in the cause. The sheriff was directed to serve on the defendant or his counsel a copy of the writ of venire facias, together with his return thereon, showing the names of the persons so summoned, and also a copy of the indictment. This order was executed, and the requisite number of jurors having appeared, on a subsequent day of the court the defendant moved to quash the special venire. The motion was overruled, the defendant taking an exception. The accused then announced himself ready for trial. A jury was selected, the defendant pleaded not guilty, and the trial resulted in a verdict of guilty as charged in the indictment. The opinion of the supreme court of the state states that this was the third trial of the defendant for the crime charged, each trial resulting in a verdict of guilty.

A new trial was asked upon various grounds, one of which was that the court erred in overruling the defendant's petition for the removal of the cause into the circuit court of the United States for trial; another, that it erred in not sustaining the motion to quash the special venire of fifty "good and lawful" men to serve as special jurors. These points were insisted upon in the supreme court of Mississippi. But that *court held that there was no error in [571] overruling the motion to remove the case into the Federal circuit court. It also refused to disturb the verdict and judgment.

Messrs. **Emanuel M. Hewlett** and *Cornelius J. Jones*, for plaintiff in error:

The following is assigned by the plaintiff in error as error in the rulings of the state courts:

1. The trial court erred in denying the petition for removal from the state court to the Federal court.

Ex parte Virginia ("*Virginia* v. *Rives*"), 100 U. S. 313 (25: 667); *Ex parte Virginia*, 100 U. S. 339 (25: 676); *Strauder* v. *West Virginia*, 100 U. S. 303 (25: 664); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Bush* v. *Kentucky*, 107 U. S. 110 (27: 354).

2. The trial court erred in overruling the motion to quash the special venire.

3. The trial court erred in overruling the motion for a new trial. Same authorities as above cited.

4. The trial court erred in correcting the minutes of the first day of trial, on the return day of the venire, by modifying the original order directing the issuance of the said venire facias.

5. The supreme court of the state of Mississippi erred in sustaining the ruling of the trial court in the denial of the petition for removal to the Federal district court. Authorities as cited above.

6. The said supreme court erred in affirming the judgment of the trial court and fixing the 17th day of July, 1895, as the day of execution of the said judgment.

Butchers' Benev. Asso. v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*"), 83 U. S. 16 Wall. 36 (21: 394); *Prigg* v. *Pennsylvania*, 41 U. S. 16 Pet. 539 (10: 1060); *United States* v. *Reese*, 92 U. S. 214 (23: 563); *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 323 (25: 670); *Ex parte Virginia*, 100 U. S. 345 (25: 679); *Neal* v. *Delaware*, 103 U. S. 385 (26: 569);

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Dubuclet v. *Louisiana*, 103 U. S. 551 (26: 504); *Bush* v. *Kentucky*, 107 U. S. 120 (27: 358); *United States* v. *Stanley* ("*Civil Rights Cases*"), 109 U. S. 34, 36, 44, 49, 50 (27: 847, 848, 850, 852, 853); *Elk* v. *Wilkins*, 112 U. S. 101 (28: 645); *People*, *King*, v. *Gallagher*, 93 N Y. 446, 455, 458, 460, 45 Am. Rep. 232; *Re Hall*, 50 Conn. 133, 47 Am. Rep. 627; *State* v. *Ah Chew*, 16 Nev. 50, 40 Am. Rep. 491; *Green* v. *Neal*, 31 U. S. 6 Pet. 291, 298 (8: 402, 405); Cooley, Const. Lim. 18, *note 3*.

The 14th article of Amendment to the Federal Constitution is asserted by the plaintiff in error as the law of the United States which reserves to him the right to have been first duly and regularly indicted by a grand jury of Washington county duly elected, summoned, sworn, and charged according to the laws of the state without partiality to the race or color of said jurors and without prejudice to the accused on account of the offense charged or his race and color.

It was designed to assure the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give that race the protection of the Federal government in that enjoyment, when it should be denied by the states.

Butchers' Benev. Asso. v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*"), 83 U. S. 16 Wall. 67 (21: 406).

Any state action that denies this immunity to a colored man is in conflict with the Constitution.

Prigg v. *Pennsylvania*, 41 U. S. 16 Pet. 539 (10: 1060).

Wherever the right to equal protection of the laws of the state is denied by that state to a colored person, such denial unquestionably establishes a case for removal of the trial in the proper Federal court under U. S. Rev. Stat. § 641.

The petition for removal disclosed a case of denial of the constitutional right guaranteed plaintiff in error under the 14th Amendment.

Bush v. *Kentucky*, 107 U. S. 110 (27: 354).

A denial upon the part of the officers of the state, charged with the duties in that regard, of the right of a colored man to a selection of grand and petit jurors without discrimination against his race because of their color, is a violation of the Constitution and laws of the United States.

Whoever, by virtue of public position under a state government, deprives another of life, liberty, or property without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition.

Neal v. *Delaware*, 103 U. S. 370 (26: 567).

Mr. **Frank Johnston,** Attorney General of Mississippi, for defendant in error:

The fact that officials charged with the enforcement of the laws of the state, which are constitutional and valid, have violated the state laws, and, without legal authority derived from the state have discriminated against any citizen, does not bring a case within the removal acts of Congress.

Neal v. *Delaware*, 103 U. S. 386 (26: 570); *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 313 (25: 667); *Strauder* v. *West Virginia*, 100 U. S. 303 (25: 664); *Ex parte Virginia*, 100 U. S. 339 (25: 676).

An *ex post facto* law, within the meaning of the constitutional prohibition, must make an act which was innocent when done, criminal, and punish the person committing it; or must make a crime greater than when it was committed; or must change the punishment, and inflict one greater; or must alter the rules of evidence. Laws of this character are unjust and oppressive, and are prohibited by the Constitution.

Calder v. *Bull*, 3 U. S. 3 Dall. 390 (1: 650); Cooley, Const. Lim. 265.

An *ex post facto* law was defined by *Chief Justice* Marshall, in *Fletcher* v. *Peck*, to be a law, "which renders an act punishable in a manner in which it was not punishable when it was committed."

Fletcher v. *Peck*, 10 U. S. 6 Cranch, 138 (3: 178).

With somewhat greater fulness it was characterized in *Cummings* v. *Missouri*, as a law, "which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required."

Cummings v. *Missouri*, 71 U. S. 4 Wall. 326 (18: 364).

A law giving the state additional challenges was held in the following cases to be valid and constitutional, and not an *ex post facto* law.

Walston v. *Com.* 16 B. Mon. 15; *State* v. *Ryan*, 13 Minn. 370; *State* v. *Wilson*, 48 N. H. 398; *Com.* v. *Dorsey*, 103 Mass. 412.

A statute which authorized the amendments of indictments was applied in the trial of offenses committed prior to the passage of the law, and was held not to be *ex post facto*.

State v. *Manning*, 14 Tex. 402; *Lasure* v. *State*, 19 Ohio St. 43.

So also a law was upheld as constitutional and not *ex post facto*, passed after the commission of the offense, and which precluded a defendant from taking advantages of variances which did not prejudice him.

Com. v. *Hall*, 97 Mass. 570.

A law of the state changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed or the indictment was found, is not an *ex post facto* law, although passed subsequent to the commission of the offense or the finding of the indictment.

Gut v. *Minnesota*, 76 U. S. 9 Wall. 36 (19: 574).

For the denial by the state courts of rights protected by the Federal Constitution and the laws of Congress enacted thereunder, in the absence of any unconstitutional state statute, the ultimate remedy, as now provided by Congress, is upon a writ of error from the supreme court of the United States to the state court, and not by the removal of the cause.

Neal v. *Delaware*, 103 U. S. 386 (26: 570); *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 320 (25: 670); *Randall* v. *Brigham*, 74 U. S. 7 Wall. 541 (19: 293).

The decisions of the state courts construing their own constitutions and laws are conclusive.

Provident Inst. for Savings v. *Massachusetts*, 73 U. S. 6 Wall. 630 (18: 913).

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Mr. Justice **Harlan** delivered the opinion of the court:

The first question presented for our consideration relates to the application of the accused for the removal of the prosecution from the state court into the circuit court of the United States.

By U. S. Rev. Stat. § 641, it is provided: "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured **580]** to him by any law *providing for the equal civil rights of the citizens of the United States, . . . such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state court shall cease," etc.

In *Neal* v. *Delaware*, 103 U. S. 370, 385, 386 [26: 567, 569, 570], reference was made to the previous cases of *Strauder* v. *West Virginia*, 100 U. S. 303 [25: 664]; *Ex parte Virginia* ("*Virginia* v. *Rives*") 100 U. S. 313 [25: 667]; *Ex parte Virginia*, 100 U. S. 339 [25: 676]; U. S. Rev. Stat. §§ 641, 1977; also to the act of March 1, 1875 (18 Stat. at L. 337, chap. 114), which, among other things, declared that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified from service as grand or petit jurors in any court of the United States, or of any state, on account of race, color, or previous condition of servitude." The cases cited were held to have decided that the statutory enactments referred to were constitutional exertions of the power of Congress to enact appropriate legislation for the enforcement of the provisions of the 14th Amendment, which was designed, primarily, to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; that while a state, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury, yet a denial to citizens of the African race, *because of their color*, of the right or privilege accorded to white citizens of participating as jurors in the administration of justice would be a dis- **581]** crimination *against the former inconsistent with the amendment and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which were excluded, *because of their color*, men of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws; and that such exclusion of the black race from juries because of their color was not less forbidden by law than would be the exclusion from juries, in states where the blacks have the majority, of the white race because of *their* color.

But those cases were held to have also decided that the 14th Amendment was broader than the provisions of U. S. Rev. Stat. § 641; that since that section authorized the removal of a criminal prosecution before trial, it did not embrace a case in which a right is denied by judicial action during a trial or in the sentence or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges, or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states rights secured by any law providing for the equal civil rights of citizens of the United States, to which § 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them resulting from the Constitution or laws of the state, rather than a denial first made manifest at or during the trial of the case.

We therefore held in *Neal* v. *Delaware*, 103 U. S. 370, 385, 386 [26: 567, 569, 570], that Congress had not authorized a *removal of the prosecution from the state court* where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the state, excluded colored citizens from juries because of their race.

*In view of this decision, it is clear that **[582** the accused in the present case was not entitled to have the case removed into the circuit court of the United States unless he was denied by the Constitution or laws of Mississippi some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that state. The equal protection of the laws is a right now secured to every person without regard to race, color, or previous condition of servitude; and the denial of such protection by any state is forbidden by the supreme law of the land. These principles are earnestly invoked by counsel for the accused. But they do not support the application for the removal of this case from the state court in which the indictment was found, for the reason that neither the Constitution of Mississippi nor the statutes of that state prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the state without regard to race, color, or previous condition of servitude. Nor would we be justified in saying that the Constitution and laws of the state had, at the time this prosecution was instituted, been so interpreted by the supreme court of Mississippi as to show, in ad-

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vance of a trial, that persons of the race to which the defendant belongs could not enforce in the judicial tribunals of the state the rights belonging to them in common with their fellow citizens of the white race. If such had been the case, it might well be held that the denial of the equal protection of the laws arose primarily from the Constitution and laws of the state. But when the Constitution and laws of a state, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the state court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, *for removing the prosecution* into the circuit court of the United States in advance of a trial.

We may repeat here what was said in *Neal* v. *Delaware*, 103 U. S. 370, 385, 386 [26: 567, 569, 570], namely: that in thus construing the stat- [583] ute "we do not withhold *from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the state, his constitutional equality of civil rights, all opportunity of appealing to the courts of the United States for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied, in the subsequent proceedings of the state court, or in the execution of its judgment, any right, privilege, or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review."

So, in *Bush* v. *Kentucky*, 107 U. S. 110, 116 [27: 354, 357], which was an indictment for murder, returned before but tried after the court of appeals of Kentucky held unconstitutional a statute of that commonwealth excluding from grand or petit juries citizens of African descent because of their race and color, and had declared that thereafter every officer charged with the duty of selecting or summoning jurors must so act without regard to race or color, this court said: "That decision was binding as well upon the inferior courts of Kentucky as upon all its officers connected with the administration of justice. After that decision, so long as it was unmodified, it could not have been properly said in advance of a trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within their jurisdiction. The last indictment was consequently not removable into the Federal court for trial under § 641 at any time after the decision in *Com.* v. *Johnson*, 78 Ky. 509, had been pronounced. This point was distinctly ruled in *Neal* v. *Delaware*, *supra*, and is substantially covered by the decision in *Ex parte Virginia* ("*Virginia* v. *Rives*") 100 U. S. 313 [25: 667]. If any right, privilege, or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States, had been denied by a refusal of the state court to set aside either that indictment or the panel of petit jurors, or by any erroneous ruling in the progress of the trial, his remedy would have been through the revisory power of the highest court of the state, and *ultimately [584] through that of this court." See also *Wood* v. *Brush*, 140 U. S. 278, 284 [35: 505, 508].

In his petition for the removal of the prosecution into the circuit court of the United States the defendant also states that, notwithstanding at the time of selecting the grand jurors for the said December term, 1892, there were in the five supervisors' districts of the county of Washington 7,000 colored citizens competent for jury service and 1,500 whites qualified to serve as jurors, there had not been for a number of years any colored man summoned on the grand jury in that county; and that colored citizens were purposely, on account of their color, excluded from jury service by the officers of the law charged with the selection of jurors. It is clear, in view of what has already been said, that these facts, even if they had been proved and accepted, do not show that the rights of the accused were denied by the Constitution and laws of the state, and therefore did not authorize the removal of the prosecution from the state court. If it were competent in a prosecution of a citizen of African descent to prove that the officers charged with the duty of selecting grand jurors had, in previous years and in other cases, excluded citizens of that race, because of their race, from service on grand juries,—upon which question we need not express an opinion,—it is clear that such evidence would be for the consideration of the trial court upon a motion by the accused to quash the indictment, such motion being based upon the ground that the indictment against him had been returned by a grand jury from which were purposely excluded, because of their color, all citizens of the race to which he belonged. *United States* v. *Gale*, 109 U. S. 65, 69 [27: 857, 859]. But there was no motion to quash the indictment. The application was to remove the prosecution from the state court, and a *removal*, as we have seen, could not be ordered upon the ground simply that citizens of African descent had been improperly excluded, because of their race and without the sanction of the Constitution and laws of the state, from service on previous grand juries, or from service on the particular grand jury that returned the indictment against the accused.

*We do not overlook, in this connec- [585] tion, the fact that the petition for the removal of the cause into the Federal court alleged that the accused, by reason of the great prejudice against him on account of his color, could not secure a fair and impartial trial in the county, and that he prayed an opportunity to subpœna witnesses to prove that fact. Such evidence, if it had been introduced, and however cogent, could not, as already shown, have entitled the accused to the *removal* sought; for the alleged existence of race prejudice interfering with a fair trial was not to be attributed to the Constitution and laws of the state. It was incumbent upon the state court to see to it that the accused had a fair and impartial trial, and to set aside any verdict of guilty based on prejudice of race.

The petition for removal also proceeds upon the ground that the indictment was returned by a grand jury organized under the Code of

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Mississippi which went into operation in 1892, after the date of the alleged murder, when, it is contended, it should have been organized in the mode required by the Mississippi Code of 1880, in force at the time the offense in question was committed.

The organization of the grand jury under a statute of the state (even if that statute was not applicable to offenses committed before its passage), rather than under a statute that was applicable, constitutes no ground for the removal of the prosecution into the Federal court, unless the statute whose provisions were followed either expressly or by its necessary operation denied to the accused some "right secured to him by any law providing for the equal civil rights of citizens of the United States." It is not every denial by a state enactment of rights secured by the Constitution or laws of the United States that is embraced by U. S. Rev. Stat. § 641. The right of removal given by that section exists only in the special cases mentioned in it. Whether a particular statute, which does not discriminate against a class of citizens in respect of their civil rights, is applicable to a pending criminal prosecution in a state court, is a question, in the first instance, for the determination of that court, and its right and duty to finally determine such a question can-586]not be interfered with *by removing the prosecution from the state court, except in those cases which, by express enactment of Congress, may be removed for trial into the courts of the United States. If that question involves rights secured by the Constitution and laws of the United States, the power of ultimate review is in this court whenever such rights are denied by the judgment of the highest court of the state in which the decision could be had. As the judges of the state courts take an oath to support the Constitution of the United States as well as the laws enacted in pursuance thereof, and as that Constitution and those laws are of supreme authority, anything in the Constitution or laws of any state to the contrary notwithstanding, "upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;" and "if they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination." *Robb* v. *Connolly*, 111 U. S. 624. 637 [28: 542, 546].

But it is said that the statute under which the grand jury was organized was *ex post facto* when applied to the case of the present defendant, and for that reason the judgment should be reversed. This question does not depend upon U. S. Rev. Stat. § 641, but upon the clause of the Constitution forbidding a state to pass an *ex post facto* law. It is not clear that the record so presents this point as to entitle us to consider it under the statutes investing this court with jurisdiction to re-examine the final judgments of the highest courts of the several states. But, as human life is involved, as the defendant pleaded not guilty, and as the state by its attorney general has discussed the question upon its merits without disputing the authority of this court to pass upon it, we will assume, and we think it may be properly assumed, that the plea of not guilty, in connection with the petition for removal, sufficiently *presents the question, and shows[587 that the state court denied to the accused what he specially set up and claimed to be a right secured to him by the Constitution of the United States.

By the Constitution of Mississippi of 1890, which was in force at the time of the commission of the alleged offense, it was provided: "No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the circuit court." § 264. And by the same instrument it was also provided: "All crimes and misdemeanors and penal actions shall be tried, prosecuted, and punished as though no change had taken place, until otherwise provided by law." § 283. By the Mississippi Code of 1880, in force when the alleged murder was committed, it was provided that "all male citizens of the United States and not being under the age of twenty-one years, nor over the age of sixty years, and not having been convicted of any infamous crime, shall be qualified to serve as jurors within the county of their residence," § 1661; and by § 1664 of the same Code it was provided that "the board of supervisors shall, at least twenty days before the term of every circuit court, select twenty persons competent to serve as jurors in said county, to be taken, as nearly as conveniently may be, in equal numbers from each supervisor's district of the county, who shall serve as grand jurors for the next ensuing term of said court."

The Annotated Code of 1892 went into effect on the 1st day of November, 1892, all prior statutes being thereby repealed. Sections 2359, 2361, and 2365 of that Code provide: "Sec. 2359. The board of supervisors, at the first meeting in each year, or at a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and, as a guide in making the list, they shall use the registration books of voters; and it shall select and *list[588 the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them, as near as it conveniently can, from the several election districts, in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors." "Sec. 2361. The names of the persons on the jury list shall be written on separate slips of paper by the clerk of the circuit court, and put in a box kept for that purpose, marked 'Jury box,' which shall be securely locked and kept closed and sealed, except when opened to draw the jurors." "Sec. 2365. At each regular term of the circuit

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court, and at a special term if necessary, the judge shall draw in open court, from the jury box the slips containing the names of fifty jurors to serve as grand and petit jurors for the first week and thirty to serve as petit jurors for each subsequent week of the next succeeding term of the court; and he shall make and carefully preserve separate lists of the names, and shall not disclose the name of any juror drawn. The slips containing the names so drawn shall be placed by the judge in envelopes, a separate one for each week, and he shall securely seal and deliver them to the clerk of the court, so marked as to indicate which contains the names of jurors for the first and each subsequent week. If in drawing it appears that any juror drawn has died, removed, or ceased to be qualified or liable to serve as a juror, the judge shall cause the slip containing the name to be destroyed, the name to be stricken from the jury list, and he shall draw another name to complete the required number."

The contention of the accused is that the Constitution of the state, § 283, required that the indictment against him should have been by a jury of the grand inquest organized as directed in the Code of 1880, because that Code was in force at the date of the murder charged to have been committed; and that the law upon that subject in the Code of 1892 would be *ex post facto* if applied to his case.

We perceive in these constitutional and statutory provisions nothing upon which to rest the suggestion that the accused was tried under a law that was *ex post facto* in its application 589]*to his case. At the time the homicide was committed no person was competent to be a grand or petit juror unless he was a qualified elector and able to read and write. This requirement was attended by an injunction that the legislature should provide by law for procuring a list of persons so qualified, and for drawing therefrom of grand and petit jurors for each term of the circuit court. Miss. Const. § 264. And, as we have seen, it was further provided that all crimes and misdemeanors and penal actions should be tried, prosecuted, and punished as though no change had taken place until otherwise provided by law. Miss. Const. § 283. It is clear that the provision in the Constitution of 1890 prescribing the qualifications of grand and petit jurors became the law of the state immediately upon the adoption of the Constitution, and that legislation was not necessary to give it effect; and that the provisions of the Code of 1880 for the conduct of trials were superseded by those on the same subject in the Code of 1892.

It is equally clear that the provisions of the Code of 1892 regulating the selection of grand and petit jurors were not *ex post facto* as to the case of Gibson, although they were not in force when the alleged homicide was committed. The requirement of the Constitution of 1890, that no person should be a grand or petit juror unless he was a qualified elector and able to read and write, did not prevent the legislature from providing, as was done in the Code of 1892, that persons selected for jury service should possess good intelligence, sound judgment, and fair character. Such regulations are always within the power of a legislature to establish unless forbidden by the Constitution. They tend to secure the proper administration of justice and are in the interest, equally, of the public and of persons accused of crime. We do not perceive that the Code of 1892, in force when the indictment was found, affected in any degree the substantial rights of those who had committed crime prior to its going into effect. It did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, *nor alter the legal [590 rules of evidence in order to convict the offender. These are the general tests for determining whether a statute is applicable to offenses committed prior to its passage. *Calder* v. *Bull*, 3 U. S. 3 Dall. 386, 390 [1: 648, 650]; *Cummings* v. *Missouri*, 71 U. S. 4 Wall. 277 [18: 356]; *Ex parte Garland*, 71 U. S. 4 Wall. 333 [18: 366]; *Kring* v. *Missouri*, 107 U. S. 221, 228 [27: 506, 509]; *Duncan* v. *Missouri*, 152 U. S. 377, 382 [38: 485, 487]. The provisions in question related simply to procedure. They only prescribed remedies to be pursued in the administration of the law, making no change that could materially affect the rights of one accused of crime theretofore committed. The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments. In *Hopt* v. *Utah*, 110 U. S. 574, 589 [28: 262, 268], a statute that permitted the crime charged to be established by witnesses who by the law at the time the offense was committed were incompetent to testify in any case whatever was adjudged not to be *ex post facto* within the meaning of the Constitution, the court observing that such a statute did not increase the punishment nor change the ingredients of the offense nor the ultimate facts necessary to establish guilt, but related "to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure." Hence it has been held that a general statute giving the government more challenges than it had at the time of the commission of a particular offense was constitutional. *Walston* v. *Com.* 16 B. Mon. 15, 39.

It is also assigned for error: 1. That the court ordered the sheriff "to summon fifty men from the good and lawful body of Washington county," etc., when he should have been ordered to summon "persons qualified as jurors," or "said fifty men, jurors as required by law." 2. That the order *directed the[591 sheriff "to summon said fifty men to serve as special jurors in the case of *State* v. *Gibson*, when the order should have directed the sheriff to summon fifty men or persons as jurors, and to serve as jurors in the case of *State* v. *Gibson* as special jurors." Without stopping to consider whether the particular order complained of was in accordance with correct practice, it is only necessary to say

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that the objection presented by the assignment of error raises no question of a Federal nature. The conduct of a criminal trial in a state court cannot be reviewed by this court unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Mere error in administering the criminal law of a state or in the conduct of a criminal trial—no Federal right being invaded or denied—is beyond the revisory power of this court under the statutes regulating its jurisdiction. See *Andrews* v. *Swartz*, 156 U. S. 272, 276 [39: 422, 424]; *Bergemann* v. *Backer*, 157 U. S. 655, 659 [39: 846, 848]. Indeed, it would not be competent for Congress to confer such power upon this or any other court of the United States.

We may observe that the former decisions of this court upon which the council for the accused relied with much confidence do not go to the extent claimed by them. Underlying all of those decisions is the principle that the Constitution of the United States in its present form forbids, so far as civil and political rights are concerned, discrimination by the general government or by the states against any citizen because of his race. All citizens are equal before the law. The guaranties of life, liberty, and property are for all persons within the jurisdiction of the United States or of any state, without discrimination against any because of their race. Those guaranties, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the nation and of the state, without reference to consideration based upon race. In the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes. The safety **592**]of the race, *the larger part of which was recently in slavery, lies in a rigid adherence to those principles. Their safety—indeed, the peace of the country and the liberties of all—would be imperiled if the judicial tribunals of the land permitted any departure from those principles based upon discrimination against a particular class because of their race. We recognize the possession of all these rights by the defendant; but upon a careful consideration of all the points of which we can take cognizance, and which have been so forcibly presented by his counsel, who are of his race, and giving him the full benefit of the salutary principles heretofore announced by this court in the cases cited in his behalf, we cannot find from the record before us that his rights secured by the supreme law of the land were violated by the trial court or disregarded by the highest court of Mississippi. We cannot say that any error of law of which this court may take cognizance was committed by the courts of the state, nor, as matter of law, that the conviction of the accused of the crime of murder was due to prejudice of race.

The judgment is therefore affirmed.

CHARLEY SMITH, *Plff. in Err.*, *v.* STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 592-602.)

Removal of criminal prosecution—evidence to support a motion—motion for new trial.

1. A criminal prosecution cannot be removed from a state court into the circuit court of the United States, where neither the Constitution nor the laws of the state, as reasonably interpreted or as interpreted by the highest court of the state, show that the accused was denied or could not enforce in the judicial tribunals of the state or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the United States.
2. Evidence to support a motion to quash an indictment is not furnished by the written motion although it is verified by the affidavit of the accused, unless its use as evidence is with the consent of the state prosecutor or by order of the trial court.
3. The granting or refusing of a motion for a new trial is a matter of discretion which is not reviewable in this court upon writ of error.

[No. 710.]

Argued and Submitted December 13, 16, 1895. Decided April 13, 1896.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment of that court affirming the judgment of the Circuit Court of Bolivar County, Mississippi, convicting Charley Smith of the crime of murder. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

*The plaintiff in error, Charley Smith, [**593** was charged by indictment in the circuit court of Bolivar county, Mississippi, with having, on the 14th day of May, 1894, in that county, wilfully, feloniously, and of malice aforethought killed and murdered one Wiley Nesby.

Before arraignment the accused moved, upon grounds stated in writing, to quash the indictment. One of those grounds was that the grand jurors who presented the indictment were not impartial, "as guaranteed by the Constitution of the state aforesaid and of the United States, of which the defendant is a citizen of color, black;" another, "because of the

NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies,—see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 23: 524; and Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes, when denied,—see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers; U. S. Rev. Stat. § 643,—see note to Davis v. South Carolina, 27: 574.

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prejudice against him and his race on account of their color the grand jury aforesaid was purposely selected of the white race, to the exclusion of the colored persons of the county competent for jury service, by the officers charged therewith under the state law, on account of their color, for the purpose of procuring this indictment against defendant in violation of his constitutional right to be tried for his life upon the charge of murder herein in the circuit [court] of Bolivar county, state aforesaid;" still another, that the grand jury "was not a duly elected and legally empaneled grand jury as contemplated in the guaranties of the Constitution of the state of Mississippi, and the Constitution of the United States."

The motion to quash the indictment was overruled. The record shows that the defendant duly excepted to the action of the court, but does not show that any evidence was introduced in support of the motion.

The accused was then arraigned and pleaded not guilty. He demanded a special venire. Thereupon fifty names were drawn from the jury box in open court, and process was issued for those persons.

The case having been continued, the accused at the next term made an application by petition for the removal of the cause for trial into the circuit court of the United States for the western division of the southern district of Mississippi. The petition is here given in full.

"This petition respectfully shows that Charley Smith, a citizen of the United States, is in 594]custody of the sheriff of *Bolivar county, Mississippi, by virtue of an indictment presented by what purports to have been a regular grand jury for the May term of said circuit court, 1894, upon a charge of murder. Relator states that he is a citizen of the state of Mississippi, and that under the Constitution of said state, § 14 thereof, he is guaranteed that for such an offense he shall first be presented and tried by an impartial jury. Further, that he shall not be deprived of his liberty or of his life in the state aforesaid except by due process of law, and that said state Constitution, as shown and prescribed in § 264 thereof, which qualifications shall be required of jurors, grand and petit, in the said state; and that the statute of 1892 of said state, styled the Annotated Code of Mississippi, adopted by the state legislature on — day of April, 1892, prescribes new and separate requirements for jurors, different, separate, and distinct from those requirements fixed by the Constitution of said state, to wit: The Constitution of the state prescribes, § 264, that all qualified electors able to read and write shall be competent to serve as jurors in the courts of the state. The statute of said state, *viz.*, the Annotated Code of 1892, § — thereof, provides that the board of supervisors of said county shall use as a guide (in selecting names of persons to serve as jurors for the two terms of the circuit court next, respectively, to be holden after the then list being prepared by them, the said board of supervisors) the registration roll of legal voters of the county, and that they shall select of jurors to serve as aforesaid persons of 'good intelligence, fair character, and sound judgment;' and such of said statute is in conflict with the Constitution of said state. Further, the record of the board of supervisors of said county shows that the list of jurors averring to have been drawn by them for the term then next to follow, being the said May term, 1894, was prepared under an order of said board of said county, which is as follows: 'Ordered by the board that the following-named persons be, and are hereby, selected to serve as petit jurors for the next term of the circuit court,' which said order of said board fails to show upon its face that the list so selected for the purpose aforesaid was selected from *the registration roll of 595 said county; said order fails to show that the persons so named in the list were citizens of said county, or were selected according to the laws of the state, or that they were qualified voters, duly registered according to law; and further fails to show that they, the persons so selected, were so selected to serve in Bolivar county, state aforesaid. Relator further states that the certificate of the circuit clerk of the said county, the sheriff of said county, and the chancery clerk of said county, which is attached to the list of names drawn from the jury box, constituting the petit jurors for the first week of said May term of circuit court of said county and copied in the minutes of the first day's proceedings of the said court, is void: First, because the circuit clerk, J. E. Ousley, did not personally attend the drawing of said list, but said certificate shows that he was represented in said drawing by deputy clerk. The statute prescribes that the circuit clerk shall officiate at said drawing, which must not be more than fifteen days before first day of said term. Second, because the said officers charged with the drawing of said jurors failed to certify, as the law directs, 'whether the envelopes containing the names appeared to have been opened or disfigured,' and this list of names contained the names of the persons who were selected by the circuit court on the 1st day of said May term, 1894, as grand jurors, which grand jury presented relator on said indictment.

"Relator charges that the said officers charged with the selection, listing, and drawing said jury list, preparatory to the holding of the said May term of said circuit court, wilfully and intentionally excluded all colored men from the said list of jurors on account of the fact of their color, and that relator is a colored man charged with murder, and that at the time the said jury list was selected, listed, and drawn, as aforesaid, there were in the county of Bolivar 1,300 or more duly registered colored voters in said county, and 300 white voters upon the registration roll of said county; the white voters registered did not outnumber the colored voters, and that had the registration roll been used as their guide, as the law directs, they would have drawn some *colored [596 voters' names; but to the prejudice of defendant in the indictment and relator therein, said colored voters were on account of their color purposely excluded, and no black person has been summoned to serve as such jurors in said county since the adoption of the new Constitution, on account of the great prejudice against the black race by those in authority, and of the white race, and relator asks subpœnas for said officers to prove same. Relator charges that his right to equal protection by the laws of the state, as guaranteed in article

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14 of the Amendments to the Constitution of the United States, was purposely ignored on account of his color and race by the officers charged with the selection of said jury at said term. This he is ready to prove, and prays subpœnas for said officers. That he is not indicted according to the due course of the law of the said state, and therefore prays that his trial under said indictment be removed from this court to the United States circuit court for the western division of the southern district of the state of Mississippi, and that the record bear evidence of such an order of this court, and that said removal of said case be granted by this court upon such terms and conditions as the law directs."

The petition to remove the cause was verified by the oath of the accused to the effect that the facts set out in it were "true to the best of his knowledge and information and belief."

The application to remove the cause into the circuit court of the United States for trial was denied, and the accused excepted to this action of the state court.

The defendant then moved that the trial be postponed to a future day of the term on account of the absence of certain witnesses, without whose testimony, he alleged, he could not safely go to trial. Evidence was heard upon this motion, and the application to postpone the trial was denied.

The accused moved to quash the venire of jurors summoned for the second week of the term upon the following grounds: "Because they have not been regularly drawn from the jury box by the officers of the county whose duty it is under the law to draw the venire for [597] the second week of said term, *to wit, the chancery and circuit clerks and sheriff of the county, and that said list of the venire, as appears in the record of the 1st day's proceedings of the term, is not certified to by the officers of the county charged with the selection of the jury as the law directs, but said jury as now answers to their call as said venire for said week is an illegal venire, and a trial by said jurors or any of them as such venire will be contrary to his rights under the Constitution of the state of Mississippi and his rights under the Constitution of the United States, and that, defendant being a citizen of the state of Mississippi and of the United States, he insists upon his right to be tried for this offense by due course of law."

The motion was denied and the defendant excepted. It does not appear from the record that any evidence was introduced in support of this motion.

The accused, having received the panel of jurors, moved that the same be quashed upon the following grounds; "Because the said jury is made up of persons whose names are upon the record as jurors for the second week of the said term of the court, and said list of jurors, constituting the venire for the second week of said term and so summoned by the sheriff of the county, was not drawn from the jury box of the county by the chancery clerk and circuit clerk and sheriff of the said county, which the law directs. Nor do the officers of the said county, charged with the drawing of said venire under the law, to wit, as aforesaid, certify to said list so appearing on the minutes of the 1st day of the said term, and there is no record that such list as does appear, purporting to be said venire for said week, was drawn from the jury box of the county, and said panel is void because composed of persons named being exclusively white jurors chosen on account of their color, as such jurors so illegally summoned to serve and now tendered defendant, he being a negro of the black race, and persons of his race and color were purposely, on account of their color, excluded by said officers of the law. Defendant is a citizen of the state of Mississippi and of the United States, and insists upon his right to be tried by due course of law, as guaranteed him under the rights incorporated in the *Constitution of [598] the state of Mississippi and the Constitution of the United States, and the panel now tendered him, from which members of his race are purposely excluded by the officers charged therewith for no other reason than their color, and that 1 500 colored men duly qualified to serve as jurors being in the county, to 500 whites, is an abridgment of his rights under the Federal Constitution."

It does not appear that any evidence was introduced or offered in support of this motion to quash, and the motion was overruled, the defendant excepting.

During the examination of jurors on their *voir dire* the accused excepted to certain jurors, but not upon any grounds that involved rights secured by the Constitution of the United States.

The trial of the case was then entered upon, and the defendant was found guilty of murder, and sentenced to suffer the punishment of death.

The record contained the following minute: "On the 6th day of December, 1894, being a day of the said criminal term of said court, the defendant having informed the court on the day of his conviction, before sentence was pronounced on him by the court, that he wished to be allowed to prepare a motion in arrest of judgment, the court held that the motion in arrest of judgment and the motion for a new trial could be made in one motion, but on said 5th day aforesaid the court ordered counsel to present both motions in one; that it would fine defendant's counsel for contempt unless he combined the motion in arrest of judgment and the motion for a new trial, that both might be heard as one motion, to which action the defendant then and there excepted."

A motion for a new trial was made and denied. Among the grounds of that motion were that the court erred in overruling: (1) The defendant's motion to quash the indictment; (2) his application for a renewal of the cause to the United States circuit court; (3) the motion to quash the weekly venire; (4) the motion to quash the panel. Other grounds were that the defendant was not tried by a jury fairly and *impartially selected according [599] to the laws of Mississippi and the Constitution of the United States, and was not convicted by due process of law, but was denied equal protection under the laws of the state on account of his race.

The case was carried, upon writ of error, to the supreme court of Mississippi, one of the errors assigned being that the application for

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the removal of the cause into the circuit court of the United States for trial was improperly overruled.

The judgment of conviction was affirmed by that court. Its opinion was as follows:

"The action of the court below in overruling the application for removal was not error. See *Gibson* v. *Mississippi*, decided at the present term of this court [162 U. S. 565, *ante*, 1075]. The motion to quash the indictment was properly denied. There was either no evidence offered in support of the motion, or, if offered, it does not appear in the record, and in this case we can do nothing but affirm the action of the court in denying this motion. The affidavit appended to the motion in its terms affords no sort of evidence (even if it had been agreed to be considered as such, as was the case in *Neal* v. *Delaware*, 103 U. S. 370 [26: 567]), that the affiant had any personal knowledge touching any of the facts relied upon as grounds for upholding the motion. It was made 'as to the affiant's knowledge and belief,' and yet the affiant may have no personal knowledge whatever as to any of the material facts. The affidavit was not evidence to support the motion. In *Neal* v. *Delaware*, *supra*, the verified petition for removal was treated by the court as evidence for the motion to quash, because of the agreement of the Attorney General of Delaware with the prisoner's counsel to that effect, as the same was construed by the majority of the court."

Messrs. **Cornelius J. Jones** and *Emanuel N. Hevlett*, for plaintiff in error:

The trial court erred in overruling the motion to quash the indictment.

Neal v. *Delaware*, 103 U. S. 370 (26: 567); *Strauder* v. *West Virginia*, 100 U. S. 303 (25: 664); *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 313 (25: 667); *Bush* v. *Kentucky*, 107 U. S. 110 (27: 354); *Ex parte Virginia*, 100 U. S. 339 (25:676).

The trial court erred in denying the petition for removal.

The trial court erred in denying the motion to postpone the trial to a future day of the term.

The trial court erred in overruling the motion to quash the weekly venire of jurors.

The trial court erred in overruling the motion to quash the panel of jurors.

The trial court erred in overruling the exceptions of the accused to the qualifications of jurors tendered him.

The trial court erred in denying to the accused the right to file his motion in arrest of judgment.

The trial court erred in overruling the motion for a new trial.

The supreme court of the state of Mississippi erred in affirming the judgment of the trial court and fixing the 10th day of July, 1895, as the day of execution.

Butchers' Benev. Asso. v. *Crescent City, L. S. L. & S. H. Co.* ("*Slaughter-House Cases*"), 83 U. S. 16 Wall. 36 (21: 394); *United States* v. *Reese*, 92 U. S. 214 (23: 563); *Prigg* v. *Com.* 41 U. S. 16 Pet. 539 (10: 1060).

Mr. **Frank Johnston**, Attorney-General of Mississippi, for defendant in error.

Mr. Justice* **Harlan delivered the [600 opinion of the court:

1. For the reasons stated in the opinion of the court in *Gibson* v. *Mississippi*, just decided [161 U. S. 565, *ante*, 1075], it must be adjudged that the petition of the accused for the removal of the prosecution into the circuit court of the United States was properly denied. Neither the Constitution nor the laws of Mississippi, by their language reasonably interpreted, or as interpreted by the highest court of the state, shows that the accused was denied or could not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, "any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the United States." U. S. Rev. Stat. § 641.

2. No evidence was offered in support of the motion by the accused to quash the indictment, unless the facts set out in the written motion to quash, verified "to the best of his knowledge and belief," can be regarded as evidence in support of the motion. We are of opinion that it could not properly be so regarded. The case differs from *Neal* v. *Delaware*, 103 U. S. 370, 394, 396 [26: 567, 573, 574]. In that case, upon the hearing of the motion to quash the indictment, based upon grounds similar to those here presented, it was agreed between the state, by its attorney general, and the prisoner, by his counsel, with the assent of the court, that the statements and allegations in the petition for removal should be taken and treated, and given the same force and effect, in the consideration and decision of the motions, "as if said statements and allegations were made and verified by the defendant in a separate and distinct affidavit." We said in that case: "The only object which the prisoner's counsel could have had in filing the affidavit was to establish the grounds upon which the motions to quash were rested. It was in the discretion of the court to hear the motions upon affidavit. No counter-affidavits were filed in behalf of the prosecution." Again: "We are of opinion that the motions to quash, sustained by the affidavit *of the accused, [601 —which appears to have been filed in support of the motions, without objection as to its competency as evidence, and was uncontradicted by counter-affidavits, or even by a formal denial of the grounds assigned,—should have been sustained. If, under the practice which obtains in the courts of the state, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the state could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its attorney general. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit 'in the consideration and decision' of the motions implied, as we think, that the state was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice." The case before us is presented, so far as the present question is concerned, in a different aspect. The facts stated in the written motion to quash, although

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that motion was verified by the affidavit of the accused, could not be used as evidence to establish those facts, except with the consent of the state prosecutor or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced or offered to be introduced by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was therefore unsupported by any competent evidence; consequently, it cannot be held to have been erroneously denied.

3. It is assigned for error that the trial court refused to postpone the trial, to quash the weekly venire of jurors and the panel of jurors, or to sustain the exception of the accused to the qualifications of jurors tendered to him. None of these motions are so presented by the record as to raise any question as to the deprivation of rights secured to the accused by the Constitution or laws of the United States.

4. The overruling of the motion for a new **602**]trial is not a *matter which this court can re-examine upon writ of error—the granting or refusing of such a motion being a matter within the discretion of the trial court.

5. In view of the order of the trial court directing the motion for a new trial and a motion to arrest the judgment to be embraced in one motion, we have, in our consideration of the case, treated the motion for new trial as having been intended to be also one to arrest the judgment. We are of opinion, for the reasons stated in *Gibson* v. *Mississippi* [162 U. S. 565, *ante*, 1075], as well as in this opinion, that no error of law was committed by the trial court in declining to arrest the judgment. As the application to remove the cause into the circuit court of the United States was properly overruled, and as the motion to quash the indictment was, for the reasons above stated, also properly overruled, the order refusing to arrest the judgment cannot be held to be erroneous upon any ground of which this court can take cognizance in its review of the proceedings of the supreme court of Mississippi.

It results that the judgment must be affirmed.

JOHN D. FEE, *Plff. in Err.*,
v.
HENRY C. BROWN, Executor.

(See S. C. Reporter's ed. 602-613.)

Location of Chippewa half-breed scrip—right of holders.

1. The location of Chippewa half-breed scrip under the treaty with the Chippewa Indians made September 30, 1854, construed with the act of Congress of December 19, 1854, must be in the territory ceded by that treaty.
2. Innocent holders of Chippewa half-breed scrip, who have made locations thereon outside of the territory ceded by the Chippewas, are, by the act of Congress of June 8, 1872 (U. S. Rev. Stat. § 2368), given a primary right of purchase of such lands at a price not less than the minimum price of public lands, *viz.*, $1.25 per acre.

[No. 165.]

Submitted March 20, 1896. Decided April 27, 1896.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment of that court affirming the judgment of the District Court of Arapahoe County, Colorado, in favor of the plaintiff, Jane C. Brown, against the defendant, John D. Fee, in an action of ejectment for the recovery of a tract of land. *Affirmed.*

See same case below, 17 Colo. 510.

Statement by *Mr. Justice* **Brown:**

*This was an action of ejectment, origi-[**603** nally brought in the district court of Arapahoe county, Colorado, by Jane C. Brown, against the plaintiff in error, Fee, to recover a tract of land in Pueblo county, to which plaintiff claimed title under a patent issued December 1, 1876, to Henry C. Brown. This land had been located by authority of certain scrip issued to the Chippewa Indians of Lake Superior, under a treaty made with them September 30, 1854 (10 Stat. at L. 1109), by which the Chippewas ceded to the United States certain lands, theretofore owned by them, and in return the United States agreed to issue patents for 80 acres of land to each head of a family, or single person over twenty-one years of age, of mixed bloods. In executing this provision the beneficiaries were identified by the issuance of certificates called "Chippewa half-breed scrip."

One Mary Dauphinais, having received a scrip certificate as a beneficiary under such treaty, Henry C. Brown, the patentee, from whom the plaintiff claimed title, in February, 1867, purchased the scrip so issued to Mary Dauphinais, from one Daniel Witter, who, acting as attorney in fact of Dauphinais, located the land in controversy. A patent was issued therefor in December, 1868, to Mary Dauphinais, the beneficiary. Under a second power of attorney Witter, as her attorney in fact, immediately conveyed the patent title to Brown, who subsequently conveyed to Jane C. Brown through one Frank Owers, an intermediary.

In view of certain abuses and frauds which appear to have sprung up in relation to the issue, sale, and dealings in this scrip, as well as some conflicting rulings of the land department, as to whether such scrip could be used to locate lands outside of the treaty cession, Congress on June 8, 1872, passed an act authorizing the Secretary of the Interior to permit the purchase of such lands as might have been located with claims arising under the Chippewa treaty in question, at a price not less than $1.25 per acre, and also permitting owners and holders of such claims in good faith to complete their entries, and to perfect their titles

NOTE.—*As to construction and operation of treaties*, see note to United States v. The Amistad, 10: 826.

As to Indians and Indian tribes, their status and rights; jurisdiction and control over them, —see note to Worcester v. Georgia, 8: 483.

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under such claims, provided the claims were held by innocent parties in good faith, etc.

604] *In May, 1875, Brown having been informed by certain judicial rulings of the invalidity of his title, by reason of the scrip having been located outside of the ceded territory, made application for the issue of a new patent, under the provisions of the act of June 8, 1872, surrendered and relinquished to the United States all his rights under the Dauphinais patent, and, after a contest with one Smith, was adjudged by the Secretary of the Interior to be entitled to a new patent, which was accordingly issued to him December 1, 1876. This patent Fee attacked as void upon its face, and as having been issued without authority of law.

Defendant Fee settled upon the land in question on September 12, 1888, and upon the same date made application to the register of the land office at Pueblo, Colorado, to enter the land as a homestead, under the laws of the United States, and tendered to the receiver of the land office his legal fees and commissions due upon making such application. This application is now, and was at the time this action was commenced, undetermined by the officers of the United States having control of the sale and disposition of the public lands. Fee has resided on the land ever since his settlement there, September 12, 1888, and was residing thereon when issue was joined in this action.

An order having been entered changing the venue to the county of Pueblo, defendant answered denying the allegations of the complaint, alleging the invalidity of plaintiff's title, and setting up his own title under the homestead entry.

The court having sustained a demurrer to this answer, the parties entered into a stipulation, pursuant to which a judgment was entered in favor of the plaintiff for a recovery of the possession of the premises, and for a writ of possession. Defendant thereupon appealed the case to the supreme court of the state, which affirmed the judgment of the court below. 17 Colo. 510. Whereupon defendant Fee sued out a writ of error from this court.

Messrs **J. M. Vale, C. C. Clements,** and *Fred. Betts,* for plaintiff in error:

It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry.

Eldred v. *Sexton*, 86 U. S. 19 Wall. 189 (22: 148).

Scrip issued for public lands selected outside the ceded territory is issued without authority of law, and patents issued therefor which show for what they were issued are void on their face.

Parker v. *Duff*, 47 Cal. 566; *Stone* v. *United States*, 69 U. S. 2 Wall. 525 (17: 765).

It cannot be disputed that without the powers conferred upon the officers of the land department by the act of 1872 no jurisdiction existed to sell the land in controversy to Brown and issue a patent therefor; but the difficulty is only intensified by looking at the act of 1872 in connection with the patent. That act limits the jurisdiction of the Secretary, by its express terms, to the sale of land located with claims arising under the 7th clause of the 2d article of the treaty, which clearly could only arise within the ceded territory; the patent to Brown is for lands outside of the ceded territory, and no jurisdiction attaches to the officers of the land department under the act of 1872 to issue it, and it is therefore void upon its face, because no provision has ever been made by law for the sale of the land in the manner it purports to have been sold to Brown.

Polk v. *Wendal*, 13 U. S. 9 Cranch, 87 (3: 665); *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 641 (26: 877): *Wright* v. *Roseberry*, 121 U. S. 519 (30: 1048); *Doe, Patterson,* v. *Winn*, 24 U. S. 11 Wheat. 380 (6: 500).

Mr. **James H. Brown,** for defendant in error:

A demurrer, for the purpose of its determination, only admits the material allegations of fact in the answer, which are well pleaded.

Foote v. *Linck*, 5 McLean, 616; *McLean* v. *Lafayette Bank*, 3 McLean, 415; *Griffling* v. *Gibb*, 67 U. S. 2 Black, 519, 523 (17: 353, 355).

The proceedings of the land department preliminary to the issuance of the patent could not be considered as admitted by the demurrer for the purpose of attacking the patent as void on its face.

St. Louis Smelt. & Ref. Co. v. *Kemp*, 104 U. S. 636, 644 (26: 875, 878); *United States* v. *Marshall Silver Min. Co.* 129 U. S. 579, 589 (32: 734, 738).

The construction of the written evidence is exclusively for the court.

Levy v. *Gadsby*, 7 U. S. 3 Cranch, 180, 186 (2: 404, 406); *Goddard* v. *Foster*, 84 U. S. 17 Wall. 123, 142 (21: 589, 595); *Hamilton* v. *Liverpool, L. & G. Ins. Co.* 136 U. S. 242, 255 (34: 419, 424).

"So the question as to its validity upon its face, as whether it appears to be duly executed or the like, is a question of law for the court."

Hughes v. *Dundee Mortg. & T. Invest. Co.* 140 U. S. 98, 104 (35: 354, 357); 1 Elliott, Gen. Pr. 537, § 431.

"Upon issuance of the patent the presumption obtains that all the requirements preliminary to its issue have been complied with."

Poire v. *Wells*, 6 Colo. 406, 409; *United States* v. *Halleck*, 68 U. S. 1 Wall. 439, 455, 456 (17: 664, 668); *North British R. Co.* v. *Todd*, 12 Clark & F. 722, 731, 732.

The utmost that can be said of Fee's allegations touching the reference in the patent to the certificate, is that the same was a recital. Recitals are not a necessary part of the patent.

McGarrahan v. *New Idria Min. Co.* 96 U. S. 316 (24: 630); *Cowell* v. *Lammers*, 21 Fed. Rep. 200, 208.

So, it is held that the officers of the land department, by inserting provisions in a patent not required by statute, can neither broaden nor narrow its force and effect.

Silver Bow M. & M. Co. v. *Clark*, 5 Mont. 378; *Talbott* v. *King*, 6 Mont. 76; *Clary* v. *Haslitt*, 67 Cal. 286.

The act of June 8, 1872, provided therein for two classes of cases, namely:

First, "the purchase of such lands as may have been located with claims arising under the 7th clause," etc. and,

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Second, "the owners and holders of such claims in good faith are also permitted to complete their entries."

Chotard v. *Pope*, 25 U. S. 12 Wheat. 586, 588 (6: 737, 738); *Rector* v. *United States* ("*Hot Springs Cases*"), 92 U. S. 698, 712, 713 (23: 690, 696); *Bowman* v. *Torr*, 3 Iowa, 571, 574.

"Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto."

Tynan v. *Walker*, 35 Cal. 634, 642, 95 Am. Dec. 152.

"There is then no reason, founded in the language or policy of the clause, to insert a restriction and locality which have not been expressed by the legislature.

United States v. *Coombs*, 37 U. S. 12 Pet. 72, 79 (9: 1004, 1007); *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129, 142, 68 Am. Dec. 467; *Torrance* v. *McDougald*, 12 Ga. 526, 531.

Plainest rules of propriety and justice require that the courts should not introduce an exception, the legislature having made none.

Galloway v. *Finley*, 37 U. S. 12 Pet. 264, 293 (9: 1079, 1093).

Again, the construction contended for by appellant would practically engraft a proviso on the general language of the act.

United States v. *Dickson*, 40 U. S. 15 Pet. 141, 165 (10: 689, 698); *Minis* v. *United States*, 40 U. S. 15 Pet. 423, 445 (10: 791, 799); *Ryan* v *Carter*, 93 U. S. 78, 83 (23: 807, 809).

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitation. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfers shall be made.

Gibson v. *Chouteau*, 80 U. S. 13 Wall. 92, 99 (20: 534, 536); *United States* v. *Gratiot*, 39 U. S. 14 Pet. 526, 527 (10: 573, 574); *Hosmer* v. *Wallace*, 97 U. S. 575, 581 (24: 1130, 1132).

Upon issuance of the patent the presumption obtains that all the requirements preliminary to its issue have been complied with.

Poire v. *Wells*, 6 Colo. 406, 409.

The necessary previous steps here being an order from the secretary to the register to offer the land for sale, we are bound to presume that the order was given.

Minter v. *Crommelin*, 59 U. S. 18 How. 87, 89 (15: 279, 280); *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636, 646 (26: 875, 879).

Mr. Justice **Brown** delivered the opinion of the court:

This case turns upon the proper interpretation of the act of Congress of June 8, 1872, subsequently incorporated into the Revised Statutes as § 2368, authorizing the Secretary of the Interior to permit the purchase of such lands as may have been located with Chippewa half-breed scrip, provided that such locations have been made in good faith, and by innocent holders of the same. Did this authorize the purchase of land which had been located outside of the territory ceded to the United States by the treaty of September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi? 10 Stat. at L. 109.

To answer this question satisfactorily requires the consideration of the exact terms of the treaty and the proceedings thereunder. By the 1st article the Chippewas of Lake Superior ceded certain territory to the United States, theretofore owned by them in common with the Chippewas of the Mississippi, and the latter assented and agreed to such cession upon certain terms, unnecessary to be specified. By art. 2 the United States agreed "to set apart and withhold from sale, for the use of the Chippewas of Lake Superior," certain tracts of land described in six paragraphs, all of which tracts lie in the neighborhood of Lake Superior, and within the states of Michigan, Wisconsin, and Minnesota. The 7th paragraph of article 2 provides that "each head of a family or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to 80 acres of land, to be *selected by them under the direction[607 of the President, and which shall be secured to them by patent in the usual form." Article 3 provides that the reserved tracts shall be surveyed; that the President shall make assignments to the parties entitled to the lands in severalty, and issue patents as fast as the occupants become capable of transacting their own affairs, with such restrictions upon the power of alienation as he may see fit to impose. The other articles of the treaty cut but a small figure in this case.

As a means of identifying the persons who, under the 7th paragraph of the 2d article, were entitled to the lands, certificates were issued to such persons, which became known as Chippewa half-breed scrip. These certificates provided that any sale, transfer, mortgage, assignment, or pledge thereof, or of any right accruing thereunder, would not be recognized as valid by the United States, and that patents for lands located by authority thereof should be issued directly to the person named in the certificate and should in nowise inure to the benefit of any other person or persons whatsoever. This seems to be conceded in this case. Notwithstanding this provision, which was intended to secure to the holder of the certificates the land itself, they were made the subject of purchase and sale, through the device of powers of attorney signed by the person to whom the scrip was issued, authorizing some person, whose name was left blank, to locate the scrip upon lands to be selected by him, and to sell and convey the lands so selected. On the patent being issued to the person named in the certificate, the name of the attorney was filled in, and the deed executed by such person as the attorney in fact of the person named in the certificate, to the actual purchaser. Of course this scheme was in the nature of a fraud upon the act.

There was no legal restriction against the conveyance by the half-breed of the patent title when once acquired; and no provision upon the face of the scrip limiting its purchasing power to any particular portion of the unappropriated public lands of the government. In fact, it appears from the time it first began

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to be issued, that it was expressly recognized [608] and *received by officers of the land office as subject to be located anywhere upon the public domain, both within and without the land ceded to the government by the treaty provisions.

The abuses connected with the transfer of this scrip in the manner above stated finally became so flagrant that the attention of Congress was called to the subject, and on December 20, 1871, a resolution was adopted calling, among other things, for the following information:

"1. The number of pieces of scrip of 80 acres each, and the names of the parties to whom issued. . . .

"4. A copy of said scrip, the manner of locating the same, whether by the parties to whom it was issued, or by others; whether located upon *lands ceded by said tribe*, and all decisions of the Department of the Interior in relation to the issuance and location of said scrip."

There appears to have been a report made in pursuance of this resolution on March 12, 1872, and on June 8, 1872, an act was passed in the following terms:

"The Secretary of the Interior is authorized to permit the purchase, with cash or military bounty land warrants, of such lands as may have been located with claims arising under the 7th clause of the 2d article of the treaty of September 30, 1854, at such price per acre as he deems equitable and proper; but not at a less price than $1.25 per acre; and the owners and holders of such claims in good faith are also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned; but it must be shown to the satisfaction of the Secretary of the Interior that such claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith, and by innocent holders of the same."

In pursuance of this act, Brown applied for and obtained, upon the payment of $2.50 per acre, a new patent for the lands, which had been located by Witter in Colorado.

[609] *We think it was probably intended that the power to locate this scrip should be confined to the territory ceded to the United States by the 1st article, though perhaps not to the tracts named in the first six paragraphs of the 2d article of the treaty of September 30, 1854. By this 2d article the United States agreed to set apart and withhold from sale for the use of the Chippewas of Lake Superior certain tracts of land, all of which were within the states of Michigan, Wisconsin, and Minnesota, and in the same article, paragraph 7, provided that each head of a family or single person over twenty-one years of age, of mixed blood, should be entitled to 80 acres of land, to be selected by them under the direction of the President. By article 3 the boundaries of the tracts were to be determined by actual survey, and the President was authorized to assign to each head of a family or single person over twenty-one years of age, 80 acres of land for his or their separate use, and as fast as the occupants became capable of transacting their own affairs, to issue patents therefor to such occupants, with such restrictions upon the power of alienation as he might see fit to impose. There is some reason for saying that this article was intended to apply to Indians of pure, as distinguished from those of mixed, blood. By subsequent articles the United States agreed to pay for the land ceded an annuity, and also a certain sum in agricultural implements, household furniture, and cooking utensils, and also to furnish guns, rifles, beaver traps, ammunition, and ready-made clothing, to be distributed among the young men of the nation, as well as to furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments. Article 7 provided against the manufacture, sale, or use of spirituous liquors on any of the lands therein set apart for the residence of the Indians, and the sale of the same was prohibited in the territory thereby ceded until otherwise ordered by the President.

The whole scope and purpose of this treaty were evidently to induce the Chippewas to relinquish their claims to a large amount of territory theretofore owned by them, and to receive *in lieu thereof a certain annuity, and [610] also six tracts of land within the states above named, which were to be allotted, at the discretion of the President, in severalty, and in parcels of 80 acres each to heads of families and single persons over twenty-one years of age. If there were any doubt upon the question, arising from article 2, the subsequent articles indicate very clearly that the reserved tracts were intended to be for the actual residence of the Indians, and were to be within the states above named.

Beyond this, however, Congress on December 19, 1854, passed an act (10 Stat. at L. 598) which, though subsequent in date to the treaty, must, we think, be read in connection with it, and be held to operate as a ratification of it, by which the President was authorized to enter into negotiations with the Chippewa Indians for the extinguishment of their title to all the lands owned by them in Minnesota and Wisconsin, "which treaties shall contain the following provisions and such others as may be requisite and proper to carry the same into effect:"

"First. Granting to each head of a family, in fee simple, a reservation of 80 acres of land, *to be selected in the territory ceded*, so soon as surveys shall be completed, by those entitled, which said reservations shall be patented by the President of the United States, and the patent therefor shall expressly declare that the said lands shall not be alienated or leased by the reservees," etc.

If there were doubts latent in the language of the treaty itself, it is clear from this act that it was the intention of Congress to limit the reservations to the territory ceded, both as applied to Indians of pure and mixed blood.

This was the distinct ruling of the supreme court of California in *Parker* v. *Duff*, 47 Cal. 566, in which an attempt had been made to locate certain of this scrip in California, and we see no escape from that conclusion. It is also entirely clear that this scrip was intended to be located by the half-breeds themselves; that the patents were to be issued to the persons

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named therein, and that the right to alienate the lands was never intended to be given until the patents had been issued. It follows from 611] this that the location *of these lands in the state of Colorado gave no title to Brown, and that the patent issued thereon was void and of no effect.

The validity of Brown's title must turn, then, upon the patent issued to him on June 8, 1872. The argument of the plaintiff in error in this connection is that, under the terms of this act, the Secretary of the Interior could only permit the purchase of such lands as may have been located "with claims arising under the 7th clause of the 2d article of the treaty;" that the facts show that Congress then knew of the existence of more than 450 claims arising under this clause of the treaty, which had been located within the ceded territory, presumably in good faith, by innocent holders thereof; that, as no claim could legally arise under this clause which would warrant the location of lands beyond the cession, the Secretary of the Interior acquired no jurisdiction from the act of 1872 to sell or issue a patent for lands lying outside that territory.

We are not, however, disposed to put so narrow an interpretation upon this act. While it is true that Congress may have been apprised of the fact that a large number of claims had been located within the ceded territory, it is also apparent from the resolution of December 20, 1871, that it had also been informed of the location of half-breed scrip upon lands which had not been ceded by the Chippewas, and that there had been certain decisions of the land department to the effect that this might lawfully be done. The evil to be remedied was the one relating to these illegal locations, and, if consistent with its language, the act ought to receive a construction broad enough to effectuate this remedy. While Congress was not disposed to validate these locations as if they had been lawfully made, it did recognize them as giving to the locator a primary right of purchase, at a price not less than the minimum price of public lands, namely, $1.25 per acre.

Upon the theory of the plaintiff in error, that the act applied only to such locations as had been made in pursuance of the treaty within the lands ceded, it is difficult to see any substantial reason for this legislation, since, if 612] the lands had been *already properly located, why compel the settlers to pay for them again, or why speak of them as holders of such claims in good faith, who should be permitted to complete their entries and perfect their titles? Or why provide that it should be shown that such claims were held by innocent parties in good faith, and that the locations made under such claims had been made in good faith by innocent holders? Strictly speaking, no person who had located this scrip, except the half-breeds themselves, could be said to be purchasers in good faith, since they were apprised by the treaty and the act of December 19, 1854, that the scrip could only be located within the ceded territory by the beneficiaries therein named, and that such scrip was incapable of alienation.

Congress, however, was evidently moved to *use these* words by the fact that this scrip had been misused by designing parties; had become an ordinary subject of barter and sale; had been located with the assent of the land department upon lands in other states, by unlearned men, who had acted themselves in perfect good faith, supposing that they had a legal right to do as they had done, and that to compel them to relinquish their holdings would be a great hardship to them and no advantage to the government, provided they were required to reimburse the government by paying for such holdings at the ordinary price at which public lands were sold. The words "located with claims arising under the 7th clause of the 2d article of the treaty" may doubtless be interpreted as referring to claims which could only arise within the ceded territory. But we are satisfied that it was not the intention of Congress to give it that narrow construction, and that it adopted a course which, partially at least, protected the holder of the land and at the same time insured to the government a proper compensation for them. It was doubtless contemplated that these lands might in the meantime have largely risen in value, or that persons obtaining knowledge of the invalidity of the original location may have proceeded to pre-empt them, to locate them under the homestead laws, or otherwise with a design of obtaining for a nominal consideration the benefit of their rise in value.

*We are therefore of opinion that [613 Brown obtained a good title to the land in question by the patent of December 1, 1876, and *the judgment of the supreme court of Colorado is accordingly affirmed.*

GEORGE W. WILSON, *Plff. in Errr.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 613-624.)

Possession of property, when evidence of guilt—bloodstains—false statements by accused—picture of a person—confessions—testimony of accused.

1. Possession, soon after a murder, of articles apparently taken from the murdered man at the time of his death, if not satisfactorily accounted for, may be the foundation of a presumption of guilt.
2. Bloodstains on the bedclothes of a person alleged to have been murdered while camping out, if not satisfactorily explained, may be considered as raising a presumption that he was murdered.
3. False statements by an accused person, or procured by him to be made, in explanation or de-

NOTE.—*As to confessions of accused, when evidence against him*, see note to Hopt v. Utah, 28: 262.

As to questions of law and fact for court or jury, see note to King v. Delaware Ins. Co. 3: 155.

Defendants in criminal cases, as witnesses in their own behalf; weight to be given to their testimony; those jointly indicted; when witnesses for each other; credibility a question for jury; parties to civil actions as witnesses for themselves.

At common law a prisoner on trial for a criminal offense is not a competent witness in his own behalf. Harwell v. State, 10 Lea, 544; Hoagland v. State, 17 Ind. 488; Whelchell v. State, 23 Ind. 89.

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fense, may be regarded by the jury as tending to show guilt.

4. A picture of a person who was killed is admissible on a trial for homicide for the purpose of showing identity.

Statements by an accused not under oath, voluntarily made in answer to questions of a commissioner, not as a confession of guilt, but as explanations to avert suspicion from himself, are not inadmissible because the commissioner failed to inform him that he could have the aid of counsel, or to warn him that his statements might be used against him, or to advise him that he need not answer.

6. The testimony of a defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have.

[No. 884.]

Submitted April 13, 1896. Decided April 27, 1896.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting George W. Wilson of murder. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

Wilson was convicted of the murder of one Thatch, both being white men and not Indians, on May 15, 1895, at the Creek Nation in the Indian country, and sentenced to *be [614 hanged. There was evidence tending to show that Thatch's body was found in a creek near where Wilson and Thatch had camped together two weeks before, in a state of decomposition, indicating that deceased had been dead for that length of time. Wilson was arrested the day the body was discovered, and had in his possession five horses and a colt, a wagon, gun, bedclothing, and other property that had belonged to Thatch. When Thatch left home he had no money except some $30

Neither are persons jointly indicted and jointly tried for the same offense competent witnesses for each other, or for the prosecution. Reg. v. Payne, L. R. 1 C. C. 349, 12 Cox, C. C. 118; Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72; Lemaster v. State, 10 Ind. 391; State v. Blennerhassett, Walk. (Miss.) 7.

Many cases hold that accomplices jointly indicted with the prisoner at the bar, but not put upon trial with him, are competent witnesses either for or against him. Reg. v. Lyons, 9 Car. & P. 555; Winsor v. Reg. L. R. 1 Q. B. 290; Reg. v. Bradlaugh, 15 Cox, C. C. 217; Marler v. State, 67 Ala. 55, 42 Am. Rep. 95; State v. Brien, 32 N. J. L. 414; Noyes v. State, 41 N. J. L. 418; Carroll v. State, 5 Neb. 35; George v. State, 39 Miss. 570; Allen v. State, 10 Ohio St. 287; Brown v. State, 18 Ohio St. 496; Everett v. State, 6 Ind. 495; Marshall v. State, 8 Ind. 498; Sloan v. State, 9 Ind. 565; Hunt v. State, 10 Ind. 69; State v. Spencer, 15 Ind. 249; People v. Labra, 5 Cal. 183; People v. Newberry, 20 Cal. 439; Jones v. State, 1 Ga. 610; Poteete v. State, 9 Baxt. 261; Lazier v. Com. 10 Gratt. 708; State v. Stewart, 51 Iowa, 312; State v. Nash, 10 Iowa, 81.

Where it is proposed to call an accomplice, jointly indicted with the prisoner, as a witness for the prosecution, it is the better practice to dispose of the indictment as to him by *nolle prosequi*, a verdict of acquittal at the request of the prosecution, or by judgment of conviction if he has pleaded guilty. Winsor v. Reg. L. R. 1 Q. B. 312. But it is not necessary to do so. Reg. v. Payne, L. R. 1 C. C. 349; Reg. v. Bradlaugh, 15 Cox, C. C. 217.

On the other hand it is held that where persons are jointly charged with the commission of a crime, one of them is not a competent witness upon the trial of another, so long as they stand jointly indicted for that offense. Moss v. State, 17 Ark. 327, 65 Am. Dec. 433; Brown v. State, 24 Ark. 620; Foster v. Street, 45 Ark. 328; Collier v. State, 20 Ark. 37; Adwell v. Com. 17 B. Mon. 310; People v. Bill, 10 Johns. 95; People v. Williams, 19 Wend. 377; Com. v. Marsh, 10 Pick. 57; State v. Mills, 2 Dev. L. 420; State v. Dunlop, 65 N. C. 288; Latshaw v. Territory, 1 Or. 141; Baker v. United States, 1 Minn. 207; State v. Dumphey, 4 Minn. 438; Shay v. Com. 36 Pa. 305; Staup v. Com. 74 Pa. 458; Kehoe v. Com. 85 Pa. 127; McMillen v. State, 13 Mo. 84; State v. Roberts, 15 Mo. 28; State v. Edwards, 19 Mo. 674; State v. Martin, 74 Mo. 547; United States v. Reid, 53 U. S. 12 How. 361 (13: 1023); Rutter v. State, 4 Tex. App. 57; Crutchfield v. State, 7 Tex. App. 65; Warfield v. State, 35 Tex. 736.

An order for a separate trial is not a matter of right. It rests within the sound discretion of the court whether the trial shall be joint or separate. United States v. Marchant, 25 U. S. 12 Wheat. 480 (6: 700); United States v. Wilson, 1 Baldw. 78; United States v. Gilbert, 2 Sumn. 20; Com. v. Manson, 2 Ashm. 32; State v. Soper, 16 Me. 293, 33 Am. Dec. 665; State v. Wise, 7 Rich. L. 412; State v. Smith, 3 Ired. L. 402; Bixbe v. State, 6 Ohio, 86; People v. Vermilyea, 7 Cow. 108; Rex v. Noble, 15 How. St. Tr. 731, 9 Harg. St. Tr. 1.

If a material witness for the prosecution is joined in the indictment, he may be rendered competent as a witness by the entry of a *nolle prosequi* as to him, or by his acquittal upon motion of counsel for the prosecution before the opening of the case. Rex v. Rowland, Ryan & M. 401; Winsor v. Reg. L. R. 1 Q. B. 312; Reg. v. Owen, 9 Car. & P. 83; Rex v. Sherman, Cas. t. Hardw. 303; State v. Clump, 16 Mo. 385.

A *nolle prosequi* restores the competency of one jointly indicted with the prisoner, although he has, since the entry of the *nolle prosequi*, been separately indicted for the same offense. McKenzie v. State, 24 Ark. 636.

And if, at the conclusion of the case for the prosecution, there is a defendant against whom there is no evidence, it is the usual practice for the court, on motion of counsel for the other defendants, to direct his acquittal, in order that he may be a competent witness for the defense. Hawk. P. C. chap. 46, § 98; 1 Hale, P. C. 303; Rex v. Mutineers of the Bounty, cited in Rex v. Suddis, 1 East, 306; Rex v. Bedder, 1 Sid. 237; Rex v. Davis, 3 Keb. 136; Fraser's Case, 1 M'Nally, 56; State v. Shaw, 1 Root, 134; Fitzerald v. State, 14 Mo. 413; State v. Roberts, 15 Mo. 61; People v. Bill, 10 Johns. 95; State v. Blennerhassett, Walk. (Miss.) 7.

One of a number of persons jointly charged with the commission of a crime, who has been separately tried and convicted, or has pleaded guilty, is, after judgment is pronounced in his case, a competent witness for or against his codefendants, unless he is rendered infamous by the judgment of the court. Reg. v. Lyons, 9 Car. & P. 555; Rex v. Fletcher, 1 Strange, 633, 4 Car. & P. 250; State v. Stotts, 26 Mo. 307; State v. Jones, 51 Me. 125; Strawhern v. State, 37 Miss. 422.

The wife of a defendant who has been convicted is a competent witness against her husband's codefendant. Reg. v. Williams, 8 Car. & P. 283.

A convict under sentence of death, is incapable of being a witness. Reg. v. Webb, 11 Cox, C. C. 133.

And, according to the weight of authority, such a defendant is a competent witness upon the trial of his codefendants before he receives his sentence, since after conviction or a plea of guilty, he is no longer a party to the issue. Reg. v. George, 1 Car. & M. 111; Reg. v. Hinks, 2 Car. & K. 462, 1 Den. C. C. 84; Reg. v. Drury, 3 Car. & K. 190; Reg. v. Arundel,

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in cash and a certificate of deposit for $140, issued by the bank of Springdale, Arkansas. Wilson, when taken, had about $28, and the certificate of deposit was found among Thatch's things in a trunk claimed by Wilson. All of Thatch's clothing was in the possession of Wilson, except a pair of overalls, and the body had on a pair of overalls similar to Thatch's. The bedclothing was bloody and the blood had passed through the bed, the bloody parts being a foot or more in diameter; a pillow case belonging to Thatch was sewed over the blood spots on one side of the bed tick and a flour sack sewed over those on the other; charred pieces of cloth and some buttons were found at the camping place, and some blood in the ground under where there had been fire.

Wilson claimed that Thatch was his uncle, but Thatch's relatives knew of no such relationship; also, that he had known Thatch for several years, but the evidence tended to show that Thatch had never known Wilson before he was brought to his camp by a boy who had started with Thatch from Springdale, Arkansas, but concluded to return, and was requested to find some one else to go in his place.

On the day before that on which he was alleged to have been killed, Thatch and Wilson were seen camping at dark near the creek, and that night about 10 o'clock two gun shots were heard in that direction, but the body was so badly decomposed that it could not be told whether any bullets had entered it. The head was crushed with some blunt instrument, and there was testimony that an axe found in Wilson's possession had blood on it. Wilson was seen at the camp the next morning at sunrise, but Thatch was not there. *Wilson said[615 that Thatch had left about two weeks before the discovery of the body, and that he had heard nothing from him since; told contradictory stories as to where Thatch had gone; asserted

4 Cox, C. C. 260; Com. v. Smith, 12 Met. 238; Lee v. State, 51 Miss. 566; State v. Jones, 51 Me. 125; Delozier v. State, 1 Head, 45.

The force of a witness's testimony is a matter strictly within the jury's province. VanTassel v. New York, L. E. & W. R. Co. 1 Misc. 299; Virginia Nat. Bank v. Mills, 99 N. Y. 656; People v. O'Brien, 68 Mich. 468; Howell Lumber Co. v. Campbell, 38 Neb. 567; Harrison v. Brock, 1 Munf. 22; Lyles v. Com. 88 Va. 306; State v. Patrick, 107 Mo. 147; Haynes v. Trenton, 123 Mo. 326; Mechelke v. Bramer, 59 Wis. 57; United States v. Hughes, 34 Fed. Rep. 732.

The common-law incompetency of parties being removed by statute, the interest which they have in the result of the trial is a matter to be considered by the jury in weighing their testimony and determining what force it shall have. Goldsmith v. Coverly, 75 Hun, 48; Van Mater v. Burns, 76 Hun, 3; Meeteer v. Manhattan R. Co. 63 Hun, 535; Nicholson v. Conner, 8 Daly, 212; Kisson v. Rieger, 22 Minn. 59; Lovell v. Davis, 52 Mo. App. 343; Stewart v. Kindel, 15 Colo. 539; Pridgen v. Walker, 40 Tex. 135; Cornelius v. Hambay, 150 Pa. 359.

The jury are not bound to give credit to the statements of a party, though he is uncontradicted and unimpeached. Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; Kavanagh v. Wilson, 70 N. Y. 177; Gildersleeve v. Landon, 73 N. Y. 609; Kearney v. New York, 92 N. Y. 621; Dean v. Van Nostrand, 23 N. Y. Week. Dig. 97; Wilson v. Wyandance Springs Improv. Co. 4 Misc. 605; Olson v. Ensign, 7 Misc. 682; Reid v. New York, 68 Hun, 110; Prowattain v. Tindall, 80 Pa. 295.

On the other hand, it cannot be affirmed as a matter of law that the jury are bound to give more weight to the testimony of one witness than they accord to that of another, on the ground of interest in the one and a lack of it in the other. Louisville & N. R. Co. v. Watson, 90 Ala. 68; Metropolitan R. Co. v. Jones, 1 App. D. C. 208; Reid v. New York, *supra;* Sullivan v. Collins, 18 Iowa, 228; Bonnell v. Smith, 53 Iowa, 281; Greer v. State, 53 Ind. 420.

The testimony of a party in interest, as that of any other witness, must be submitted to the jury, for whom it is to say how far his interest shall affect his credibility. Prowattain v. Tindall, *supra;* Honegger v. Wettstein, 94 N. Y. 261.

But it is error for the court to refuse to instruct the jury that they have a right to consider the interest of a party when weighing his testimony. Hill v. Sprinkle, 76 N. C. 353; Dean v. Metropolitan Elev. R. Co. 119 N. Y. 540.

An instruction as to the interest of the respective witnesses in a criminal case, which states that the deep personal interest of the defendant should be considered in weighing his evidence and determining his credibility, is not erroneous. Reagan v. United States, 157 U. S. 301 (39: 709).

An instruction that, while the defendants are competent witnesses, the jury have a right to take their interest into consideration and all the circumstances surrounding them, and give to the testimony only such weight as it is entitled to, is not erroneous. Barmby v. Wolfe, 44 Neb. 77.

An instruction that the jury are not required blindly to receive the testimony of the accused as true and made in good faith, but only for the purpose of avoiding conviction, is erroneous. State v. White, 10 Wash. 611.

An instruction that the testimony of the accused in his own behalf is to be weighed by its own inherent truthfulness or proving power, unless corroborated, is not erroneous. Johnson v. United States, 157 U. S. 320 (39: 717).

An instruction that the jury must remember that defendant's testimony is that of an accused man, and that while they are not to disbelieve him solely on that account they must remember that he has a powerful motive to swear himself out of the charge, is erroneous. People v. Lang, 104 Cal. 363.

The jury may be instructed that the testimony of the accused may be considered with reference to its probability, the manner in which it is given, its connection with other evidence in the case, and the situation, inducements, and temptations of the accused. State v. Hartley (Nev.) 28 L. R. A. 33.

An instruction that the statement of defendant on trial for murder is evidence before the jury, to be allowed such weight, and "such only," as they see fit to give it, is not erroneous. Olive v. State, 34 Fla. 208.

An instruction that the jury "shall," instead of "may," take into consideration the interest of an accused as affecting his credibility, is not erroneous. State v. Renfrow, 111 Mo. 589.

A requested charge in a murder trial, as to the credibility of the accused in making the statement of his defense, is properly refused as invading the province of the jury. Ballard v. State, 31 Fla. 266.

Instructions as to the credibility of the defendants in a criminal case are not erroneous on the ground that they are thus singled out from the other witnesses for comment. Haines v. Territory, 3 Wyo. 167.

In a criminal trial an instruction that the defendants, having become witnesses in their own behalf, are subject to the same rules as other witnesses, and that their interest and the contradiction of their testimony by other witnesses may be taken into consideration in determining their credibility,—is proper. Siebert v. People, 143 Ill. 571.

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that Thatch owed him and the indebtedness was liquidated by his purchasing the wagon and two of the horses; that he bought the clothing after the time he said Thatch had left; that the pillow case was sewed on the bed tick when he bought it; that Thatch rode away on horseback, though Thatch's saddle was there, the only pair of shoes that Thatch had was there, the plates had been taken from the heels of the shoes, and similar plates were found in Wilson's possession. The body had on no shoes, hat, or coat, only an undershirt, overalls, and a pair of socks. Tracks resembling Wilson's near where the body was found were testified to. Wilson admitted that he had been there, and then said that it was lower down the creek. One witness, after Wilson was put in jail, assured him that he would go and look for Thatch if necessary, and Wilson told him not to go, as it was not necessary. His explanation of the appearances against him, on the stand and otherwise, were inadequate and improbable, and evidence in much detail showed that many of his statements were false.

Wilson called witnesses to show that the blood found on the bedclothes had gotten there from the blood of a prairie chicken which they had killed, and also from the bleeding of sick horses, and that Thatch had been seen in Oklahoma territory several times after the body was found.

Wilson testified, among other things, as set forth in the bill of exceptions, "that after he was arrested he was taken to Keokuk Falls, where a great crowd of people gathered around him and threatened to mob him, and he was taken before J. B. George, who proceeded to examine him in the presence of the crowd without giving him the benefit of counsel, or warning him of his right of being represented by counsel, or in any way informing him as to his right to be thus represented."

On behalf of the United States a written statement purporting to have been made by Wilson before J. B. George was offered in evidence and objected to "on the ground that it was not voluntary;" whereupon J. B. George **616**] was examined on *behalf of the government, and testified that he was a United States commissioner; that Wilson was brought to his office at night; there was a crowd at the door and talk of mobbing; and he directed him to be turned over to the city marshal to be taken to jail; that he examined him the next day, and that the statement was his statement as made and written down at the time; that he read the charges to Wilson and went on and examined him, and he answered the questions; that he was not represented by any attorney; that witness had the questions and answers taken down by others than himself, but did not read them over to Wilson as he remembered; it was just Wilson's statement of the case; that Wilson voluntarily made the statement,—that is, he (George) asked the questions and Wilson went on and answered them. He did not tell Wilson that he had a right to answer or not as he chose, or advise him as to his rights or tell him he had the right to be represented by counsel; that there were a dozen or more present; that there had been a talk of mobbing before Wilson was interrogated. The witness said that he told Wilson that the bedclothes and the axe showed his guilt, but that was not before he made the statement but at the winding up; that other witnesses were examined but not in the presence of Wilson. George was asked whether "the statement was made freely and voluntarily," and answered "Yes, sir. I stated the charge to him and went on and asked him these questions and he answered them, and that is what was done. He went on and made these replies to my questions." One Edmons testified that he wrote down some of the questions and answers and did it correctly. The statement was then again offered in evidence, defendant objected, his objection was overruled, the statement admitted, and he excepted. The statement was throughout a denial of guilt, but contained answers to questions which were made the basis for contradiction on the trial.

The district attorney offered in evidence a picture purporting to be that of Thatch. Defendant objected to its introduction, his objection was overruled, and he excepted.

The court charged the jury, among other things, as follows:

(1) "The law says that if a man has been killed, and killed *in such a way as to show [**617** that it was done murderously under the law I have given you defining the crime of murder, then you are to look to see whether the party accused of the killing was found in possession of any of the property of the man killed. If so, that is the foundation for a presumption. It is not conclusive in the beginning, but it is a presumption which you are to look at just as you would look at it as reasonable men outside of the jury box. The party so found in possession of such property, recently after the crime, is required to account for it, to show that as far as he was concerned that possession was innocent and was honest. If it is accounted for in that way then it ceases to be the foundation for a presumption. If it is not accounted for in that satisfactory, straightforward, and truthful way that would stamp it as an honest accounting then it is the foundation for a presumption of guilt against the defendant in this case, just upon the same principle if a certain man is charged with robbery or larceny, and is found in the possession of the property stolen or robbed recently after the crime, he is called upon to explain that possession. If his explanation of it is truthful; if it is consistent; if it is apparently honest; if it is not contradictory; if it is the same at all times; if it has the indicia of truth connected with it, that may cause to pass out of the case the consideration of the presumption arising from the possession of the property, but if it is not explained in that way it becomes the foundation of a presumption against the party who is thus found in possession of that property.

(2) "Now that is not the only foundation for a presumption, but you take into consideration the very appearance of this property, whether there were blood stains upon it, indicating that there was blood of some kind there; and, if so, whether that fact has been satisfactorily explained by the defendant in this case. If not, whether, in your judgment, there is that in these numerous bloodstains upon these

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clothes, bedclothing, and found upon the straw in that bed, whether or not that fact, if it has not been satisfactorily explained, is a fact upon which you may base a presumption that there was an act of deadly violence perpetrated while 618] the party was *upon these bedclothes, or while he was connected with them in such a way as that the blood was the blood of the murdered man or the missing man.

(3) "Now another foundation of a presumption is the fact of his false statements. . . . If a man makes a statement to you to-day about a transaction, which is one thing, and details to you another one to-morrow, which is something else, and another again, which is something else, you necessarily call upon him to explain why he has made these contradictory statements, because you know they are not the attributes of truth; you know they do not belong to the truth, because the highest attribute which it possesses is harmony, is consistency, and it possesses these attributes at all times. . . . Therefore if statements in this case before you, which are false, were made by the defendant or upon his side of the case; if they were made by his instigation, and they were knowingly instigated by him, you have a right to take into consideration the falsehoods of the defendant, first to see whether they are falsehoods. Then you are to look at them to see whether he satisfactorily explains to you the making of these false statements, and if he does not they are the foundation of a presumption against him for the reasons I have given you, because if they are not in harmony with nature; if they are not in harmony with truth; if they do not speak the voice of truth; then they speak the voice of falsehood; they speak the voice of fraud; they speak the voice of crime,—for they are not in harmony with that great law of truth which in all of its parts is consistent and harmonious. Then look at these statements and view them not alone, but in connection with the other circumstances in the case—all the other circumstances which have gone before you as evidence—to see whether or not the conduct which is urged by the government as accusatory, as inculpatory, has been satisfactorily explained by the defendant upon the theory of his innocence. If so, then that conduct passes away as proving facts in the case. It is no longer the foundation as proving facts for a presumption; but if these explanations are not satisfactory, if they are not in harmony with the truth, the pre-619] sumption must remain in the *case, and you have a right to draw inferences from these circumstances I have named. . . .

(4) "The defendant goes upon the stand in this case, and you are to view his evidence in the light of his relation to the case, in the way I have named, and in addition thereto you are to look at all the other facts and circumstances in the case as bearing upon his evidence to see whether it contradicts what he says, and therefore weakens it; whether it is so as to be contradictory and inconsistent from statements made by him at other times; whether it is shown to lack these elements of truthfulness known as rationality; known as consistency; known as naturalness.

"Whether these things are all absent from it, or whether in your judgment it seems to be consistent and probable in itself when you come to look at the story and listen to it and weigh it by your judgment. If it has these attributes they are evidences of its being true. If it hasn't them, but has the opposite, this opposite condition made up of these circumstances is an evidence of its being false."

The defendant saved exceptions to each of the foregoing instructions numbered 1, 2, 3, and 4.

Errors were assigned to the admission of the picture, the admission of the statement, and the giving of instructions.

No counsel for plaintiff in error.

Mr. **J. M. Dickinson**, Assistant Attorney General, for defendant in error:

A photograph can be introduced in evidence for the purpose of proving identity.

Whart. Crim. Ev. 8th ed. § 544; 3 Rice, Ev. 150; 18 Am. & Eng. Enc. Law, 424; *Luke* v. *Calhoun County*, 52 Ala. 115; *Beavers* v. *State*, 58 Ind. 530; *Ruloff* v. *People*, 45 N. Y. 215; *Cowley* v. *People*, 83 N. Y. 464, 38 Am. Rep. 464; *Udderzook* v. *Com.* 76 Pa. 340; *Schaible* v. *Washington L. Ins. Co.* 9 Phila. 136.

Confessions are admissible, even though made while in custody and while a mob is surrounding the building in which the prisoner is confined, if it appear that they were not made under the influence of threats, promises, or fear.

State v. *Ingram*, 16 Kan. 14; *Redd* v. *State*, 68 Ala. 492; Roscoe. Crim. Ev. 42 *note*.

When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding judge.

Com. v. *Preece*, 140 Mass. 276.

In a number of the states it is left to the jury, where there is conflicting evidence as to the voluntariness of the confession, to determine whether the confession was voluntary or not.

People v. *Howes*, 81 Mich. 396; *Thomas* v. *State*, 84 Ga. 618.

The practice of examining the accused was familiar to the Roman jurisprudence, and is still continued in continental Europe. It was first introduced in England by the statutes of 1 & 2 Phil. & M. chap. 13, and 2 & 3 Phil. & M. chap. 10.

Greenl. Ev. § 224 *note*.

These statutes did not provide for any warning to the defendant of any character.

In these cases, the manner of the examination is to be particularly regarded, and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so, in what he was called upon to say, or did not feel himself at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary.

Greenl. Ev. § 225.

The fact of administering an oath has been the turning point in a great many cases holding that statements made by the accused are inadmissible on the trial.

People v. *Gibbons*, 43 Cal. 557; *State* v. *Garvey*, 25 La. Ann. 191; *People* v. *McMahon*, 15 N. Y. 384; *People* v. *Mondon*, 103 N. Y. 214, 57 Am. Rep. 709.

A confession is admissible, though it is elicited by questions, whether put to the pris-

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oner by a magistrate, officer, or private person, and the form of the question is immaterial to the admissibility, even though it assumes the prisoner's guilt.

Rex v. *Wild*, 1 Mood. C. C. 452; *Rex* v. *Thornton*, 1 Mood. C. C. 27; *Gibney's Case*, Jebb, C. C. 15; *Reg.* v. *Kerr*, 8 Car. & P. 176; *Reg.* v. *Arnold*, 8 Car. & P. 621; Joy, Confessions, 34, 42; Roscoe, Crim. Ev. 51.

If the confession was voluntary, it is sufficient though it should appear that he was not warned.

Gibney's Case, Jebb, C. C. 15; *Rex* v. *Magill*, cited in McNally's Crown Pleas, 38; *Reg.* v. *Arnold*, 8 Car. & P. 622; Joy, Confessions, 45-48.

Rice in his work on Evidence, vol. 3, § 225, states the law to be that testimony elicited before a committing magistrate from one arrested and accused of the crime is not competent against him at the trial, unless he is duly cautioned that any statement he may make is liable to be urged against him in his subsequent trial.

State v. *Spier*, 86 N. C. 600; *People* v. *Darr*, 61 Cal. 554; *Farkar* v. *State*, 60 Miss. 847; *Dickerso* v. *State*, 48 Wis. 298; *Rector* v. *Com.* 80 Ky 468; *State* v. *Glass*, 50 Wis. 218, 36 Am. Rep. 845; *Teachout* v. *People*, 41 N. Y. 7.

If a prisoner under examination as to his own guilt be sworn, his statement is not evidence.

State v. *Broughton*, 7 Ired. L. 100, 45 Am. Dec. 507, *State* v. *Gilman*, 51 Me. 215; *Hendrickson* v. *People*, 6 Seld. 13; *Com.* v. *Harman*, 4 Pa. 270.

Possession of the fruits of crime recently after it has been committed affords a strong and reasonable ground for the presumption that the party in whose possession they were found was the real offender unless he can account for such possession, in some way, consistently with his innocence.

Wills, Circ. Ev. 47; Roscoe, Crim. Ev. 22; *State* v. *Brown*, 75 Mo. 317; *State* v. *Butterfield*, 75 Mo. 297; *Tucker* v. *State*, 57 Ga. 503; *Foster* v. *State*, 52 Miss. 695; *Dillon* v. *People*, 1 Hun, 670; *State* v. *Daily*, 37 La. Ann. 576; *State* v. *Kennedy*, 88 Mo. 341; *Knickerbocker* v. *People*, 43 N. Y. 177; *State* v. *Furlong*, 19 Me. 225; 1 Greenl. Ev. § 34; East, Crim. Law, 656.

The possession of stolen goods recently after their loss may be indicative, not of the offense of larceny simply, but of any more aggravated crime which has been connected with theft.

Wills. Circ. Ev. 52, 53; Rice, Crim. Ev. § 468; Burrill, Circ. Ev. 457-459; Whart. Crim. Ev. § 762.

The existence of bloodstains on or near a place where violence has been inflicted is always relevant and admissible as proof.

Whart. Crim. Ev. § 778; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. 1 Greenl. Ev. (15th ed.) § 34. In *Rex* v. *Rickman*, 2 East, P. C. 1035, *cited, it was held that on an indictment [620 for arson, proof that property was in the house at the time it was burned, and was soon afterwards found in the possession of the prisoner, raises a probable presumption that he was present and concerned in the offense; and in *Rex* v. *Diggles* (Wills, Circ. Ev. *53), that there is a like presumption in the case of murder accompanied by robbery. Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with its legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict. *Williams* v. *Com.* 29 Pa. 102; *Com.* v. *McGorty*, 114 Mass. 299; *Sahlinger* v. *People*, 102 Ill. 241; *State* v. *Raymond*, 46 Conn. 345; Whart. Crim. Ev. § 762.

The trial judge did not charge the jury that they should be controlled by the presumption arising from the fact of the possession of the property of one recently murdered, but that they might consider that there was a presumption and act upon it, unless it were rebutted by the evidence or the explanations of the accused.

Again the existence of bloodstains at or near a place where violence has been inflicted is always relevant and admissible in evidence. Whart. Crim. Ev. § 778; *Com.* v. *Sturtivant*, 117 Mass. 122 [19 Am. Rep. 401]. The trial judge left it to the jury, if they found that there were bloodstains and that the defendant had not satisfactorily explained them, to draw the inference, in the exercise of their judgment, that there was an act of deadly violence perpetrated against a person while upon or connected with the bedclothing. In other words, that the jury might regard bloodstains not satisfactorily explained as a circumstance in determining whether or not a murder had been committed.

Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant or on his behalf, at his instigation, they had the right, not only to take such statements into consideration in connection with all the other circumstances of the case *in deter- [621 mining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense made, or procured to be made, as in themselves tending to show guilt. The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury. 1 Greenl. Ev. § 37; 3 Greenl. Ev. § 34; *Com.* v. *Webster*, 5 Cush. 295 [52 Am. Dec. 711].

The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have. *Hicks* v. *United States*, 150 U. S. 442, 452 [37: 1137, 1141]; *Allison* v. *United States*, 160 U. S. 203 [*ante*, 395]. The trial judge did not charge the jury to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses, and left it to them to give his evidence, under all

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the circumstances affecting its credibility and weight, such consideration as they thought it entitled to receive.

We cannot reverse this judgment for error in either of the instructions complained of.

No ground of objection is specified to the admission of the picture of Thatch, nor is any particular ground disclosed by the record It was, we presume, admitted on the question of identity, and as such was admissible in connection with the other evidence. *Udderzook* v. *Com.* 76 Pa. 340; *Cowley* v. *People*, 83 N.Y. 464 [38 Am. Rep. 464]; *Ruloff* v. *People*, 45 N. Y. 213; *Luke* v. *Calhoun County*, 52 Ala. 115; *Franklin* v. *State*, 69 Ga. 36 [47 Am. Rep. 748]. And see *Luco* v. *United States*, 64 U. S. 23 How. 515 [16: 545].

This brings us to consider the exception taken to the admission of defendant's statement in evidence. The ground of the objection was that it was not voluntary. Although his answers to the questions did not constitute a confession of guilt, yet he thereby made disclosures which furnished the basis of attack, and whose admissibility may be properly passed on in the light of the rules applicable to confessions. Of course, all verbal admissions must be re-[622]ceived with caution, though free, *deliberate, and voluntary confessions of guilt are entitled to great weight. But they are inadmissible if made under any threat, promise, or encouragement of any hope or favor. 1 Greenl. Ev. §§ 214, 215, 219.

In *Hopt* v. *Utah*, 110 U. S. 574, 584 [28: 262, 267], *Mr. Justice* Harlan, delivering the opinion of the court, remarked: "While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in *Reg.* v. *Baldry*, 2 Den. C. C. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B. (*Rex* v. *Warickshall*, 1 Leach, C. C. 299), 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.' Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession. 1 Greenl. Ev. § 215; 1 Archb. Crim. Pl. 125; 1 Phillips, Ev. 533, 534; Stark. Ev. 78.

"But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. Tested by these conditions, there seems to have been no reason to exclude the confession of the accused; for the existence of any such inducements, *threats, or promises seems to have [623] been negatived by the statement of the circumstances under which it was made."

In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.

The same rule that the confession must be voluntary is applied to cases where the accused has been examined before a magistrate, in the course of which examination the confession is made, as allowed and restricted by statute in England and in this country in many of the states. Greenl. Ev. § 224. But it is held that there is a well-defined distinction between an examination when the person testifies as a witness and when he is examined as a party accused; *People* v. *Mondon*, 103 N. Y. 211 [57 Am. Rep 709]; *State* v. *Garvey*, 25 La. Ann. 191; and that where the accused is sworn, any confession he may make is deprived of its voluntary character, though there is a contrariety of opinion on this point. Greenl. Ev. § 225; *State* v. *Gilman*, 51 Me. 215; *Com.* v. *Clark*, 130 Pa. 641; *People* v. *Kelley*, 47 Cal. 125. The fact that he is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. *Sparf* v. *United States*, 156 U. S. 51 [39: 343]; *Pierce* v. *United States*, 160 U. S. 355 [*ante*, 454]; *State* v. *Gorham*, 67 Vt. 365; *State* v. *Ingram*, 16 Kan. 14. And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. Joy, Confessions, *45, *48, and cases cited.

In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him "without giving him the benefit *of counsel or warning him of [624] his right of being represented by counsel, or in any way informing him of his right to be thus represented." He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statement before a commissioner who was investigating a charge against him, as he was informed; he was in custody, but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which

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went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt, but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law.

When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. *Com.* v. *Preece*, 140 Mass. 276; *People* v. *Howes*, 81 Mich. 396; *Thomas* v. *State*, 84 Ga. 613; *Hardy* v. *United States*, 3 App. D. C. 35. The question here, however, is simply upon the admissibility of the statement; and we are not prepared to hold that there was error in its admission in view of its nature and the evidence of its voluntary character, the absence of any threat, compulsion, or inducement, or assertion or indication of fear, or even of such influence as the administration of an oath has been supposed to exert.

Judgment affirmed.

625] ALEX. W. CRAIN, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 625-650.)

Reference to previous count in indictment—sufficiency of indictment—plea by defendant necessary—due process of law—recitals.

1. A reference to a previous count in an indictment, if sufficiently full to incorporate the matter going before with that in the count in which the reference is made, may be effective for that purpose, notwithstanding the fact that the previous count is defective or the fact that judgment upon it was arrested.
2. An indictment charging that defendant did the things and each of them which are prohibited by U. S. Rev. Stat. § 5421, respecting the forging or counterfeiting of writings to obtain money from the United States, and also that he caused the doing of such things and each of them, is not defective on the ground that it charges separate and distinct felonies.
3. The record of a trial for an infamous crime must show affirmatively that it was demanded of the accused to plead to the indictment or that he did so plead: and failure to show this is not a matter of form only which is cured by U. S. Rev. Stat. § 1025, but is a matter of substance in the administration of the criminal law, involving the substantial rights of the accused.
4. Due process of law requires that an accused person shall plead or be ordered to plead, or in a proper case that a plea of not guilty be filed for him, before his trial can rightfully proceed.
5. Recitals in the record of a trial, that the accused appeared in person and by attorney, and that the jury were ordered "to try the issue joined," are insufficient to show that he pleaded to the indictment or was formally arraigned.

[No. 557.]

Submitted March 3, 1896. Decided April 20, 1896.

IN ERROR to the District Court of the United States for the Western District of Arkansas to review a judgment convicting Alex. W. Crain of violation of U. S. Rev. Stat. § 5421, and sentencing him to imprisonment. *Reversed*, and case remanded that the defendant may be arraigned and plead to the indictment, and for further proceedings.

Statement by *Mr. Justice* **Harlan:**

This writ of error brings up for review a judgment in the district court of the United States for the western district of Arkansas, by which the plaintiff in error was sentenced to imprisonment in the House of Correction at Detroit, Michigan, at hard labor, for the term of three years.

The defendant was indicted under U. S. Rev. Stat. § 5421, which provides: "Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or willingly *aids or assists in the false making,[626 altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive, from the United States or any of their officers or agents any sum of money; or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years, or shall be imprisoned not more than five years and fined not more than $1,000."

The indictment contained three counts. The first count sets out in full a declaration purporting to have been made by one Spahiga, a resident of the Creek nation, in the Indian territory, for an invalid pension, to which was appended a certificate or statement purporting to have been made by two persons named Marrel and Fixico, to the effect that they were present and saw Spahiga sign his name or make his mark to said declaration, and that they had every reason to believe that he was the identical person that he represented himself to be. The declaration and accompany-

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NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

In criminal case: right of prisoner to be present during his trial, and necessity of his being present; record must show that he was present,—see note to Lewis v. United States, 36: 1011.

As to confessions of accused, when evidence against him, see note to Hopt v. Utah, 28: 262.

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ing certificate or statement purported to have been sworn to on the 4th day of August, 1892, before "A. W. Crain, U. S. Comm'r, Pension Notary."

The second count charged "that heretofore, to wit, on the 4th day of August, A. D. 1892, one Spahiga is alleged to have executed a certain declaration and affidavit; said declaration and affidavit are in words and figures as set out in the first count of this indictment, and said 627] declaration and affidavit *purporting to be executed before one A. W. Crain, United States commissioner in the Creek Nation, in the Indian territory, the said Spahiga claiming in said declaration a pension from the United States as soldier of war of rebellion, who in said declaration was alleged to have enlisted under the name of Spahiga, at ——, on the 12th day of August, 1863, Company D, First Regiment, Indian Home Guards, Indian territory; in the war of the rebellion; said declaration and affidavit, after being so made, executed, and falsely counterfeited and forged by said Alex. W. Crain, was by said Alex. W. Crain forwarded with intent to defraud the United States and to obtain certain moneys from the United States, to the office of Commissioner of Pensions, in the Department of the Interior, at the city of Washington, in the District of Columbia, where the same was duly filed on the 12th day of August, 1892, as a claim against the government of the United States for a pension by the said Spahiga, as soldier aforesaid, as aforesaid, and being so filed for approval by the said A. W. Crain, in the office aforesaid, by the Commissioner of Pensions, and the said affidavit and declaration being material on the question pending before said Commissioner of Pensions as to whether the said Spahiga was by the laws of the United States entitled to a pension. And the jurors aforesaid upon their oaths aforesaid do further present that on the 4th day of August, 1892, at the Creek Nation, Indian territory, and within the western district of Arkansas, at which date said declaration, affidavit, and claims were prepared and made for filing in the office of the Commissioner of Pensions, as aforesaid, the same being an office of the United States, for the purpose aforesaid, one Alex. W. Crain did make, execute, and forge, and cause to be made, executed, and forged, a certain pretended and false affidavit, or the same may be called a certificate, the same being one and the same paper, and being in form and substance as hereinafter set out, which said forged, false, and counterfeited affidavit or certificate was fraudulent, and was a part of the said declaration and affidavit above mentioned, and was forwarded, together with the said declaration, to the office of the Commissioner of 628] Pensions aforesaid *for the purpose of defrauding the United States and of aiding and abetting the said Spahiga to obtain the approval of the said Commissioner of Pensions to his said claim for a pension as aforesaid, for the purpose of aiding the said Spahiga fraudulently to obtain money from the United States; which said pretended and false affidavit and certificate is in substance set out in the first count of this indictment. The said pretended affidavit and certificate and declaration were forged, false, and fraudulent, and did contain fraudulent and fictitious statements, as the said A. W. Crain well knew, in this: That Pahose Marrell, Spahiga, and Nokos Fixico did not sign said pretended affidavit and certificate, declaration, and affidavit, as set forth in said false certificate and affidavit, and said Pahose Marrell, Spahiga, and said Nokos Fixico were not sworn as to the truth of the matters and things set forth in said pretended declaration, affidavit, and certificate, but in truth and fact the said A. W. Crain did knowingly and wilfully, feloniously, and falsely make, counterfeit, forge, and cause to be made, counterfeited, and forged the names of Pahose Marrell, Spahiga, and Nokos Fixico to and upon the said false and forged affidavit and certificate with intent to defraud the United States and to aid the said Spahiga in obtaining money fraudulently from the United States, and that the said A. W. Crain did not swear the said Pahose Marrell, said Spahiga, and the said Nokos Fixico as to the truth of the matters and things set forth in said declaration, affidavit, and certificate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The third count charged "that A. W. Crain, on the 4th day of August, A. D. 1892, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, unlawfully and feloniously did transmit to the office of the Commissioner of Pensions of the United States, the same being an office under the government of the United States, and for the purpose of defrauding the United States, the false and forged instrument of writing set out in the first count of this indictment, contrary," etc.

Messrs. **A. H. Garland** and **R. C. Garland** for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The transcript before the court must be taken to be as certified, namely, a true and complete copy of the record and proceedings in this case. It appears from the first order of record in the trial court that the defendant came "in his own person, and by his attorney;" that on motion of the United States, by its attorney, it was "ordered by the court that a jury come to try the issue joined;" that a jury was selected, impaneled, and sworn "to try the issue joined, and a true verdict render according to the law and the evidence;" and that the jury found the defendant "guilty *as [633 charged in the first, second, and third counts of the within indictment."

The defendant moved, upon written grounds filed, to arrest the judgment and to set aside the verdict. The grounds of that motion all related to the sufficiency of the several counts of the indictment. The motion was overruled as to the second count, and sustained as to the first and third.

The defendant, on a subsequent day, tendered his bill of exceptions, embodying the motion in arrest of judgment, with the grounds

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therefor, and at the same time presented an assignment of errors.

The errors assigned by him in the court below, and made part of the record were: 1. The overruling of the motion in arrest of judgment upon the conviction on the second count of the indictment. 2. The rendering of judgment upon the verdict of guilty on that count, and the sentence of imprisonment.

When the accused was brought into court, after verdict, it was demanded of him what he had or could say why the sentence of the law upon the verdict of guilty on the second count should not be pronounced against him. He replied that he had nothing further to say than he had theretofore said.

1. One of the objections made to the second count was that it was incomplete, and referred in an uncertain, indefinite manner to documents set forth in the first count. The reference to the declaration and affidavit set forth in the first count indicated the documents that were intended to be incorporated, by reference, into the second count; and this reference was not affected by the fact that the first count was defective, or by the fact that judgment upon that count was arrested. One count may refer to matter in a previous count so as to avoid unnecessary repetition; and if the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made. *Blitz* v. *United States*, 153 U. S. 308, 317 [37: 725,728].

634] *2. It is said that the second count charges three separate, distinct felonies, and is therefore materially defective, within the rule that two offenses cannot be charged in the same count. 1 Archb. Crim. Pr. & Pl. 95; 1 Bish. Crim. Proc. § 432. Undoubtedly the section of the Revised Statutes under which the indictment was framed embraces several distinct acts, the doing of either of which is punishable. It is prohibited either to falsely make, alter, forge, or counterfeit, or to cause to be falsely made, altered, forged, or counterfeited, any deed, power of attorney, order, certificate, receipt, or other writing for the purpose of obtaining recovering, or enabling any other person, either directly or indirectly, to obtain or receive from the United States any sum of money. It is also prohibited to any person to transmit, or present at, or cause or procure to be transmitted to or presented at, any office or to any officer of the government, any deed, power of attorney, order, certificate, receipt, or other writing, in support of or in relation to any account or claim with the intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited. The second count charged in substance, not only that the defendant did things and each of them, the doing of which or either of which the statute prohibited, but also that he caused the doing of such things and of each of them. Was the count, thus drawn, so defective as to require that judgment upon it be arrested?

In *Rex* v. *Hunt*, 2 Campb. 583, the question was whether a defendant might be found guilty upon a count in an information, charging him with having composed, printed, and published a libel, if it were proved that he simply published but did not compose it. Lord Ellenborough held that it was enough to prove publication. "If an indictment," he said, "charges that the defendant did and caused to be done a particular act, it is enough to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." Chitty says: "If an indictment charge that the defendant did, and caused to be done, a particular act, it is enough to prove *either. Thus, [**635** under an indictment for forgery stating that the defendant forged and caused to be forged, it suffices to prove either." 1 Chitty, Crim. Law, 251; Stark. Crim. Pl. 339.

In *Rasnick* v. *Com.* 2 Va. Cas. 356, it was held that an indictment charging the defendant with the making of certain base coin, of causing and procuring such coin to be made, and of assisting in making it—three distinct offenses set out in one count—was sufficient to authorize judgment upon a general verdict of guilty.

So, in *Com.* v. *Tuck*, 20 Pick. 356, it was adjudged that a count in an indictment alleging that the defendant broke and entered a shop with intent to commit larceny, and did there commit larceny, was not double. In that case, doubt was expressed whether the objection that an indictment containing one count and embracing more than one offense could be taken advantage of in arrest or on error—the court observing that the better opinion was that it cannot, and that the appropriate remedy of the accused, in order to avoid the inconvenience and danger of having to meet several charges at the same time, is a motion to quash the indictment or to confine the prosecutor to some one of the charges. In another case, arising under a statute of Massachusetts making it an offense to set up *or* promote certain exhibitions, without license therefor, an indictment containing a single count, and charging that the defendant set up *and* promoted a certain exhibition, was sustained against the objection of duplicity. *Com.* v. *Twitchell*, 4 Cush. 74.

Under a statute of New Jersey, making it an offense to burn *or* cause to be burned any barn, not parcel of a dwelling house, an indictment, containing one count, charging that the defendant "burned *and* caused to be burned," etc., was sustained by the supreme court of New Jersey in *State* v. *Price*, 11 N. J. L. 241, 255. Among other authorities the court cited Starkie, who says: "It is the usual practice to allege offenses cumulatively, both at common law and under the description contained in penal statutes; as that the defendant published and caused to be published a certain libel; that he forged and caused to be forged, etc." Stark. Crim. Pl. 271.

*So, under a statute of Pennsylvania, [**636** making it an offense for supervisors of highways to neglect to open *or* repair a public highway, it was held proper to charge in one count the neglect to open *and* repair such highway, the court observing that the offenses of not opening

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and not repairing were of the same character and description, if indeed they were distinct. *Edge* v. *Com.* 7 Pa. 275, 278.

We are of opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorneys, orders, certificates, receipts, or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declaring that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years and a fine of not more than $1,000. We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it.

3. But an objection is made to the proceedings in the court below, which is of a serious character.

The record does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, unless all that is to be inferred simply from the order, made at the beginning of the trial and as soon as the accused appeared, reciting that the jury were selected, impaneled, and sworn "to try the issue joined," and from the statement in the bill of exceptions that the jury were "sworn and charged to try the *issues joined." What that [637 issue was is not disclosed by the record.

The government does not, in terms, claim that it was unnecessary for the defendant to plead to the indictment. But it assumes (although the record does not state such to be the fact) that the defendant pleaded not guilty, and contends that the omission to record that plea is only a clerical error which did not prejudice his substantial rights.

By U. S. Rev. Stat. § 1025, it is declared that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Is it a matter of form only whether the accused pleads or does not plead to an indictment for an infamous crime? If it be not a matter of form, then it would seem that if convicted, the fact that the accused did plead should clearly appear from the record, and not be left to mere inference arising from a general recital that the jury were sworn to try and did try "the issue joined," without stating what was such issue. While, as said in *Pointer* v. *United States*, 151 U. S. 396, 419 [38: 208, 217], all parts of the record are to be interpreted together, so that, if possible, effect be given to all, and a deficiency in one part of it supplied by what appears elsewhere, it was there held that "the record of a criminal case must state what will affirmatively show the offense, the steps without which the sentence cannot be good, and the sentence itself."

In capital or other infamous crimes an arraignment has always been regarded as a matter of substance. "The arraignment of the prisoner," Lord Coke said, "is to take order that he appear, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the indictment or other record." Co. Litt. 263*a*.

According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is the *"demanding of him whether he is guilty [638 or not guilty; and if he pleads not guilty, the clerk joins issue with him *cul. prit*, and enters the prisoner's plea; then he demands how he will be tried, the common answer is by God and the country, and thereupon the clerk enters *pro se* and prays to God to send him a good deliverance." 2 Hale, P. C. 219. So, in Blackstone: "To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment. . . . After which [after the indictment is read to the accused] it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty." 4 Bl. Com. 322, 323, 341. Chitty says: "The proper mode of stating the arraignment on the record is in this form, 'and being brought to the bar here in his own proper person, he is committed to the marshal,' etc. And being asked how he will acquit himself of the premises (in case of felony, and of high treason in case of treason) above laid to his charge, saith,' etc. If this statement be omitted, it seems the record will be erroneous." 1 Chitty, Crim. Law, *419.

The importance attached to the proper arraignment of one accused of felony, including the demand upon him to plead to the indictment, was illustrated in *Com.* v. *Hardy*, 2 Mass. 303, 316. That was a case of murder. The accused was arraigned before one of the justices of the supreme judicial court of Massachusetts. He pleaded not guilty, and put himself for trial upon the country. The plea was recorded, and counsel was assigned to him at his own request. On a subsequent day the prisoner was brought into court, three justices being present, and the clerk having been directed to arraign him, he informed the court that the prisoner had been arraigned and had pleaded not guilty. The prisoner made no objection to proceeding, and he was convicted. The question arose whether the conviction was valid under a statute then in force which provided that "all indictments which may be found for any capital offense shall be heard, tried, and determined exclusively in the courts which are to be holden pursuant to the 2d section hereof by *three or more of the said [639 justices." Chief Justice Parsons said: "We are all of opinion that the power of hearing, try-

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ing, and determining, an indictment for a capital offense includes a power to arraign a prisoner, and to record his plea. It is therefore one of the powers which the court, when holden by one judge, is restrained from exercising. Consequently the arraignment of a prisoner, and his plea, were not *coram judice.*" Again: "No possible inconvenience has resulted to the prisoner from the proceedings in this case. His plea, that was recorded, was the most favorable plea he could have pleaded; and when the jury were called, he made no objection to proceed in the trial of his issue, but assented by making his challenges. But an objection, founded in a want of jurisdiction, however small, and from which no inconvenience has arisen, is not, in capital cases, taken away by an implied assent."

In *Grigg* v. *People*, 31 Mich. 471, which was an indictment for larceny, the record did not show that the accused had been arraigned or that any plea was made or entered of record. Nevertheless he was convicted and sentenced to the House of Correction. The court, speaking by Chief Justice Graves (Justices Cooley and Campbell concurring), said: "The Attorney General, whilst admitting that an arraignment and plea were indispensable, as of course they were, submits to the court whether, in the absence of any express matter in the record as returned to show the contrary, it ought not to be intended that both proceedings were actually had. An arraignment and plea being imperatively required, the recital of them, if they were taken, was a necessary ingredient of the record." The judgment was reversed, that the accused might be lawfully arraigned or otherwise dealt with agreeably to law.

The supreme court of Wisconsin, in a case of misdemeanor, said: "The record in this case fails to show any issue which the jury were called upon to try. It is the business and duty of the prosecuting officer of the government to move on the trial of criminal cases and to see that the proper issue be made up. It may be probable that the defendant in this case was perfectly aware of the offense with which [640] he was charged. *It appears that he consented to go to trial, but a trial of what did he consent to? He was arrested and held in custody under the process of the court. It was his right to be informed, and it was the duty of the government to inform him, of the accusation against him. This is done by arraignment and requiring the defendant to plead. It is true, this right of arraignment may, in minor offenses, be waived, but a plea, an issue, is absolutely essential. Nor can we supply an issue corresponding to the verdict when the record is entirely silent on the subject." *Douglass* v. *State*, 3 Wis. 821.

In *People* v. *Corbett*, 28 Cal. 328, 330, it appeared that the defendant, indicted for grand larceny, asked, when brought into court, a separate trial, which was granted; the jury were impaneled; witnesses were introduced by him; the case was argued by his counsel; and the jury, having been charged by the court, returned a verdict of guilty. The supreme court of California said: "If the defendant had, at any time anterior to the trial, plead not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured on the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury, nor did all of them combined, cure the want of a plea. There was not only no arraignment, but over and beyond that there was no issue for the jury to try. Not only did the defendant not plead, but inasmuch as the statute opportunity for pleading was never extended to him, he was never under any obligation to plead. A verdict in a criminal case where there has been neither arraignment nor plea is a nullity, and no valid judgment can be rendered thereon. And so is a verdict rendered upon a plea put in by the attorney of a party indicted for a felonious assault with intent to rob."

In *State* v. *Hughes*, 1 Ala. 655, 657, it was held to be error to swear the jury to pass upon the guilt or innocence of the accused before calling upon him to plead. The court said that until the prisoner was called on for his plea, it could not be known whether there would be an issue of fact for the jury, *or what [641] the issue (if any) might be; that the prisoner, instead of submitting the question of his guilt, might have pleaded in abatement, or have presented to the court legal objections to the indictment; and that, though a formal arraignment of one charged with a criminal offense may not be indispensable to the regularity of a conviction, it was clear that the case must be put in a condition for trial before the jury is sworn.

In *Sartorious* v. *State*, 24 Miss. 602, 611, 612, which was an indictment for buying certain goods, knowing them to be stolen, the court said: "The record does not show that the prisoner was arraigned or that he plead to the indictment. In trials for minor offenses a formal arraignment in practice is generally dispensed with. In such cases, where the defendant has plead to the indictment, an arraignment will be presumed. But a party, before he can be put upon his trial, must plead to the indictment. In civil proceedings it is error to submit a cause to the jury without an issue in fact having been made up by parties. In prosecutions for offenses it must be equally erroneous to put a party upon his trial unless he has taken issue upon the charge by pleading to the indictment."

In *Bowen* v. *State*, 108 Ind. 411, 413, the court said: "Under the decisions of this court it can no longer be recognized as a subject of controversy that where the record in a criminal case fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous, to say the least."

In *Aylesworth* v. *People*, 65 Ill. 301, which was an indictment for a misdemeanor, the record failed to show that the accused was ever arraigned or pleaded. The supreme court of Illinois said: "The record should also show that the plea of not guilty was entered. Without it there is nothing for the jury to try. *Johnson* v. *People*, 22 Ill. 314." The judgment was reversed. In the subsequent case of *Hoskins* v. *People*, 84 Ill. 87, 25 Am. Rep. 438, which was an indictment for larceny, the court

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said: "It appears from the record that defendant 'waived arraignment, copy of indictment, list of jurors and witnesses,' etc., but no [642]plea of any kind was entered. *So far as this record discloses, no plea was entered before the accused was placed on trial. On the authority of the former decisions of this court, this was error. *Johnson* v. *People, supra; Yundt* v. *People*, 65 Ill. 372. It was held in those cases that, without an issue formed there could be nothing to try and the party convicted could not properly be sentenced." So, in *Parkinson* v. *People*, 135 Ill. 401, 403, 10 L. R. A. 91, which was an indictment for a felony: "There must be a plea; and if a trial is had, and no plea of any kind is interposed and shown by the record, it is reversible error."

In *State* v. *Chenier*, 32 La. Ann. 103, which was an indictment for rape, the accused, after the trial commenced, was, by order of court, arraigned, and his plea made. The trial then proceeded under the direction of the court. The supreme court of Louisiana said: "We cannot sanction such a departure from ancient landmarks in criminal procedure. The prisoner must be arraigned and must plead to the indictment before the case can be set down for trial or tried. It may be that in this particular case no prejudice was wrought to the accused. Still we think it unsafe to sanction such irregularities in capital cases."

In *Ray* v. *People*, 6 Colo. 231, which was an indictment for forgery, it was assigned for error that the accused never was arraigned, and that he never pleaded or was required to plead to the indictment. Upon these points the record was silent. The statutes of Colorado required all criminal trials to be conducted according to the course of the common law, except where a different mode is pointed out. The court held that without an issue there was nothing to try, and if the record failed to show an arraignment and plea prior to trial the proceeding was a nullity.

In *State* v. *Vanhook*, 88 Mo. 105, the supreme court of Missouri reversed a judgment of conviction because the record did not show an arraignment and plea of not guilty, observing that the error was a fatal one, and that it was for the legislature, and not the court, to change the law on the subject.

To the same general effect are *State* v. *Wilson*, 42 Kan. 587; *Jefferson* v. *State*, 24 Tex. [643] App. *535; *Hicks* v. *State*, 111 Ind. 402; *State* v. *Agee*, 68 Mo. 264; *State* v. *Saunders*, 53 Mo. 234.

The American treatises upon criminal law are to the same effect. Bishop says: "It is laid down, in a general way, that the arraignment and plea are a necessary part of the proceedings, without which there can be no valid trial and judgment. With the consent of the court the prisoner may waive the reading of the indictment, though, without waiver, it will be read, even where he has been furnished with a copy. And as the object of the arraignment is to obtain the plea, if the prisoner voluntarily makes it without, and it is accepted by the court, nothing more is required. But without plea there can be no valid trial. Nor will the proceeding be rendered good by the fact that the defendant went to trial voluntarily and without objection, knowing there was no plea. It must be before the jury are sworn; afterward the plea comes too late." 1 Bishop, Crim. Proc. 3d ed. § 738. "There can be no trial on the merits without a plea of not guilty." 1 Bishop, Crim. Proc. 3d ed. § 801. Wharton: "When brought to the bar in capital cases, and at strict practice in all cases whatever, the defendant is formally arraigned by the reading of the indictment and the calling on him for a plea. . . . The right of arraignment on a criminal trial may, in some cases, be waived, but a plea is always essential." 1 Am. Crim. Law. § 580.

Without citing other authorities we think it may be stated to be the prevailing rule in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced, and that unless this fact appears affirmatively from the record the judgment cannot be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury were sworn to "try the issue joined." The record should be a permanent memorial of what was the issue tried, and show whether the judgment whereby it was proposed to take the life of the accused or to deprive him of his liberty, was in accordance with the law of *the land. In *Hopt* v. *Utah*, [644] 110 U. S. 574, 579 [28: 262, 265], this court, observing that the public has an interest in the life and liberty of an accused person, said: "Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

The views we have expressed would seem to be the necessary result of U. S. Rev. Stat. § 1032, which provides: "When any person indicted for an offense against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

This statute is based on the act of April 30, 1790, § 30 (1 Stat. at L. 119), the act of March 3, 1825, § 14 (4 Stat. at L. 118), and the act of March 3, 1835, § 4 (4 Stat. at L. 777). It proceeds upon the established principle that before a criminal trial can be legally commenced there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. And the section above quoted requires the entry of the plea before the trial commences. Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea?

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Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often 645] *prepared. Before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. That cannot be predicated of the record now before us. We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely. That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently, such a defect in the record of a criminal trial is not cured by U. S. Rev. Stat. § 1025, but involves the substantial rights of the accused.

It is true that the Constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law and essential to a valid trial was taken in the trial court; otherwise the judgment will be erroneous. The suggestion that the trial court would not have stated, in its order, that the jury was sworn to try and tried "the issue joined," unless the defendant pleaded, or was ordered to plead, to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction 646] of an infamous crime *where the record does not clearly show that there was a valid trial.

The judgment is reversed and the case is remanded that the defendant may be properly arraigned and plead to the indictment, and for further proceedings in conformity with law.

Mr. Justice **Peckham** dissenting:

I dissent from the judgment of the court in this case. It seems to me to proceed, not alone upon the merest technicality, but also upon an unwarranted presumption of error arising from the absence of a formal statement in the record showing that the defendant was duly arraigned and pleaded not guilty, although the inference that he was so arraigned and that he did thus plead seems to be plain from the facts which the record discloses. At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punishments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe if not cruel penalty, should be accorded great weight, and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defense against prosecutions which might otherwise be successful, and which at the same time ought not to succeed. These times have passed and the reasons for the strict and slavish adherence to mere form have passed with them.

In this case there cannot be a well-founded doubt that the defendant was arraigned and pleaded not guilty. The presumption of that fact arises from a perusal of the record and it is, as it seems to me, conclusive. There is no presumption in favor of defendant upon a criminal trial, excepting that of innocence. Error in the court is not presumed, but must be shown. A presumption that proper forms were omitted is not *to be made. There must 647] be at least some evidence to show it. And yet, because the record fails to make a statement in terms that the defendant was thus arraigned and did so plead, this judgment is to be reversed, and that, too, without an allegation or even a pretense that the defendant has suffered any injury by reason of any alleged defect of the character in question. I think such a result most deplorable.

The record sets out the indictment. It then shows that the district attorney for the United States appeared in court and the defendant, in his own person and by his attorney, also appeared, and then, on motion by the district attorney, it is ordered by the court that a jury come to try the issue joined, and a jury is duly selected, impaneled, and sworn to try the issue joined, and a true verdict to render according to the law and the evidence. The trial proceeds and the jury return a verdict that the defendant is guilty as charged in the first, second, and third counts of the indictment. In the bill of exceptions, a document prepared by the defendant, it is also asserted that a jury was impaneled, sworn, and charged to try the issues joined in the cause. Can there, from these facts, be a doubt founded upon any fair presumption that the defendant had been arraigned and had pleaded not guilty?

That the plea was of that nature must be presumed from the fact that the jury was summoned to try the issue, and that upon the trial of such issue the defendant was convicted on the first, second, and third counts of the indictment. The evidence stated in the bill of exceptions is directed solely to the issue of guilt or innocence. It would be wholly immaterial upon any other issue, and it is also of such a nature as to show beyond all rational

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doubt that it was received upon the trial of the issue raised by a plea of not guilty. No other presumption than that an arraignment and a plea of not guilty had been interposed could from such a record be reasonably indulged in. The record further shows a motion made in arrest of judgment and the grounds thereof, among which no mention is made of any alleged failure to arraign the defendant. The motion is sustained as to the first and third counts of the indictment, and overruled as to the **648**]second, *and the defendant excepts to the ruling. The record then continues, and states that on motion of the district attorney the defendant was brought to the bar of the court in custody of the marshal, and it being demanded of him what he has to say why sentence should not be pronounced upon the verdict, says he has nothing further to say than as already said. There is no statement in the record that the defendant, when thus called upon to speak, said one word or raised any objection as to any failure to arraign him or take his plea. If there had been such failure, was not that a time to speak, and would the defendant not then have spoken? Further, the defendant, after his sentence, obtains a writ of error from this court, and files an assignment of error, and yet no mention is therein made of any absence of an arraignment. Is it reasonable upon such a record to infer that no arraignment was had and no plea taken? Is it not, on the contrary, reasonable to infer that defendant was arraigned, and that he did plead not guilty? Yet, by this decision, it results that unless the record states in terms an arraignment and plea, a judgment must be reversed, although the presumption that there was an arraignment and plea arising from the contents of the record is both strong and uncontradicted.

In the face of such a presumption, the simple failure of a clerk to make an entry of the fact of arraignment and plea, although both presumably took place, is yet made a substantial ground for a reversal of a judgment which actually was rendered in due course of a criminal prosecution and by a court of competent jurisdiction. This ought not to be. There is but a mere suggestion at the end of the brief of the counsel for the plaintiff in error, filed in this court, where the objection is for the first time raised that defendant was not given an opportunity to plead to the indictment before being put upon his trial, never having been arraigned. For the *facts* counsel refer to the record, and that shows what has already been set forth. I think a clear and necessary inference arises from the contents of the record that the defendant was arraigned and pleaded.

Suppose, however, the defendant, through **649**]mere inadvertence, *had not been formally arraigned at the bar and had not in terms pleaded, but that he was placed on trial without objection on his part, and both sides treated the case as if he had been arraigned and pleaded not guilty, could it be plausibly contended that, nevertheless, a fatal error had been committed by a neglect of this form, and that a judgment of conviction must on that account be reversed? Is it possible that for the first time a defendant can in this court successfully raise this formal objection, and under circumstances showing a waiver of the rule, and yet obtain a reversal of the judgment on that ground alone? To my mind the mere statement of these questions furnishes their conclusive answer. Some cases may hold the necessity of a formal plea and that the conduct of a defendant in going to trial without any objection, and as if a plea of not guilty had been entered, did not waive the necessity of such a plea. Those cases are not based on principles which, in my judgment, ought now to be followed.

Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.

It is not necessary, however, in this case to place my judgment upon any doctrine of waiver, and I do not base my dissent upon that view of the case.

This record is, as I have said, far from showing that through mere inadvertence the defendant was not arraigned and did not plead. On the contrary, the necessary presumption arising from the facts appearing therein is that the *defendant was arraigned and did plead. [**650** To reverse the judgment upon the pure technicality (raised in this court for the first time) that the record does not *in terms* show an arraignment and a plea, where the presumption arising from the contents of the record is that both occurred, is to my mind a sacrifice of justice to the merest and most formal kind of an objection, founded upon an unjustifiable presumption of error and entirely at war with the facts as they occurred. If the statute cited in the opinion of the court (U. S. Rev. Stat. § 1025) does not apply to a case such as this, it is difficult to think of one for which its provisions could more properly be invoked.

The judgment should be affirmed.

I am authorized to state that *Mr. Justice* **Brewer** and *Mr. Justice* **White** concur in this opinion.

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WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,
v
DAVID W. JAMES.

(See S. C. Reporter's ed. 650-663.)

Penalty for delaying to deliver a telegram—action for.

1. A state statute imposing a penalty for lack of due diligence in delivering a telegram, if made in a reasonable exercise of the police power of the state, is not an unconstitutional interference with interstate commerce as applied to interstate messages, in the absence of any legislation by Congress on the subject.
2. An action for a penalty for delay in delivering a telegram is unaffected by any stipulation as to liability for mistakes in its transmission, contained in the contract under which it is sent.

[No. 206.]

Argued April 2, 1896. Decided May 4, 1896.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment of that court reversing in part and affirming in part a judgment of the Superior Court of Early County in favor of the plaintiff, David W. James, against the Western Union Telegraph Company for a penalty and for damages for delay in delivery of a telegram. *Affirmed.*

See same case below, 90 Ga. 258.

The facts are stated in the opinion.

Messrs. **John F. Dillon,** *Geo. H. Fearons,* and *Reese Taggart* for plaintiff in error.

No counsel for defendant in error.

651] **Mr. Justice* **Peckham** delivered the opinion of the court:

This action was brought by the defendant in error against the telegraph company to recover the amount of a penalty which the plaintiff below alleged the company had incurred, and also to recover damages which the plaintiff alleged he had sustained by reason of the failure of the company to promptly deliver a telegraphic despatch directed to plaintiff at his residence in Blakely, in the state of Georgia.

The statute under which the action was brought was passed by the legislature of the above named state, October 22, 1887, and reads as follows:

An Act to Prescribe the Duty of Electric Telegraph Companies as to Receiving and Transmitting Despatches, to Prescribe Penalties for Violations thereof, and for Other Purposes.

Sec. 1. Be it enacted by the general assembly of the state of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, every electric telegraph company with a line of wires, wholly or partly in this state, and engaged in telegraphing for the public, shall, during the usual office hours, receive despatches, whether from other telegraphic lines or from individuals; and, on payment of the usual charges according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of $100, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, by either the sender of the despatch, or the person to whom sent or directed, whichever may first sue: Provided, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit.

Sec. 2. Be it further enacted that such companies shall deliver all despatches to the persons to whom the same are addressed or to their agents, on payment of any charges due for the same. Provided, such persons or agents reside within *one mile of the tele-[652 graphic station or within the city or town in which such station is.

Sec. 3. Be it further enacted that in all cases the liability of said companies for messages in cipher, in whole or in part, shall be the same as though the same were not in cipher.

Sec. 4. Be it further enacted that all laws or parts of laws in conflict with this act be, and the same are hereby, repealed.

The plaintiff recovered in the trial court the statutory penalty of $100, sued for, and also the sum of $242.60 damages, for the nondelivery of the telegram in question, and upon appeal to the supreme court of Georgia that court reversed the judgment as far as it was based upon the actual damages claimed, but affirmed it for the penalty of $100, provided for by the statute above quoted. Under the direction of the supreme court the plaintiff remitted the claim for damages, and accordingly the judgment for the penalty and for costs was affirmed, and from that judgment the company prosecuted a writ of error from this court.

The defendant by its answer denied that it had been guilty of any violation of the statute in question, and among other defenses it set up by an amended plea that the plaintiff ought not to recover the statutory penalty of $100 sued for, because the message in question was an interstate message and part of interstate commerce. Upon the trial the court in its charge to the jury stated: "I charge you that if the defendant telegraph company undertook to transmit to this place a message which had been paid for at the other end of the line and did fail to deliver the message to James within a reasonable time from the time it was received, the plaintiff is entitled to recover for the failure to deliver $100 as a penalty fixed upon that act by law." The court also charged as follows: "I charge you that if you find that the message was not delivered within a reasonable time under the attending circumstances, your

NOTE.—*As to power of Congress to regulate commerce,* see notes to Gibbons v. Ogden, 6: 23; and Brown v. Maryland, 6: 678.

As to interstate commerce, regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute, when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid,—see note to Harmon v. Chicago, 37: 216.

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verdict should be for the plaintiff upon both propositions," which included the claim for the penalty and for actual damages.

The following facts are stated in the bill of exceptions: The plaintiff, who was a cotton [653]merchant in Blakely, Georgia, *on the 4th day of November, 1890, sent a message from his residence to Tullis & Co., who were in the same business in Eufaula in the state of Alabama, offering to sell certain cotton on terms named in the message, and asked to have an answer that night. Tullis & Co. received the message on that day and at once sent a message in reply accepting the offer of the plaintiff upon certain conditions. This message was received at Blakely late in the evening of November 4, but was not delivered until the morning of November 5. The plaintiff alleged that the delivery was not made with due diligence, and the result of the delay in the delivery of the message was, as he stated, the loss of the sale of the cotton upon the terms mentioned in the message. He therefore brought his action to recover both the penalty and the actual damages which he alleged he had sustained by reason of this failure on the part of the company to deliver the message with due diligence. By the decision of the supreme court the claim for damages was not sustained, and the judgment given was solely for the penalty.

The only question, therefore, before this court, is whether the statute of the state of Georgia, providing for the recovery of such penalty, is a valid exercise of the power of the state in relation to messages by telegraph from points outside and directed to some point within the state of Georgia.

The plaintiff in error insists that the act in question is a violation of that portion of U. S. Const. art. 1, § 8, which empowers Congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The validity of the statute is based upon the general power of the state to enact such laws in relation to persons and property within its borders as may promote the public health, the public morals, and the general prosperity and safety of its inhabitants. This power is somewLat generally described as the police power of the state, a detailed definition of which has been said to be difficult if not impossible to give. However extensive the power may be, it cannot encroach upon the powers of the Federal government in regard to rights granted or secured by the Federal [654] *Constitution. *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661 [29: 516, 521]; *Walling* v. *Michigan*, 116 U. S. 446, 460 [29: 692, 696]; *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98 [39: 910].

It has been settled by the adjudications of this court that telegraph lines, when extending through different states, are instruments of commerce which are protected by the above clause in the Federal Constitution, and that the messages passing over such lines from one state to another constitute a portion of commerce itself. *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1 [24: 708]; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 [26: 1067]; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347 [30: 1181, 1 Inters. Com. Rep. 306]. Such messages come within the protecting clause of the Constitution just quoted, and if the statute in question can be construed as regulating commerce between the states, the statute would be invalid on that account.

The Congress of the United States, by the act of July 24, 1866, chapter 230, legislated upon the subject of telegraph companies. That legislation has become a part of U. S. Rev. Stat. §§ 5263-5269, both inclusive. The sections referred to do not, however, touch the subject-matter of the delivery of messages as provided for in the state statute. The provision in the section of the Revised Statutes as to the precedence to be given to the messages of officers of the government in relation to their official business are not inconsistent with or in any manner opposed to the provisions of the Georgia act, nor are they upon the same subject within the meaning of the rule which permits state legislation in some instances only until Congress shall have spoken.

The company now contends that under the cases decided in this court, some of which are above cited, and by reason of the act of Congress just mentioned, it is so far within the commerce clause of the Federal Constitution as to be protected from any state legislation of the character of the act in question. It is urged that although there is no statute of Congress expressly providing a penalty for a failure to deliver telegraphic messages impartially and with due diligence, yet still the very fact of the absence of such *legislation is equi-[655] valent to a declaration by Congress that no penalty should be affixed, and that the company should be left free to pursue its business untrammeled by any state legislation upon the subject.

In regard to those matters relating to commerce which are not of a nature to be affected by locality, but which necessarily ought to be the same over the whole country, it has been frequently held that the silence of Congress upon such a subject, over which it had unquestioned jurisdiction, was equivalent to a declaration that in those respects commerce should be free and unregulated by any statutory enactment. *Welton* v. *Missouri*, 91 U. S. 275, 282 [23: 347, 350]; *Hall* v. *DeCuir*, 95 U. S. 485, 490 [24: 547, 549]. The matters upon which the silence of Congress is equivalent to affirmative legislation are national in their character, and such as to fairly require uniformity of regulation upon the subject matter involved affecting all the states alike. *Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238].

In *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204 [38: 962, 4 Inters. Com. Rep. 649], *Mr. Justice* Brown, in delivering the opinion of the court, said: "The adjudications of this court with respect to the power of the state over the general subject of commerce are divisible into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the state cannot interfere at all." On page 212 [966] of the report are cited many cases as coming within the second class, among which are laws for the regulation of pilots; for quarantine and inspection; for policing harbors;

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improving navigable channels; regulating wharves, piers, and docks; constructing dams and bridges across navigable waters of a state; and also laws for the establishment of ferries. In relation to the power of Congress to regulate commerce in cases of the second class, it is said that it is not its mere existence but its exercise by Congress which may be incompatible with the exercise of the same power by states, and that the states may legislate in the absence of Congressional regulations. *Sturges* v. *Crowninshield*, 17 U. S. 4 Wheat. 122, 193 [4: 529, 548]. When the subjects in **656**] *regard to which the laws are enacted, instead of being of a local nature affecting interstate commerce but incidentally, are national in their character, then the nonaction of Congress indicates its will that such commerce shall be free and untrammeled. It has been held that it is not every enactment which may incidentally affect commerce and the persons engaged in it that necessarily constitutes a regulation of commerce within the meaning of the Constitution. *Sherlock* v. *Alling*, 93 U. S. 99 [23: 819]; *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 284 [21: 164]; *Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238]; *Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804]. A state statute was held valid in this last cited case, which provided for an examination of engineers of locomotives by a state board of examiners, and it was applied to an engineer engaged in running a locomotive on one continuous trip from Mobile in Alabama to Corinth in Mississippi. It was held to be a valid police regulation.

Legislation which is a mere aid to commerce may be enacted by a state, although at the same time it may incidentally affect commerce itself. *Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238].

On the other hand, a state statute which only assumed to regulate those engaged in interstate commerce while passing through the particular state has been held void because it in effect and necessarily regulated and controlled the conduct of such persons throughout the entire voyage, which stretched through several states. Such is the case of *Hall* v. *De Cuir*, 95 U. S. 485 [24: 547].

The statute in that case, after providing that common carriers of passengers should have the right to refuse certain classes of undesirable and improper persons passage on their vehicles, gave the power to carriers to expel such persons after admission, and also gave them power to expel all who should commit any act in violation of the rules and regulations prescribed for the management of the business of the carrier after such rules and regulations should have been made known, "provided such rules and regulations make no discrimination on account of race or color;" and **657**] the statute also *prohibited all persons engaged in the business of common carriers of passengers, except in the cases enumerated, from refusing admission to their conveyances, or from expelling therefrom any person whatsoever. The plaintiff was a person of color and took passage upon the steamboat owned by the defendant's intestate on her trip up the river from New Orleans to Hermitage, both within the state of Louisiana. Being refused accommodations on account of her color in the cabin especially set apart for white persons, she brought an action under the provisions of the state act above referred to for the purpose of recovering damages sustained on account of such refusal. The defense set up was that the statute was inoperative and void as to the owner of the steamboat, because as to his business it was an attempt to regulate commerce among the states, and it was so held here. Although, in the case in question, the passage was taken from and to a point both of which were within the state of Louisiana, it was held that such fact was not material; that the effect of the statute necessarily was to regulate interstate commerce.

The court, speaking by *Mr. Chief Justice* Waite, said:

"While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the *conduct of carriers while[**658** within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It is seen from this reasoning that the foundation for holding the act void was that it necessarily affected the conduct of the carrier and regulated him in the performance of his duties

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outside and beyond the limits of the state enacting the law. A provision for the delivery of telegraphic messages arriving at a station within the state is not of the same nature as that statute, and would have no such effect upon the conduct of the telegraph company with regard to the performance of its duties outside the state.

In *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347 [30: 1187, 1 Inters. Com. Rep. 306], the state of Indiana required telegraph companies to deliver despatches by messengers to the persons to whom the same were addressed, or to their agents, provided they resided within one mile of the telegraph company's station within the city or town within which such station was. That statute was held to conflict with the clause of the Constitution of the United States which vests in Congress power to regulate commerce among the states in so far as it at-**659**]tempted *to regulate the delivery of such despatches to places situate in other states, and it was said that the reserved police power of the state under the Constitution, although difficult to define, did not extend to the regulation of the delivery at points without the state of telegraphic messages received within the state. In that case the action was brought by Pendleton to recover of the telegraph company the penalty of $100, prescribed by statute for failing to deliver at Ottumwa, in the state of Iowa, a message received by the company in Indiana for transmission to that place. The action was brought in the state of Indiana and it was held that it was an attempt on the part of that state to enforce its own statute outside and beyond the territorial limits of the state. The object of vesting the power to regulate commerce in Congress, it was said by *Mr. Justice* Field speaking for the court in that case, was "to secure with reference to its subjects uniform regulations, where such uniformity is practicable, against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different states if each state was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each state. . . . Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states."

In *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 [26: 1067], it was held that a telegraph company in respect to its foreign and interstate business was an instrument of commerce subject to the regulating powers of Congress, and that state laws, so far as they imposed upon it a specific tax upon each message which it transmitted beyond the state, or which an officer of the United States sent over its lines on public business, were unconstitutional.

With this brief reference to some of the cases that have been decided in this court respecting the commerce clause in the Constitution, the question arises, Which of the classes spoken of **660**]*in *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204 [38: 962, 4 Inters. Com. Rep. 649], includes the statute under review? Is it a mere police regulation, that but incidentally affects commerce, such as *Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804], and which, at any rate, would be valid until Congress should legislate upon the subject; or is it of such a nature, so extensive and national in character, that it could only be dealt with by Congress? We do not think it is the latter. It is not at all similar in its nature to the case above cited of *Hall* v. *De Cuir*, 95 U. S. 485 [24: 547]. In one sense it affects the transmission of interstate messages, because such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it. But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor.

The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there *any [**661** regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several states by holding that in regard to such a message as the one in question, although it comes from a place without the state, it is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery), at least so far as legislation of the state tends to enforce the performance of the duty owed by the company under the general law. So long as Congress is silent upon the subject, we think it is within the power of the state government to enact legislation of the nature of this Georgia statute. It is not a case where the silence of Congress is equivalent to an express enactment. As has been said, this statute levies no tax and seeks no revenue from the company by reason of these interstate messages.

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The case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29: 158], 1 Inters. Com. Rep. 882, is an illustration of the invalidity of an attempt to tax persons or property received and landed within a state which had been transported from another state. It was there held that the tax was upon interstate commerce and a regulation thereof upon a matter national in character, requiring uniformity of regulation, and that, therefore, the power of Congress was exclusive. If Congress were silent, no exactions could be made or levied. In the case at bar there is no tax laid upon these messages, and no obstruction is placed in the way of the company in regard to the performance of any duty owed by it in connection with them. Instead of obstructing this statute aids commerce. The subject of the act is not national in character nor is uniformity at all requisite. Conduct which might incur the penalty of $100 in one state might violate no statute in another, and in still a third might subject the carrier to a penalty of but $50, and yet there would exist no reason for uniformity of rule governing the subject, and the carrier would really suffer nothing from its absence.

Nor is the statute open to the same objections [662] that were *regarded as fatal in *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347 [30: 1187], 1 Inters. Com. Rep. 306. No attempt is here made to enforce the provisions of the state statute beyond the limits of the state, and no other state could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the state of Georgia. No confusion therefore could be expected in carrying out within the limits of that state the provisions of the statute. It is true it provides a penalty for a violation of its terms and permits a recovery of the amount thereof irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it. We do not mean to be understood as holding that any state law on this subject would be valid, even in the absence of congressional legislation, if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legislation. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harass and to impede it. While the penalty in the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the state to enact.

While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet on the other hand there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the state over the subject.

*Again, it is said that this company en- [663] tered into a valid contract in Alabama with the sender of the message, which provided that it would not be liable for mistakes in its transmission beyond the sum received for sending the message, unless the sender ordered it to be repeated and paid half the sum in addition, and this statute changed the liability of the company as it would otherwise exist. The message was not repeated. This kind of a contract, it is said, was a reasonable one and has been so held by this court. *Primrose* v. *Western U. Teleg. Co.* 154 U. S. 1 [38: 883]. This, however, is not an action by the person who sent the message from Alabama, and this plaintiff is not concerned with that contract, whatever it was. There was no mistake in the transmission of the message, and there was no breach of the agreement. The action here is not founded upon any agreement and the judgment neither affects nor violates the contract mentioned. Nor are we here concerned with the provisions of the 3d section of the act relating to the damages to be recovered in the case of cipher messages. This was not such a message, and this judgment is solely based upon the penalty granted by the statute for nondelivery, and could be sustained even if the 3d section of the act were not valid, which is a question we do not decide nor express any opinion concerning it. The residue of the act could stand without the 3d section.

After a careful review of the case, we think *the judgment is right and that it should be affirmed.*

Mr. Justice **Shiras** and *Mr. Justice* **White** dissent, and refer for their reasons to the case of *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347 [30: 1187, 1 Inters. Com. Rep. 306].

FRANCIS A. COFFIN, *Plff. in Err.*, [664
v.
UNITED STATES.

(See S. C. Reporter's ed. 664-687.)

Indictment for misapplying funds of bank—abettors—instruction—particular fact—refusal of instruction—assuming facts—context—implication of law—bona fide transaction—making false entries.

1. A common purpose to subserve the joint interests of the principal offender and of his aider and abettor by misapplication of the funds of a bank is not necessary to create the offense of aiding and abetting a bank officer in misapplying the bank funds in violation of U. S. Rev. Stat. § 5209, but it is immaterial whom they may have intended to benefit if there existed the intent to defraud named in the act of Congress.
2. The acts charged against the aider and abettor are sufficiently connected with the offense stated against the principal offender, in an indictment charging a bank president with misapplying a specific sum in a certain manner, and then alleg-

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ing that the other parties did abet "said" president "as aforesaid" to misapply the funds of the bank, specifying a sum identical in amount with that previously named.

3. A requested instruction which is fully covered by the general charge of the court is properly refused.

4. The absence of one of several possible motives for the commission of an offense cannot be singled out from all other facts of the case, and the court required to instruct as to the weight to be given to that particular fact independent of the other proof.

5. Refusal to give a requested instruction stating a correct legal proposition is not error unless there is evidence making it applicable to the case.

6. Instructions which assume facts to be proved which are in dispute are not erroneous where the court repeatedly instructs the jury that they are the sole judges of the facts, and that the views of the court on questions of fact are not controlling.

7. An instruction that the abettors should be proved to have done or said something showing their consent to or participation in the unlawful acts of the principal offender is not erroneous, where from the entire context it is clear that the court required the jury to find participation as well as consent.

8. An allegation that a bank had been "heretofore" created under the laws of the United States, in an indictment under U. S. Rev. Stat. § 5209, is, even if material and if the word should have been "theretofore," only an imperfect statement of that which the law implies to be true after verdict.

9. An instruction that an entry on bank books which truly represents "an actual bona fide transaction" would not constitute a false entry, is not misleading as an assumption that an entry is false unless it represents a transaction entered into in good faith and without fraud.

10. An indictment for aiding and abetting a bank president in misapplying funds of the bank and making false entries is not defective because it avers that the principal offender intended to defraud the bank and also to deceive an agent of the comptroller, while it charges the aiders and abettors only with an intent to deceive such agent.

[No. 801.]

Argued March 5, 6, 1896. Decided May 4, 1896.

IN ERROR to the District Court of the United States for the District of Indiana to review a judgment convicting Francis A. Coffin of having aided and abetted the president of the Indianapolis National Bank in criminal misapplication of the moneys, funds, and credits of that bank and with having aided and abetted said president in making a false entry on the books of the bank, in violation of U. S. Rev. Stat. § 5209. *Affirmed.*

See same case, 156 U. S. 432 (39: 481).

Statement by *Mr. Justice* **White:**

The various counts of the indictment herein charged Francis A. Coffin, the plaintiff in error, Percival B. Coffin, and Albert S. Reed with having (in violation of U. S. Rev. Stat. § 5209) aided and abetted one Haughey, as president of the Indianapolis National Bank, in criminal misapplications of the moneys, funds, and credits of that bank, and with having aided and abetted the making or causing to be made by Haughey of a false entry on the books of the bank. A prior conviction of the plaintiff in error and Percival B. Coffin, upon the indictment in question, was here reviewed and the verdict and sentence were reversed. 156 U. S. 432 [39: 481]. On the second trial only seventeen out of the fifty counts contained in the indictment were submitted to the jury, and a verdict was returned finding the plaintiff in error guilty on seven counts, that is, Nos. 4, 9, 11, 12, 13, 14, and 39, and the defendant Percival B. Coffin not guilty. After the overruling of a motion for a new trial and in arrest of judgment, plaintiff in error was sentenced on each of the seven counts to imprisonment in the penitentiary for eight years. The imprisonment under each count was ordered to be concurrent, and not cumulative. This writ of error was thereupon sued out.

Messrs. **W. H. H. Miller, F. Winter,** and *John B. Elam* for plaintiff in error.

Mr. **Holmes Conrad,** Solicitor General, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Fifty-two requests for instructions were submitted on behalf of the defendants to the trial court. The assignments of error are sixty-two in number. The uselessness of this multitude of assignments is demonstrated by the fact that but nineteen out of the sixty-two were relied upon at bar. These nineteen are grouped in the brief of counsel for plaintiff in error under *twelve [666 headings. We shall confine our examination to the consideration of the matters embraced under these headings, and in the order in which they are discussed by counsel.

I. Point 1 alleges that the court erred in refusing to give instructions requested, numbered 47 and 48.

No. 47 reads as follows:

"47. In the indictment in this case it is charged that Theodore P. Haughey, president of the Indianapolis National Bank, with intent to injure and defraud the bank, wilfully misapplied the funds of the bank, and also that, with intent to defraud the bank and to deceive an agent appointed or to be appointed to examine its affairs, he made or caused to be made false entries upon the books of the bank. The defendants Francis A. Coffin and Percival B. Coffin are charged with having, with like intent, aided and abetted said Haughey in said wrongful acts. In order to sustain this charge of aiding and abetting against the defendants the evidence must show beyond a reasonable doubt that the defendants acted in the matter with a like intent as that attending the action of Mr. Haughey—that is, it must be shown that the Coffins, charged as aiders and abettors, stood in a similar relation to the alleged crime as Mr. Haughey; that they approached it from the same direction and touched it at the same point. If, as matter of fact, in any of the transactions charged as criminal in this indictment Mr. Haughey acted with one intent and the defendants acted with a different and unlike intent, then, as to that

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transaction, they are not guilty as charged in this indictment."

No. 48 is similar to No. 47, except that the words "stood in a similar relation to the alleged crime," contained in the third sentence of No. 47, are omitted in No. 48.

We held in our former opinion (156 U. S. 446 [39: 489]) that the language of the statute fully demonstrated the unsoundness of the contention then advanced, that no offense was stated in the indictment against the aiders and abettors, because in none of the counts was it asserted that they were officers of the bank or occupied any specific official relation to it.

The ruling then made establishes the error 667] of the foregoing *requests to charge, and hence practically disposes of the questions arising under this heading. However, as counsel now contend that their former position was misunderstood and was not adequately met by the reasoning previously adopted, we add the following considerations: The contention now advanced admits that one not an officer of the bank may be, under some circumstances, an aider or abettor in violation of U. S. Rev. Stat. § 5209, but urges that in order to be such aider or abettor the person so charged, when not an officer of the bank, must stand in such relation to the recreant bank officer, or have such interest with him in other enterprises, "as that they may work together for the hurt of the bank for a common purpose." In other words, the argument substantially asserts that an essential element of the offense of aiding and abetting is the existence of a common purpose between the officer and the aider and abettor to promote or subserve the joint interest of the wrongdoers in enterprises in which they are mutually interested. But the statute nowhere requires that there should be a "common purpose" on the part of the principal and the aider and abettor to subserve their joint interests by the misapplication committed. It only requires that there should be a misapplication of the moneys of the bank with a joint intent to "injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of such association." It is clear that the statute has been violated if the one charged with aiding and abetting is shown to have actually aided and abetted the officer of the bank in misapplying its funds, no matter whom the accused may have ultimately intended to benefit by his misconduct, provided, of course, there existed the intent to defraud enumerated in the act of Congress. In accord with this view the court properly instructed the jury that there must have existed in the minds of both Haughey and the defendants the wrongful intent stated in the law. The intent contemplated by counsel in the requested instruction was evidently the other and different one heretofore referred 668]to, namely: the beneficial purpose to*be subserved or common interest to be promoted by the performance of the wrongful act. But, as we have said, it is not essential that the intent should, in this particular, have been coincident, provided there existed the intent which the law ordains.

The proposition upon which reliance is mainly placed is that the person charged as an aider and abettor "must stand in the same relation to the crime as the principal, approach it in the same direction, touch it at the same point." This language is taken from the opinion in *State* v. *Teahan*, 50 Conn. 92. In that case it was held that one who bought intoxicating liquors from another, the sale being illegal, was not an aider and abettor of the offense of unlawful selling within the meaning of a general statute, which provided that "every person who shall assist, aid, counsel, cause, hire, or command another to commit any offense, may be prosecuted and punished as if he were a principal offender." The court said:

"The abetting intended by it is a positive act in aid of the commission of the offense—a force, physical or moral, joined with that of the proprietor in producing it. This is clear from the context, where aiding is classed with assisting, causing, hiring, and commanding. The abettor, within the meaning of the statute, must stand in the same relation to the crime as the principal, approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side. He touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges a man to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offense wholly on the other side. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he cannot be said to assist him in it. The whole force, moral or physical, that went to the production of the crime as such was the seller's."

Separated from the context in which the sentence was used *by the Connecticut [669 court, it becomes meaningless and confusing. The direction from which the parties must approach the transaction, that is, the intent to defraud, is accurately specified in the statute under consideration. The meaning which counsel affix to the sentence which they excerpt from *State* v. *Teahan*, *supra*, is illustrated by their assertion that it appears from the bill of exceptions that Haughey, the president, had no interest in the cabinet company for whose benefit the indictment alleges the misapplications and false entries were made, nor any interest in or relation to the defendants, and that neither the plaintiff in error nor any other person connected with or interested in the cabinet company, or any of the other companies, had any interest in the bank or with Haughey of any kind whatsoever. Conceding this to be so, the accused was none the less guilty of a violation of the statute if he aided and abetted in the misapplication of the funds of the bank with the intent specified in the law. The contention that if Haughey, the president, intended to benefit the bank by the transactions complained of, he therefore could not have had

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a common purpose, with the person receiving the money, to defraud the bank, amounts simply to the assertion that if the proof showed that there was no intent on the part of Haughey to defraud the bank, it was the duty of the jury to acquit. However, the real premise, upon which the whole argument rests, is that if the accused was guilty at all, he was guilty as a principal and not as an aider and abettor. But it is not necessary to give much time to the consideration of this claim, in view of the clear intent of Congress as expressed in the statute under review. It is evident that no matter how active the co-operation of third persons may have been in the wrongful act of a bank officer or agent, such third person is required to be charged as an aider and abettor in the offense and prosecuted as such. The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons co-operating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender. [670] In every criminal offense *there must, of course, be a principal, and it follows that without the concurring act of an officer or agent of a bank, third persons cannot commit a violation of the provisions of § 5209. If, therefore, a violation of the statute in question is committed by an officer and an outsider the one must be prosecuted as the principal and the other as the aider and abettor.

II. Under point 2, error is alleged to the refusal of the court to give the following requested instruction:

"6. The fourth count of the indictment charges that Theodore P. Haughey, as president of the Indianapolis National Bank, did, on the 20th day of May, 1893, unlawfully, wilfully, and feloniously misapply certain moneys of said bank in said count specifically named, to wit, the sum of $3,272.29. The count does not charge that the defendants aided or abetted said Haughey in misapplying the same moneys which he is charged to have misapplied. Under these circumstances this count charges no crime against the defendants, and on this count you should not convict the defendants."

The proposition embodied in this request rests on the assumption that the aiding and abetting clause in the fourth count of the indictment does not refer to the identical misapplication which that count charges to have been committed by the president. In other words, that there is a want of identity between the offense which the accused is charged to have aided and abetted and the offense there averred to have been committed by the president. The count charges the president with having on the 20th of May, 1893, misapplied a specific and enumerated sum by then and there "paying and causing said sum to be paid out of the moneys, funds, and credits of said association upon certain divers checks drawn upon said association by the Indianapolis Cabinet Company, which checks were then and there cashed and paid out of the moneys, funds, and credits of said association, which said sum aforesaid and no part thereof was said Indianapolis company entitled to withdraw from said bank because said company had no funds in said association to its credit." The aiding and abetting clause charges that the accused did "on the 20th of *May, 1893, aid and abet said [671] Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association, to wit," specifying a sum identical in amount with that referred to in the previous part of the indictment. The contention is that the word "said" preceding and the words "as aforesaid" following the name of Haughey, president, do not refer to the sum previously charged to have been misapplied, and therefore there is a want of relation between the averred misapplication and the alleged aiding and abetting. When this case was previously before us substantially the same general complaint was made against all the counts of the indictment, the contention then being that the words "said" and "as aforesaid" did not aver that those who aided and abetted knew that Haughey was the president of the bank, and, hence, the counts were bad. We said (p. 449): "Without entering into any nice question of grammar, or undertaking to discuss whether the word 'said' before Haughey's name, and the words 'as aforesaid' which follow it, are adverbial, we think the plain and unmistakable statement of the indictment as a whole is, that the acts charged against Haughey were done by him as president of the bank, and that the aiding and abetting was also knowingly done by assisting him in the official capacity in which alone it is charged that he misapplied the funds." This reasoning is conclusive of the point now made. The words "said" and "as aforesaid," which we then considered as sufficiently referring to the capacity in which the act was averred to have been committed in the first part of the indictment, also adequately connected the acts charged against the aider and abettor with the offense stated against the principal offender.

III. This point complains of the refusal to give the following instructions:

"19. Evidence has been introduced upon the trial with reference to drafts drawn by the Indianapolis Cabinet Company on the Tufts Cabinet Company and accepted in the name of the latter company, and it is claimed on behalf of the government that there never was any such organization *as said Tufts Cab- [672] inet Company, but that the same was wholly fictitious. This evidence has been permitted to be introduced before you for the purpose of throwing light upon the intent of the defendants and of Theodore P. Haughey in connection with the charge of wrongdoing by them in the various counts of the indictment. This evidence can only be considered by you for this purpose, as there is no charge in any count of the indictment based upon this particular transaction, and the light it may throw upon the intent of the defendants, or either of them, or of said Haughey must depend upon all the circumstances shown to have attended the transaction."

"43. As you have been already told, the government in this case is prosecuting the

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defendants for particular transactions charged to have been unlawful and criminal, as specifically set forth in certain specific counts of the indictment. Evidence has been introduced by the government of other transactions between the Indianapolis Cabinet Company, and the Indianapolis National Bank, and various other parties. This evidence has been allowed to go before you solely upon the question of intent and should be considered by you only in so far as it may tend to illustrate the intent of Mr. Haughey or of the defendants. Except for that purpose you have nothing to do with other transactions than those specifically charged and prosecuted under this indictment. Except as illustrating such intent, the question of the lawfulness or unlawfulness of such other transactions is one with which you have nothing to do."

We think the instructions here requested were properly refused because fully covered by the general charge of the court. *Northern P. R. Co.* v. *Urlin*, 158 U. S. 271, 277 [39: 977, 982]; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 433 [36: 485, 493]; *New York, L. E. & W. R. Co.* v. *Winter*, 143 U. S. 74 [36: 80]; *Ayers* v. *Watson*, 137 U. S. 584, 601, 603 [34: 803, 810, 811].

Repeatedly in the instructions given, the jury were told that they could not find the defendants guilty, unless they were satisfied beyond a reasonable doubt that Haughey and the defendants had committed the specific criminal acts alleged in the counts of the indictment [673] which were *submitted to them with the intent therein charged. Thus the court, in the opening of its charge, said: "You have nothing to do with the other counts of the indictment, which are withdrawn from your consideration." Again, in another portion of the charge: "The particular acts of misapplication described in the several specific counts of the indictment on trial before you must be established by the proofs as therein respectively charged." And yet further: "You are not authorized to find the defendants guilty of any other charge of aiding and abetting in the wilful misapplication of the moneys, funds, and credits of said bank, except those specifically charged in the first twelve counts of the indictment now on trial before you, and also on the specific charges elected by the government, as above stated, under the thirteenth, fourteenth, fifteenth, and sixteenth counts of the indictment." Having thus repeatedly called the attention of the jury to the fact that they were confined in the determination of the guilt of the accused to the specific matters submitted to them, the court, on the subject of intention, also correctly instructed them that for this purpose and for this purpose alone they might consider the proof introduced as to other misapplications than those charged in the counts which were before them. For instance, the court observed: "In determining whether they had the criminal intent to deceive or defraud as charged, or whether they acted in good faith, you should take into consideration the situation of the parties, the course of business between them as well as between the cabinet company and the bank, and all the facts and circumstances in proof before you." We think there can be no doubt that the charge of the court as given, therefore, left no question in the minds of the jury that they could only find the defendants guilty upon the particular matters specified in the counts submitted to them, and that they could not find them guilty of a different misapplication from that charged, whether or not there was proof establishing such other misapplications.

IV. The 4th point alleges, as error, the refusal of the court to give the following requested instruction:

*"15. The intent on the part of Mr. [674] Haughey in the alleged misapplications of the moneys of the bank to injure or defraud the bank is an essential ingredient of the offense charged against the defendants. In determining the question, therefore, of Mr. Haughey's intent, you should take into consideration the relation he bore to this bank, both as an officer and shareholder, and whether the evidence shows any motive on his part for defrauding or injuring the bank, and it is for you to say, in the light of all the evidence, whether Mr. Haughey, in letting the cabinet company have such moneys, did so with such intent. If the evidence does not satisfy you beyond a reasonable doubt of such intent, then the government's case is not made out. In determining this question you may consider whether Mr. Haughey was in any way benefited, or hoped to be benefited, by the loans or advances to the cabinet company; and, if you find from the evidence that there was no such benefit or hope thereof on the part of Mr. Haughey, such fact may be considered by you in determining whether there was any such intent as is charged, and, if the making of such loans and advances was under such circumstances shown by the evidence as would injure or tend to injure Mr. Haughey, that fact may be considered in like manner and for the same purpose."

The complaint is made that nowhere in the charges given did the court expressly inform the jury that they might consider, in determining the question of criminal intent, whether the evidence disclosed that the motive of personal gain induced Haughey to commit the offense charged. But the instruction requested, in the particular mentioned, was not upon the law of the case, but upon the inferences to be drawn from the evidence, a matter peculiarly within the province of the jury. The court did charge that the jury might look at all the proofs in the case in determining the question of guilty intent, and while it also instructed that it was not necessary for the commission of this offense that the officer of the bank who makes a wilful misapplication should derive any personal benefit or advantage from the transaction, the court added that "when the moneys, funds, or credits of the bank are unlawfully *taken from its possession and know- [675] ingly and wilfully misapplied by converting them to the use of any person or company other than the bank, with the intention to injure and defraud, the offense described in the statute has been committed." So, also, the court elsewhere in its instructions to the

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jury said: "If loans and discounts are made by the president of a national bank in bad faith for the fraudulent purpose of giving gain or advantage to some other person or company, and not in the honest exercise of official discretion, the officer making them passes the line dividing honesty and dishonesty, and his action is criminal if done with intent to injure and defraud the banking association, and it so results."

The accused could not properly single out the absence of one of several possible motives for the commission of an offense, isolate it in an instruction from all the other facts of the case, and demand that the court instruct the jury as to the weight to be given this particular fact, independent of all the other proof in the case. The charge as a whole having correctly conveyed to the jury the rule by which they were to determine from all the evidence the question of intent, we think there was no error to the prejudice of the defendant in refusing the request which he asked.

V. This point alleges error in the refusal of the court to give two instructions requested by plaintiff in error, one to the effect that the allowance of mere overdrafts was not of itself sufficient to show any criminal intent on the part of Haughey, and the other, that notwithstanding that the statute forbids loans to any one person in excess of 10 per cent of the capital stock, that such loan, although unlawful, was not for that reason alone criminal. The first instruction referred to is, in substance, given in various parts of the charge of the court. Thus the court instructed the jury:

"On the counts for wilful misapplication the questions for you to determine are: Did Theodore P. Haughey, as president of the Indianapolis National Bank, knowingly and unlawfully and with intent to injure and defraud said bank in manner and in form as charged, wilfully misapply the moneys, funds, or credits of said bank by cashing, dis- [676] counting, and paying for the *use and benefit of the said Indianapolis Cabinet Company, knowing it to be insolvent, out of the moneys, funds, and credits of the bank without authority from its board of directors, any notes, drafts, or bills of exchange drawn by and upon insolvent persons, firms, and companies, knowing them to be insolvent, and knowing such notes, drafts, or bills of exchange to be valueless, in manner and form as charged in either count of the indictment? If he did, he has committed the offense of wilful misapplication as charged in the count or counts of the indictment now on trial relating to that subject which you find to have been so proved."

The court also said:

"If Haughey and the defendants withdrew moneys from the bank for the use of the cabinet company by means of checks drawn by it on said bank when it had no funds or moneys on deposit against which to draw, if they acted in good faith, honestly believing that the cabinet company would be able to repay the same when required, they would not be guilty of the intent to defraud the bank as charged; but, on the other hand, if they acted in bad faith and did not believe and had no reasonable ground to believe that the cabinet company could repay such overdrafts when required to do so, then they had no lawful right to make such overdrafts or allow them to be made."

We think the second requested instruction was also fully covered in the charge actually given.

VI. The refusal to give the following instruction was assigned as error:

"18. The counts of the indictment relating to misapplication charge a misapplication of the moneys of the bank. These charges of misapplication are not sustained by merely showing that the bank gave to the cabinet company credit to which it was not entitled, unless it is also shown that as a result of such credit the cabinet company was enabled to and did withdraw from the bank moneys of some kind, resulting in loss to the bank. Thus, evidence of the giving by the cabinet company, and the receiving by the bank, of renewal paper upon which nothing was withdrawn from the bank, would not sustain the *charge of criminal misapplication of [677 the credits of the bank."

There is no doubt of the soundness of the abstract principle which this request embodied. If the money of a bank be misapplied by paying it out on worthless paper, it is obvious that a subsequent renewal of such paper upon which nothing was actually obtained could not have misapplied the money of the bank. Whilst this is true in the abstract, the refusal to give, when requested, a correct legal proposition, does not constitute error, unless there be evidence rendering the legal theory applicable to the case. *Stryker* v. *Crane*, 123 U. S. 527 [31: 194], and authorities there cited.

The bill of exceptions contains the following statement relative to the ninth count, to which it is asserted the instruction asked related:

Be it further remembered that there was evidence tending to show that the transactions mentioned in the ninth count of the indictment consisted solely of the taking up by the Indianapolis Cabinet Company of two drafts theretofore drawn by it upon customers and discounted by said bank, and which had not been paid or accepted by the drawees, the aggregate amount of said drafts being $3,467.23, by a new draft drawn by said Indianapolis Cabinet Company on one of the drawees in the drafts taken up for the sum of $3,467.23, and that there was evidence tending to show that the drawee in said last-mentioned draft was, at the time the same was drawn and accepted by said bank, solvent and indebted to the cabinet company in an amount greater than the amount of said draft, for which said company had a right to draw.

"There was evidence tending to show that the drawee in said draft above mentioned was, at the time the same was drawn and placed in said bank, insolvent, and said draft was never forwarded for acceptance or collection, but was held by the direction of Theodore P. Haughey in said bank, and that said defendant knew that the drawee of said draft always refused to accept or honor drafts, and

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that he made all his settlements either in cash or by note, and that the indebtedness mentioned in said draft was afterwards settled by 678] the *note of said drawee, but was not turned over to said bank, but was delivered by said defendant to other creditors. There was evidence tending to show that the notes which were claimed to have been given for said indebtedness were not executed until after the failure of the bank, and that the disposition to other creditors was made by Albert S. Reed."

From this statement it is impossible to determine whether there was any evidence tending to show a state of fact adequate to make the instruction which was refused pertinent, and there is no other matter in the bill of exceptions to which the legal principle stated could apply. It is true that counsel say that by the bill of exceptions it "appears that other transactions were based upon the renewals of paper merely without in any way depleting the funds of the bank." But the portion of the bill of exceptions which is referred to as supporting this statement relates solely to the evidence offered on the count alleging a false entry, and therefore in no way involves the other counts of the indictment which charged misapplication. We therefore find that error was not committed by the refusal in question.

VII. The refusal to give the following instruction was assigned as error:

"40. In order to warrant a conviction of the defendants as aiders and abettors of Mr. Haughey in the making of false entries, as charged in this indictment, it is not enough to show that the entries were false and that Mr. Haughey made them with the criminal intent charged, but it must also be shown by the evidence, beyond a reasonable doubt, that the defendants had knowledge of the making of such entries, and that they did acts aiding and abetting Mr. Haughey in making the same with like criminal intent. Proof of the fact that the defendants presented the paper covered by the false entry and received credit for it is not sufficient to warrant their conviction for aiding and abetting the making of the false entry on the books, unless some knowledge of or connection with the making of such false entry is brought home to them."

This instruction is fully covered in the following portion of the charge of the court, the giving of which is also alleged to have been error:

679] *"If you are satisfied that Theodore P. Haughey did knowingly and purposely make or cause to be made the false entries as charged, you cannot find the defendants guilty as aiders and abettors unless you are satisfied that they with like intent unlawfully and knowingly did or said something showing their consent to and participation in the unlawful and criminal acts of said Haughey, and contributing to their execution."

The instruction is not open to the objection that the expression "unlawful and criminal acts," used in the last sentence, might have been understood by the jury as relating to unlawful and criminal acts of Haughey generally.

The court instructed the jury that an entry made knowingly and purposely in the books of the bank, with the intent to deceive or defraud, as charged, which represented as an actual transaction one which did not exist, or an entry knowingly and purposely made with the intent to deceive and defraud, which was false in a material part, constituted a false entry within the statute. It appeared that the entry under the thirty-ninth count related to six pieces of paper which were brought to the bank on May 29, 1893, aggregating the face value of $44,000, and the court instructed the jury as to these notes that "if the paper was never accepted or discounted by the bank, but was simply left with the bank as a mere memorandum and not as a deposit, and for the fraudulent purpose of enabling fictitious entries to be made on the books of the bank with the intent to deceive and defraud, such entry on the books of the bank would constitute a false entry." In the light of these instructions, the expression "unlawful and criminal acts" could only have been interpreted by the jury as having reference to the acts of Haughey attendant upon and connected with the making of the entry, such as the taking by him of the paper to be used as the supposed basis of the false credit.

VIII. This covers three assignments of error (Nos. 59, 60, 61), which assert error in the giving of the following instructions:

"It is further shown by the evidence that large sums of money were obtained from the bank by the Indianapolis Cabinet*Com-[680 pany by means of notes, drafts, and bills of exchange which were wholly or partially valueless.

"It is also proved that various sums of money were obtained from the bank by means of checks drawn upon it by the Indianapolis Cabinet Company, which were presented to and cashed by the bank out of its moneys and funds when said cabinet company had no moneys, funds, or credits on deposit with said bank with which to pay said checks.

"It is also shown that the cabinet company and the various corporations affiliated with it organized by the defendants were during the whole period of time covered by the indictment insolvent."

It is claimed that these instructions assumed facts to have been proved which were in dispute, and also indirectly stated to the jury, as settled, propositions which were disputed and were those most earnestly contested in the case.

These criticised excerpts of the charge are contained in the latter portion thereof, and were part of a brief *résumé* of the salient evidence in the case. To guard against the danger that the jury might consider that there was a purpose to remove the facts from their consideration or control their judgment thereon, the court repeatedly instructed that the determination of the facts was, by law, in them vested.

Thus, immediately following the criticised portion of the charge, the court said: "Carefully weigh all the evidence in the case and from it, under the rules of law which I have given you, determine the guilt or innocence

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of the defendants. With you, and not with the court, rests the responsibility of finding and determining the facts. The views of the court on questions of fact are not controlling upon you."

Again, in the opening paragraph of the charge, it was said: "You are the sole judges of the facts and of what is proved, and any statements of fact made by the court are not controlling upon you. Such statements are intended to invite your attention to the matters of fact which the court deems important, and not for the purpose of controlling your judgment."

In the earlier portions of the charge it was especially left to the jury, when considering whether or not an offense had been commit-
681] ted, *to determine whether the money had been obtained by the cabinet company on worthless paper, or by payments made by the bank on checks of the company when it was insolvent and its account with the bank was overdrawn. The jury were also instructed at length with reference to the charge contained in the indictment, that divers persons, firms, and corporations were insolvent. We give an extract from the charge on this subject:

"If you are satisfied that the Indianapolis Cabinet Company, or any other person, firm, or corporation alleged to have been insolvent at the time charged, had not sufficient property or assets to pay its debts in full when wound up, then such person, firm, or corporation was insolvent in manner and form as charged in the indictment."

Keeping in mind the repeated cautions given by the court to the jury, it is impossible to perceive how the language of the court in the matter excepted to could have been understood by the jury as binding them to accept, as controlling, the statements of the court regarding the facts.

IX. The giving of the following instruction was assigned as error No. 55:

"In order to make the defendants liable as aiders and abettors, as charged in the indictment, it is necessary that they should be proved to have done or said something showing their consent to or participation in the unlawful and criminal acts of Theodore P. Haughey, and contributing to their execution as charged in the indictment."

It is complained that the instruction was erroneous because it assumes that Haughey had committed a criminal offense, and that the defendants were liable as aiders and abettors, if it was shown that they either consented to or participated in the unlawful and criminal acts of the president.

But prior to this portion of the charge the court directly instructed the jury that the guilt of Haughey was necessary to be established by the government. Following the instruction above quoted, the court also said:

"The burden of proving Haughey and the
682] defendants *guilty as charged rests upon the government, and this burden does not shift from it.

"Haughey and the defendants are presumed to be innocent until their guilt in manner and form, as charged in some count of the indictment, is proved beyond a reasonable doubt. To justify you in returning a verdict of guilty, the evidence should be of such a character as to overcome this presumption of innocence and to satisfy each one of you of the guilt of Haughey and the defendants as charged to the exclusion of every reasonable doubt."

It is not possible that the jury could have supposed that the court intended, from the portion of the charge claimed to be erroneous, that the acts of Haughey were "to be accepted and treated by them as criminal acts."

So, also, the jury could not have been misled, by the use of the disjunctive "or," into supposing that the court instructed them that mere consent of the defendants to the unlawful and criminal acts of Haughey would be sufficient to sustain a verdict of guilty. The consent or participation was required to be such as "contributed to the execution of" the unlawful and criminal acts of Haughey charged in the indictment. From the entire context it is clear that the court required the jury to find participation as well as consent. For instance, the court in its charge said to the jury:

"If you are satisfied that Theodore P. Haughey did knowingly and purposely make or cause to be made the false entries as charged you cannot find the defendants guilty as aiders and abettors unless you are satisfied that they with like intent unlawfully and knowingly did or said something showing their consent to and participation in the unlawful and criminal acts of said Haughey and contributing to their execution."

X. This alleges error in the following portion of the charge of the court:

"If Haughey and the defendants withdrew moneys from the bank for the use of the cabinet company by means of checks drawn by it on said bank when it had no funds or moneys on deposit against which to draw, if they acted in good faith, honestly believing that the cabinet company *would be [683
able to repay the same when required, they would not be guilty of the intent to defraud the bank as charged; but, on the other hand, if they acted in bad faith, and did not believe, and had no reasonable ground to believe, that the cabinet company could repay such overdrafts when required to do so, then they had no lawful right to make such overdrafts or allow them to be made."

But this instruction should be read in connection with the paragraph following, which is as follows:

"Every person is presumed to intend the natural and ordinary consequences of his own acts. Hence, if the natural and ordinary consequence of the acts of Haughey and the defendants, as shown by the proofs, were to injure and defraud the bank as charged, you would be authorized to find that such was their intent, if such intent is in harmony with the other proofs in the case."

It cannot be disputed that a bank president not acting in good faith has no right to permit overdrafts when he does not believe and has no reasonable ground to believe that the moneys can be repaid. And if, coupled with such wrongful act, the proof establishes that he intended by the transaction to injure and

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defraud the bank, the wrongful act becomes a crime.

XI. This embraces assignments of error Nos. 49 and 50, which allege error in the giving of the following instructions:

"If, however, the entry truly represents an actual bona fide transaction, then it would not constitute a false entry.

"But if the paper was never accepted or discounted by him for the bank, but was simply left with the bank as a mere memorandum and not as a deposit and for the fraudulent purpose of enabling fictitious entries to be made on the books of the bank with the intent to deceive or defraud as charged, such entry on the books of the bank would constitute a false entry."

These sentences were contained in the following paragraph of the charge of the court:

"An entry knowingly and purposely made on the books of the bank, with intent to deceive or defraud, as charged, which represents as an actual transaction one which does 684]not *and did not exist, or an entry knowingly and purposely made, with intent to deceive and defraud, as charged, which in a material part falsely and untruly represents an actual and existing transaction, would constitute a false entry within the meaning of the statute. If, however, the entry truly represents an actual bona fide transaction, then it would not constitute a false entry."

The objection to this portion of the charge is that it assumes that an entry is false unless it represents a transaction entered into in good faith and without fraud. It is contended that this instruction is within the condemnation of this court as expressed in its former opinion (156 U. S. 463 [39: 494]), where it was said:

"The exception reserved to the charge actually given by the court (on the subject of false entries) was well taken, because therein the questions of misapplication and of false entries are interblended in such a way that it is difficult to understand exactly what was intended. We think the language used must have tended to confuse the jury and leave upon their minds the impression that if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry exactly as it occurred constituted 'a false entry;' in other words, that an entry would be false, though it faithfully described an actual occurrence, unless the transaction which it represented involved full and fair value for the bank. The thought thus conveyed implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute. We think it is clear that the making of a false entry is a concrete offense which is not committed where the transaction entered actually took place, and is entered exactly as it occurred."

The objection is not meritorious. The trial court carefully distinguished between an entry based upon an actual discount of paper and credit predicated thereon, and a credit not representing an actual deposit or discount. The expression "bona fide" was used in the sense of "real," and but emphasized the word "actual." Nor is there force in the suggestion that the instruction "must have tended to confuse the jury and *leave [685 upon their minds an impression that if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry, exactly as it occurred, constituted a false entry." It is claimed that under the proof these instructions were wholly irrelevant. Reliance is placed upon a statement in the bill of exceptions "that the evidence showed that all the paper upon which the credit mentioned in said thirty-ninth count was based, was retained in said bank as a part of its assets until the same matured, when it was renewed by other paper of the same kind, and again renewed from time to time as it matured, until said bank failed, at which time said paper, so renewed, was in possession of said bank as a part of its assets and passed as such into the possession of the receiver, by whom it was held as a part of the indebtedness of the cabinet company to said bank, secured by the mortgage executed (to Haughey as trustee for said bank) by said cabinet company to secure the indebtedness of said cabinet company to said bank."

But this is entirely consistent with the claim that the original paper "was simply left with the bank as a mere memorandum, and not as a deposit," etc. The fact that other notes were substituted for this paper does not necessarily import that the original transaction was an actual one if the notes were originally given to the bank as a mere pretext to enable the false entry to be made, and the subsequent renewals were equally unreal and made for a like purpose. The receiver was empowered, finding them in the hands of the bank, to retain them as a part of its assets. Prior to the statement in the bill of exceptions, which we have quoted, the following recital appears: "It was claimed on behalf of the government, and evidence was by it introduced tending to show, that the paper was not bona fide paper, representing the value for which the same was credited or any substantial value, and that said paper was not actually discounted by said bank or actually received as a genuine deposit, but was only received as a memorandum deposit to serve for the time being only, for the purpose of giving the Indianapolis Cabinet Company an apparent credit upon the books of the bank, which in fact *it[686 did not have, and that said entries represented no actual transactions whatever." We think this extract clearly indicates that the charge as given was relevant to the issue.

XII. This heading alleges error in overruling the motion in arrest of judgment. We do not deem it necessary to consider it at length. It is predicated on the assertion that six of the seven counts upon which conviction was had were bad, because it alleged that the bank had been "heretofore" created and organized under the laws of the United States. If we assume that the word should have been "theretofore" in order to make it certain that prior to the finding of the indictment the association had been incorporated, and if we further assume that the allegation as to the incorporation of the bank

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was material, the averment was only an imperfect statement of that which the law implies to be true after verdict. Whart. Crim. Ev. § 760. Under this heading it is moreover contended that the thirty-ninth count was defective, because the principal offender was charged with having made the false entries with the intent to injure and defraud the bank, and also with the intent to deceive any agent appointed and any agent or agents who might thereafter be appointed by the Comptroller of the Currency to examine the affairs of the association, whilst the aiders and abettors were charged only with having had an intent to deceive the agent appointed by the Comptroller. The answer is self-evident. It was wholly immaterial that the principal offender should have had several intents, provided the principal and the aider and abettor were both actuated by the criminal intent specified in the statute. The alleged additional intent on the part of the principal offender might well have been treated as surplusage; besides it appears from the recital in the bill of exceptions that there was evidence tending to show that the purpose of Haughey in causing the false entry to be made was to deceive any officer who might be sent by the Comptroller of the Currency to make an examination of the bank, and that the paper upon which the entry was made, as stated in the count, was furnished by the defendant Coffin at the request of Haughey with a like intent.

687] *This completes the review of all the very numerous grounds of error which have been pressed upon our consideration, and the result is that we find that they are all without merit.

The judgment is therefore affirmed.

WARREN F. PUTNAM, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 687-715.)

Omission of part of a name—refreshing memory of witness—contemporaneous memoranda—exclusion of testimony—illegal checks by bank president—ratification—practice.

1. The omission of the words "of Exeter" from the name of a bank proved as "The National Granite State Bank of Exeter," in an indictment of the president of the bank for defrauding it, is immaterial.
2. Testimony given by a witness more than four months after the occurrence described is not contemporaneous for the purpose of refreshing his memory in giving testimony at a later time.
3. Surprise at unexpectedly adverse testimony of one's own witness does not create an exception to the general rule which restricts the right to refresh memory to contemporaneous memoranda or writing.
4. Exclusion of testimony on cross-examination on the ground that the matter had not been opened up by the other side is not prejudicial error, if the matter thus sought to be elicited is not offered by the cross-examining party at any subsequent stage of the trial.
5. The crime of a bank president begun outside of his own state by illegally drawing checks in the name of his bank on another bank, which paid them and debited them to his bank is completed in his own state, so as to be within the jurisdiction of the courts of that state, by his inducing his bank to ratify the debit, if such debit was illegal and not binding upon the bank without ratification.
6. The ratification of the power of the president of a bank to draw checks in its name when in another city is, in the absence of proof as to a course of business implying the power, a question for the jury.
7. There being in this case separate sentences of concurrent imprisonment under each of two counts of the indictment, this court, on affirming as to one and reversing as to the other, remits the case to the court below for further proceedings, instead of ordering a new trial.

[No. 578,574.]

Submitted January 23, 1896. Affirmed (by Divided Court) February 3, 1896. Petition for rehearing submitted March 2, 1896. Leave granted to file briefs on two questions March 9, 1896. Decided May 4, 1896.

IN ERROR to the Circuit Court of the United States for the District of New Hampshire to review a judgment convicting the defendant, Warren F. Putnam, upon the second and seventh counts of an indictment for violations of the provisions of U. S. Rev. Stat. § 5209. *Affirmed as to one count, and reversed as to the other*, and case remanded for further proceedings.

Mr. **Frank S. Streeter**, for plaintiff in error:

Variance is any such partial lack of harmony between an essential averment or a nonessential one, in a form precluding its rejection and the evidence, as renders the proof inadequate.

Bishop, New Crim. Proc. 484*a* 3.

Where the name of a third person is introduced in an indictment, as descriptive of some person or thing, the name must be proved as laid.

State v. *Copp*, 15 N. H. 216; *State* v. *McCoy*, 14 N. H. 364; *Million* v. *People*, 6 Ill. App. 537; *Zellers* v. *State*, 7 Ind. 659; *People* v. *Hughes*, 41 Cal. 234; *State* v. *Green*, 100 N. C. 547; *Hensley* v. *Com.* 1 Bush, 11, 89 Am. Dec. 604; *Matthews* v. *State*, 33 Tex. 102; *Livingston* v. *State*, 16 Tex. App. 652; *People* v. *Frank*, 1 Idaho, 200; *Reg.* v. *Dent*, 2 Cox, C. C. 334; *Reg.* v. *Carter*, 6 Mod. 168.

The existence of the bank is legally essential to the charge.

Anonymous, 3 Salk. 102; *Rex* v. *Morris*, 1 Ld. Raym. 337; *Turvil* v. *Ainsworth*, 2 Strange, 787; *Rex* v. *Patrick*, 1 Leach, C. C. 287; *Reg.* v. *West*, 2 Eng. Ry. & Canal Cas. 613; *Queen* v. *Registrar of Joint Stock Co.'s*, 10 Q. B. 839.

The name of a corporation must be proved exactly as laid, and the least variance is fatal.

Lithgow v. *Com.* 2 Va. Cas. 297; *State* v.

NOTE.—*As to use of memoranda to refresh memory of witness*, see note to Republic F. Ins. Co. v. Weide, 20: 894.

As to the scope and limits of a cross-examination, see note to Rea v. Missouri, 21: 707.

That ratification proves agency, see note to Cecil Nat. Bank v. Watsontown Bank, 26: 1099.

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Waters, 3 Brev. 507; *Newby* v. *Oregon C. R. Co.* Deady, 609; *United States* v. *Denicke*, 35 Fed. Rep. 407; *Com.* v. *Pope*, 12 Cush. 272; *McGary* v. *People*, 45 N. Y. 153; *Sykes* v. *People*, 132 Ill. 32.

In an indictment for an offense affecting a corporation, the fact of incorporation must be alleged and proved.

DeBow v. *People*, 1 Denio, 9; *State* v. *Murphy*, 17 R. I. 698, 16 L. R. A. 550; *Wallace* v. *People*, 63 Ill. 451; *White* v. *State*, 24 Tex. App. 231; *Thurmond* v. *State*, 30 Tex. App. 539.

Allegations of creation and organization of a corporation must be proved as laid, in both civil and criminal cases.

Owen v. *Shepard*, 59 Fed. Rep. 746; *United States* v. *Howard*, 3 Sumn. 12; *State* v. *Copp*, 15 N. H. 212; *United States* v. *Brown*, 3 McLean, 233; *Com.* v. *Stone*, 152 Mass. 498.

The use of the testimony taken before the grand jury, as permitted by the court, during the examination of Mr. Dorr, was improper and prejudicial to the defendant.

The testimony of the witness taken before the grand jury was not a proper means of refreshing his recollection.

Haven v. *Wendell*, 11 N. H. 112; *Huckins* v. *People's Mut. F. Ins. Co.* 31 N. H. 238; *State* v. *Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Kelsea* v. *Fletcher*, 48 N. H. 283; *Watts* v. *Sawyer*, 55 N. H. 38; *Bigelow* v. *Hall*, 91 N. Y. 145; *Coffin* v. *Vincent*, 12 Cush. 98; *Com.* v. *Ford*, 130 Mass. 64, 39 Am. Rep. 426.

Mr. **Holmes Conrad,** Solicitor General, for defendant in error:

In naming a third person all that is generally necessary is that he be described with such certainty that it is impossible to mistake him for any other; or, as it is generally expressed, there must be certainty to a common intent. Nothing more than this is required. He may, like the accused, be described by the name by which he is usually known.

Rex v. *Lovell*, 1 Leach, C. C. 248; *Rex* v. *Berriman*, 5 Car. & P. 601; *Rex* v. *Sulls*, 2 Leach, C. C. 861; *State* v. *Davis*, 109 N. C. 780; *Washington County Nat. Bank* v. *Lee*, 112 Mass. 521; *Rogers* v. *State*, 90 Ga. 463.

A witness may be asked if he had not made a different statement before the grand jury from that which he made before the trial jury, and upon his denial it may be shown what statements he made before the grand jury.

Reg. v. *Hughes*, 1 Car. & K. 519; *Little* v. *Com.* 25 Gratt. 932.

Mr. Justice **White** delivered the opinion of the court:

This is a writ of error to obtain a reversal of a judgment of the circuit court of the United States for the district of New Hampshire, entered on a verdict of a jury, finding the defendant guilty upon the second and seventh counts of an indictment which alleged violations of the provisions of U. S. Rev. Stat. § 5209.

The indictment originally consisted of ten counts. A demurrer to counts 3, 5, and 8 was sustained. Upon the trial, at the close of the evidence for the prosecution, counts 4, 6, 9, and 10 were withdrawn from the consideration of the jury, and the case was submitted to them on counts 1, 2, and 7. Counts 1 and 2 covered the same transaction, count 1 charging an embezzlement, while count 2 charged an unlawful abstraction of the same property.

The second count charged the defendant, as president of the "National Granite State Bank," with having, on July 26, 1893, at Exeter, New Hampshire, unlawfully abstracted and converted to his own use certain described bonds and obligations, the property of said association.

The seventh count charged that the defendant, while president as aforesaid and at the place aforesaid, did, between January 1, 1893, and July 15, 1893, "unlawfully and willfully, and without *the knowledge and[689 consent of said association, and with intent to injure and defraud said association, abstract and convert to his own use the moneys, funds, and credits of the property of said association, to wit, $40,000 of the money, funds, and credits of said association, a more particular description of which moneys, funds, and credits is to the said jurors unknown." Before the trial, a statement of the items upon which the government intended to rely for a conviction under the seventh count was furnished by the district attorney to counsel for the accused, and the court limited the evidence with reference to that count to matters embraced in the list. The specification referred to fifteen sums, each of which was stated to have been drawn by the accused upon checks signed by him, in the name of the bank as its president, and made payable to the order of the American Loan & Trust Company of Boston, or to the order of H. N. Smith on the National Bank of Redemption, a banking institution located and doing business at Boston. The checks were delivered by the defendant to the payees thereof in Boston in return "for cash or funds in the form of checks or drafts" handed to him in Boston, and the checks were paid by the Boston bank on whom they were drawn.

A motion in arrest of judgment having been overruled, the court, on January 31, 1895, separately sentenced the defendant on each count to five years' imprisonment in the state's prison at Concord, but ordered that the imprisonment under the seventh count should be concurrent with that under the second count.

The errors assigned are eighteen in number. In addition a second writ of error was sued out and on this writ errors were assigned relating solely to the validity of the sentence imposed. This second writ was separately docketed and numbered in this court. We are relieved from considering the legality of this second writ, as well as the soundness of the errors thereon assigned, as all the matters complained of thereon were abandoned on the hearing.

Of the eighteen assignments of error, four (Nos. 7, 8, 11, and 18) are not pressed by counsel, and need not be reviewed. *Ten[690 assignments (Nos. 1 to 6 and 13 to 16) affect both of the counts upon which conviction was had, and relate to an asserted variance between the name of the bank alleged in the indictment to have been defrauded and the

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name established by the proof. Assignment No. 9 affects the second count alone, and alleges error in permitting a witness for the prosecution, upon his direct examination, to refresh his memory in a manner claimed to be illegal. Assignment No. 10 alleges error in the sustaining of objections to questions as to the amount of stock of the bank owned by the defendant during the period when the alleged unlawful acts referred to in the seventh count were committed, while assignments Nos. 12 and 17 attack the jurisdiction of the court over the offense set forth in the seventh count.

We will consider the questions which arise from these assignments in the order in which they have just been mentioned.

1. *Variance asserted to exist between the name of the bank charged in the indictment and the name as established by the proof.*

The bank alleged to have been defrauded was referred to in the indictment as "a certain national banking association, then and there known and designated as the National Granite State Bank, which said association had been heretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at the city of Exeter under the laws aforesaid."

The evidence offered proved that the authorized name of the bank was the National Granite State Bank of Exeter, the omission of the words "of Exeter" being, therefore, the variance relied on. The court held that this was not material, if the bank carried on its business and was as well known by the one name as the other.

The text writers state the rule to be that where the name of a third person is used in an indictment, it must be proved as laid. Whart. Crim. Ev. § 102*a;* 1 Bishop, Crim. Proc. § 488, subs. 3, § 667, subs. 3. Many authorities illustrating this rule are referred [691] to in the brief of counsel. We *notice only the two cases principally relied on, to wit: *McGary* v. *People*, 45 N. Y. 153, and *Sykes* v. *People*, 132 Ill. 32. Both of these cases are in conflict with *Com.* v. *Jacobs*, 152 Mass. 276, in which last case the rule is laid down as declared by the trial court in the case at bar. However, the case now before us is distinguishable from that presented in *McGary* v. *People*, and *Sykes* v. *People*, *supra*, from the fact that the variance relied on in those cases was in an integral part of the name proper, whilst here it consists simply in the omission of the words "of Exeter," which, whilst a part of the name, would be commonly understood as referring only to the place of business of the corporation. A case precisely in point is *Rogers* v. *State*, 90 Ga. 463, where a railroad company was referred to in an indictment by the name under which it usually transacted business, and it was held, in a well-reasoned opinion, that the omission of the words "of Georgia" at the close of the designated name of the company was not a fatal variance.

In the indictment at bar, the accused was charged as president of the bank, and it was alleged that the institution carried on business at Exeter. It is impossible, therefore, to suppose that the omission of the words "of Exeter" could have in any way misled the defendant, or failed to convey to his mind what bank was intended to be referred to. It is manifest, therefore, that the omission could not have operated to his prejudice. These views dispose of assignments from 1 to 6.

2. *Error averred to have been committed by the court in permitting the prosecution to refresh the memory of a witness called by it by reference to certain testimony previously given by the witness before the grand jury.*

The ruling of the court from which this error is asserted to have resulted was made during the examination-in-chief of C. M. Dorr, a witness for the prosecution. He was a bank examiner, and was being questioned as to the whereabouts of certain bonds referred to in the second count of the indictment. The testimony of the witness was important, and the matter as to which he was being examined had a direct bearing *upon the guilt or innocence of the ac- [692 cused. The bill of exceptions discloses what took place at the time of the ruling, as follows:

"*Q.* Did he ever, at any time, tell you what he had done with these bonds?

"*A.* Not that I now recollect.

"Mr. Branch: I propose to ask this witness a leading question, because I am taken by surprise at his answer. I have his testimony before the grand jury, and I wish to ask him if he did not testify to certain things before the grand jury.

"The Court: You may do that.

"Mr Streeter: To that I object and except.

"The Court: It is a matter of discretion with the court to allow counsel on either side who say they are surprised to ask such question. It is not a matter of exception.

"By Mr. Branch:

"*Q.* (Referring to minutes, and apparently reading for the purpose of putting the question.) Do you now recollect that you testified before the grand jury that when you discovered those bonds were gone you went to Boston and learned that Mr. Putnam had them, and that he acknowledged to you he had those bonds on the 3d day of August? Did you not so testify before the grand jury?

"*A.* If it is a matter of record, I suppose that it is so. Mr. Putnam done considerable of the business by letters.

"*Q.* I am asking if you did not so testify before the grand jury?

"*A.* If it is a matter of record, I do not dispute the record.

"*Q.* Do you not recollect that fact that you asked him what he had done with them?

"Mr. Streeter: I still object and except to this because it is the record taken before the grand jury and should not be introduced here; it is improper and I object to it.

"The Court: I do not think you ought to say it is improper after the court has ruled that it is.

"Mr. Streeter: I beg your honor's pardon; I did not understand that you had ruled on this point.

"The Court: It is a thing often done, and when counsel say *they are surprised by the [693

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way a witness recollects a thing it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection.

"By the Court:

"*Q.* Do you recollect this conversation in view of your attention being now called to it?

"*A.* I do not recall distinctly where I had that interview, but I think it must have been at the station at Exeter.

"*Q.* It is not a question of where it must have been, but whether you recall it now.

"By Mr. Branch:

"*Q.* Let me refresh your recollection a little further. Did you testify before the grand jury that you said to him something about the bond, and he said, 'Mr. Dorr, I will state to you I am not going away?'

"*A.* Yes, sir; I did.

"Mr. Streeter: I object to the reading here before this tribunal of the records taken before the grand jury—records of the grand-jury room—and I renew the objection I took when my brother first put it in, two or three minutes ago. I renew the objection I then took to the production of grand-jury records before this court.

"Mr. Branch: I am not.

"The Court: It is competent.

"Mr. Streeter: I except.

"*Q.* And did he not say, 'I will get the bonds for you as soon as I can?'

"*A.* Yes; I can assent to that.

"The Court: It must be understood that the putting into the question a conversation is merely done for the purpose of directing the witness's attention to the matter, and that it is not in, unless the witness remembers the conversation and states it here.

"Mr. Streeter: If your honor will pardon me, my exception to its being read is in the record, and I do not want to be deprived of that.

"The Court: That is all right."

694] *Many objections are pressed upon our attention which are alleged properly to arise from the exceptions which were taken during the proceedings just quoted, but which we deem either unfounded or not reserved by the exception as taken.

It is settled that a trial court can, in its discretion, permit, upon direct examination, a leading question to be asked, when the counsel conducting the examination is surprised by the statements of the witness. *St. Clair* v. *United States*, 154 U. S. 134, 150 [38: 936, 942]. It is also clear that where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by the witness or under his direction, or he must be connected with it in such a way to make it competent for the purpose for which it is proposed to use it. But here the objection below did not address itself to the fact that the minutes of the testimony taken before the grand jury had not been properly authenticated or that they had not been reduced to writing in the presence of the witness or read over or examined by him at the time. The exception taken, therefore, reserves none of these questions. We shall hence, in considering the matter, assume that in these particulars the use of the testimony taken before the grand jury to refresh memory was not objectionable.

It is elementary that the memory of a witness may be refreshed by calling his attention to a proper writing or memorandum. The rule is thus stated by Greenleaf (1 Greenl. Ev. § 436):

"Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the *particulars therein mentioned were [695 correctly stated. And it is not necessary that the writing used to refresh the memory should itself be admissible in evidence: for if inadmissible in itself as for want of a stamp, it may still be referred to by the witness."

The very essence, however, of the right to thus refresh the memory of the witness is that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. Indeed, the rule which allows a witness to refresh his memory by writings or memoranda is founded solely on the reason that the law presupposes that the matters, used for the purpose, were reduced to writing so shortly after the occurrence, when the facts were fresh in the mind of the witness, that he can with safety be allowed to recur to them in order to remove any weakening of memory on his part, which may have supervened from lapse of time.

In *Parsons* v. *Wilkinson*, 113 U. S. 656, 658 [28: 1037, 1038], speaking through *Mr. Justice* Gray, the court said:

"Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. *Nicholls* v. *Webb*, 21 U. S. 8 Wheat. 326, 337 [5: 628, 630]; *Ætna Ins. Co.* v. *Weide*, 76 U. S. 9 Wall. 677 [19: 810], and *Republic F. Ins. Co.* v. *Weide*, 81 U. S. 14 Wall. 375 [20: 894]; *Chaffee* v. *United States*, 85 U. S. 18 Wall. 516 [21: 908]. It is well settled that memoranda are inadmissible to refresh the memory of a witness unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been 'presently committed to writing,' Lord Holt in *Sandwell* v. *Sandwell*, Comb. 445; Holt, 295; 'while the occurrences mentioned in it were recent, and fresh in his recollection,' Lord Ellenborough in *Burrough* v. *Martin*, 2 Campb. 112; 'written contemporaneously with the transaction,' Chief Justice Tindal in *Steinkeller* v. *Newton*, 9 Car. &

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P. 313; or 'contemporaneously or nearly so with the facts deposed to,' Chief Justice Wilde (afterwards Lord Chancellor Truro) in *Whitfield* v. *Aland*, 2 Car. & K. 1015. See also *Burton* v. *Plummer*, 2 Ad. & El. 696] 341, 4 Nev. & M. 315; *Wood* *v. *Cooper*, 1 Car. & K. 645; *Morrison* v. *Chapin*, 97 Mass. 72, 77; *Spring Garden Mut. Ins. Co.* v. *Evans*, 15 Md. 54, 74 Am. Dec. 555."

In appreciating what length of time after the occurrence may be considered as "contemporaneous," as "shortly after the time of the transaction," or "while fresh in his recollection," courts have differed somewhat, depending of course upon the facts of each particular case.

In *Wood* v. *Cooper*, 1 Car. & K. 646, a witness was allowed to look at his examination before commissioners in bankruptcy, signed by him, given within a fortnight of the time of the happening of certain occurrences, and when the facts were fresh in his memory. So in *State* v. *Colwell*, 8 R. I. 132, a witness was allowed to refer to a memorandum made a day or two after a previous trial, when an interval of about eight days had elapsed from the time when the occurrences transpired concerning which the witness gave testimony. In *Billingslea* v. *State*, 85 Ala. 323, it was held proper to allow a witness to refresh his recollection by resort to the minutes of statements made to a grand jury within a week after the occurrence about which he wa being interrogated. In *Spring Garden M. Ins. Co.* v. *Evans*, *supra*, it was held that a witness, who, five months after the occurrence of certain facts, and at the request of a party interested, made a statement in writing and swore to it, could not be allowed to testify to his belief in its correctness.

In the case at bar the indictment was found at the December term, 1893, of the district court, and the testimony used to refresh the memory of the witness was given at that time before the grand jury. The conversations to which the testimony of the witness, given before the grand jury, related transpired on the third of the previous August. The effort, therefore, was to refresh the memory of the witness as to an interview which had taken place in August, 1893, by referring to his testimony given in December, 1893; in other words, by the use of testimony given by the witness more than four months after the occurrence. We think it clear that testimony given after this lapse of time was not contemporaneous, and that it would not sup-697]port a reasonable probability that *the memory of the witness, if impaired at the time of the trial, was not equally so when his testimony on the prior occasion was committed to writing.

In conflict with the well-settled rule to which we have just referred, there are some adjudications of the courts of last resort of several states, noted in the †margin of this opinion, holding that there exists an exception to the general rule which restricts the right to refresh memory to contemporaneous memoranda or writing. This exception is said to arise when a party is surprised by the unexpectedly adverse testimony of his own witness, in which case he may, for the purpose of refreshing the memory of the witness, be permitted to ask him as to any prior statements, whether oral or written, without reference to their contemporaneousness. The error of this conclusion, as we shall hereafter demonstrate, originally arose from a misconception of the doctrine laid down in *Wright* v. *Beckett* or *Melhuish* v. *Collier*, *infra*, and has been continued by merely following this first departure from correct principles. And this confusion of thought and misunderstanding of those cases seems to have operated upon the mind of the trial court, for it said "it is a thing often done, and when counsel say they are surprised by the way a witness recollects a thing, it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection." But the right of counsel to refresh the memory of a witness in no way depends on the surprise which may have been created by the testimony of the witness. The right to refresh the memory of a witness, by proper matter, exists independently of surprise. Where a legal instrument for refreshing the memory exists, it may be availed of by the witness himself or may be permitted to be referred to by the court without reference to the course of the *examining counsel. Surprise on the [698 part of the examiner of a witness by the latter's unexpected adverse testimony, on direct examination, was among the elements by which it was determined that the right existed to ask a witness as to contradictory statements previously made by him, not for the purpose of refreshing his memory, but with the object of neutralizing or overthrowing his testimony, and this course was only allowed where the right to neutralize or impeach the testimony of one's own witness existed. Indeed, this doctrine of surprise was a part of the controversy as to whether one could be allowed to neutralize or contradict the testimony of his own witness under given conditions, which was long agitated, and which culminated in some of the states of the Union and in England in statutory provision on the subject.

A detailed analysis of the cases to which we have above referred will make clear the fact that they rest, not upon sound reason, but solely upon the supposed exception to which we have adverted.

In *Wright* v. *Beckett*, 1 Mood. & R. 414, it was held by Lord Denman (Bolland, B., dissenting), upon a review of previous cases, that where a witness gives evidence destructive of the case which he was called to prove, the party calling him may be permitted, in order to neutralize his testimony, to interrogate the witness as to whether he had not at a previous time given an account of the transaction entirely different from that sworn to by him at the trial, and that the party may also call other witnesses to establish the

*Campbell v. State, 23 Ala. 44; Hemingway v. Garth, 51 Ala. 530; Bullard v. Pearsall, 53 N. Y. 230; Hurley v. State, 46 Ohio St. 330, 4 L. R. A. 161; People v. Kelley, 113 N. Y. 647, 651; Hildreth v. Aldrich, 15 R. I. 163; State v. Sorter, 52 Kan. 531; Humble v. Shoemaker, 70 Iowa, 223; Hall v. Chicago, R. I. & P. R. Co. 84 Iowa, 311; George v. Triplett (N. D.) 63 N. W. 891.

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fact of the making of such prior inconsistent statements.

In *Melhuish* v. *Collier*, 15 Q. B. 878, a witness for the plaintiff, on the trial, having omitted in her testimony to speak of an act of violence committed on the plaintiff by the defendant, was questioned by the plaintiff's counsel, as in cross-examination, and asked whether she had not seen the defendant take the plaintiff by the hair; she denied this, and was then asked whether on an examination before magistrates she had not said to the plaintiff's attorney that she saw it. The witness answered that if she had said so, it was **699**] all lies. *She was then asked whether she had not made to the same attorney a further specified statement, and, on objection being made, the court "ruled that the question might be put, not to discredit, but to remind the witness."

In the course of the argument, at the Queen's bench, of the motion for a new trial, counsel for defendant urged that it was error to have permitted the question to be put, but Patterson, J., called his attention to the fact (p. 887) that it had only been allowed for the purpose of "reminding" the witness. The counsel evidently understood that the word "remind" was synonymous with a mere caution to the witness, for he said (p. 887):

"A question merely to remind should have had the character of those general admonitions which are sometimes given to a witness to recollect himself and to consider that he is speaking on oath, and which the judge does not take down, or notice to the jury. It ought not, at farthest, to have gone beyond the simple inquiry whether the party had not been examined before. It should, at any rate, have been so shaped that the witness might have admitted the former statement alluded to without discrediting herself."

So, also, the opposing counsel urged that the objection was premature, saying (p. 882): "If counsel had gone on to ask her whether the former statements were not the true ones, it would have been the proper time to object; but the objection would have differed from that now taken."

Patterson, J., found difficulty in coming to a conclusion. (p. 888.)

Coleridge, J., observed (p. 889):

"I agree in the distinction which has been taken between putting a question to the witness as to former statements, and contradicting his answer. It has been ingeniously suggested by Mr. Smith that, if the question be admissible, it must be so put as to recall the fact to the witness's memory, without tending to impeach his credit if the account he then gives be different from the first: and I can conceive a case in which that might happen. The witness may be flurried on his first examination and afterwards vary **700**]his statement when his *attention is recalled to circumstances; but it is said that here the object of the question was distinctly to contradict the witness. It is difficult to draw a line, and I am not disposed to draw it too closely. I think that, in the present case, the question did not go farther than inquiry may properly be carried."

Erle, J., said (p. 890):

"A plaintiff's witness says, in effect, that the plaintiff has no cause of action. Then he is asked whether he has not, formerly, made a different statement. I think that question is proper, and not inconsistent with the rule that a party knowing a witness to be infamous ought not to produce him, and must not be allowed to take the chance of his answers and then bring evidence to contradict him. We do not interfere with that rule. There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then, for a bribe or from some other motive, make statements in support of the opposite interest. In such cases, the law undoubtedly ought to permit the party calling the witness to question him as to the former statement, and ascertain, if possible, what induces him to change it."

The judges, moreover, intimated a doubt as to the correctness of Lord Denman's opinion in *Wright* v. *Beckett*, in so far as it recognized the right of a party, when surprised by the testimony of his own witness, to call other witnesses, to prove his contradictory statements, but followed *Wright* v. *Beckett* to the extent that it held that one might, when surprised by the testimony of his witness, ask him as to inconsistent statements, in order to neutralize his testimony, employing, however, the word "remind," in the stead of neutralize. The word "remind," used in *Melhuish* v. *Collier*, in its broadest sense, would certainly be susceptible of the interpretation of refreshing memory, and if it were to receive that construction the case would undoubtedly be authority for the proposition that one taken by surprise, by the testimony of his own witness, could refresh the memory of the witness by calling his attention to contradictory statements previously made by him without reference to whether *such statements were or not contempo-[**701** raneous, or whether oral or written. But the context of the opinions demonstrates that the case has no such significance. The learned judges were considering, not the right of one to refresh the memory of his witnesses, but whether he could neutralize the testimony of his own witness; that is, whether a party had the right to do so as to a witness by him introduced though the incidental effect might be to impeach his credit. The reasoning of the opinion shows that the use of the word "remind" was intended rather as a qualification on the right to neutralize, in case of surprise, which was recognized in *Wright* v. *Beckett*, and therefore it was not the purpose of the ruling in the *Melhuish Case* to overthrow the elementary rule of evidence which restricts refreshing the memory of a witness to contemporaneous memoranda or writings. And support for the view that the reminding of the witness spoken of in the *Melhuish Case* was not considered as synonymous with the right to refresh recollection, is found in the fact that the judge before whom that case was first tried subsequently, in 1853, in the case of *Reg.* v. *Williams*, 6 Cox C. C. 342, held that where a witness for the prosecution gave a different answer on his examination in chief from that which was

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expected, his deposition before the coroner or justice, as the case might be, might be put in his hands for the purpose of "refreshing his memory," and then a question from the deposition might be put to him in leading form. The court further said that if the witness persisted in giving the same answer after his memory had been so refreshed, the question might be repeated to him from the deposition in leading form, but when the witness answered that question the counsel could not proceed any further.

A few years after *Melhuish* v. *Collier* was decided, in 1854, Parliament adopted the common-law procedure act, which, among other things, provided as follows:

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the 702]*judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." 17 & 18 Vict. chap. 125, § 22.

Clearly the purpose of this statute was to give one a right under certain circumstances to neutralize or discredit the testimony of his own witness, and in no way to change the rule as to refreshing a witness's memory by contemporaneous writings or memoranda. This statute was, substantially, a legislative recognition of the correctness of the rule laid down in *Wright* v. *Beckett*, and the modern English cases have treated the act as applying to the power to contradict and neutralize the testimony of one's own witness when he proves adverse or hostile, and as controlling the examination of the witness himself concerning prior inconsistent statements, as well as the proof thereof by other witnesses. *Faulkner* v. *Brine*, 1 Fost. & F. 254; *Dear* v. *Knight*, 1 Fost. & F. 433.

This view of the act is also the one taken by Taylor in his treatise on Evidence. He refers to the common-law procedure act of 1854 as having settled "the question how far a party is at liberty to discredit his own witness," a question which he says "for years was agitated in Westminster Hall." 2 Taylor, Ev. § 1246. Statutes similar to the English act have been passed in various states of the Union, some before and others subsequent thereto. 1 Greenl. Ev. § 444, *note b*.

The case of *Campbell* v. *State*, 23 Ala. 44, held that a trial court had not committed error in permitting the state's attorney to inquire of a witness for the prosecution whether he had not, on the day preceding, made statements conflicting with what he had said on the trial, the avowed object of the question being to refresh the witness's memory. The ruling was rested on the authority of *Wright* v. *Beckett*, 1 Mood. & R. 414, and on the opinions of Greenleaf and Phillipps. But the learned court overlooked the fact that *Wright* v. *Beckett* expressly confined *the right to put the question, in[703 order to neutralize the testimony of the witness when the party introducing him was taken by surprise, and that neither in the treatise of Greenleaf or that of Phillipps is this right to examine a witness for the purpose of neutralizing his testimony confounded or confused with the distinct and different faculty of refreshing the memory of the witness by contemporaneous writings or memoranda. *Hemingway* v. *Garth*, 51 Ala. 530, was placed simply upon the authority of the previous case.

In *Bullard* v. *Pearsall*, 53 N. Y. 230, upon the trial in the lower court, a witness was called for the purpose of proving that a certain conversation took place between the witness and the defendant previous to the 17th of June, 1868, but to the surprise of the plaintiff the witness testified that the conversation took place on the 24th of July. The date was material. The plaintiff was permitted to ask the witness whether he had not, on a prior examination, sworn that the conversation took place in June, and this action of the trial judge was held to be proper. The court of appeals, speaking through Rapallo, J., said (p. 231):

"We are of opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry."

As authority supporting this language the learned judge said (p. 232):

"The principal cases in this state in which the subject is referred to are: *People* v. *Safford*, 5 Denio, 118; *Thompson* v. *Blanchard*, 4 N. Y. 311; *Sanchez* v. *People*, 22 N. Y. 147; and in England it is very thoroughly discussed in *Melhuish* v. **Collier*, 15 Q. [704 B. 878. It has since been there regulated by act of Parliament, passed in 1854. The English and American authorities are referred to in 1 Greenl. Ev. §§ 442, 444, 444*a*, and notes."

The fact that *Melhuish* v. *Collier* does not sustain the proposition which it is thus cited to support we have already established, and even a casual examination of the New York cases referred to demonstrates that they not only do not uphold the views expressed, but, on the contrary, are adverse to them. The only remaining reference is to §§ 442, 444, and 444*a* of Greenleaf on Evidence. One of these sections (444) which we have already quoted, bears no relation to the subject. The other, 442, does not refer to refreshing recollection, but treats of the question whether one may contradict his own witness. The third section referred to, 444*a*, is not a part of the treatise of Greenleaf. The learned judge of course referred to the twelfth, or

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Redfield's, edition of Greenleaf's work, published in 1866, where the comments of the editor are included in the text, in brackets, and by way of supplemental sections. In this edition there is such a section (444a):

"[The author seems in the preceding section to have stated the doctrine of the right of a party to contradict his own witness who unexpectedly testifies against him, somewhat more strongly than is held by the English courts; and the rule of the American courts is even more restricted than that of the English courts in that respect. The question is extensively discussed in the case of *Melhuish* v. *Collier*, *supra*, both by counsel and by the different members of the court, and the conclusion arrived at is, that you may cross-examine your own witness if he testify contrary to what you had a right to expect, as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness and give him full opportunity to set the matter right if he will, and at all events to set yourself right before the jury. But you cannot do this for the mere purpose of discrediting the witness, nor can you be allowed to prove the contradictory statements 705]*of the witness upon other occasions, but must be restricted to proving the fact otherwise by other evidence. And the same rule prevails in the courts of admiralty. *The Lochlibo*, 14 Jur. 792; 1 Eng. L. & Eq. 645.]"

This language, however, as we have seen, is not the opinion of Greenleaf, but the comment of his editor Redfield, and was doubtless influenced by the same mistaken view of what was really decided in *Melhuish* v. *Collier*, to which we have already adverted.

Brevity prevents a detailed review of the other cases on this subject previously mentioned in the margin hereof. Suffice it to say that an examination discloses that they all rest upon the mistaken idea which we have pointed out. Indeed, if the principles upon which these cases necessarily rest are pushed to their logical conclusion, they not only under the guise of an exception overthrow the general rule as to refreshing memory, but also subvert the elementary principles of judicial evidence. The fact that these consequences are the legitimate and necessary outcome of the cases we have reviewed, depends on not mere abstract reasoning, but is demonstrated by the case of *People* v. *Kelly* (1889) 113 N. Y. 647, 651. In that case, upon the sole authority of *Bullard* v. *Pearsall*, 53 N. Y. 230, it was held that where inconsistent or adverse statements had not been given by a witness for the state, but, from mere forgetfulness or a wish to befriend the accused, the witness had omitted to testify to certain details, error had not been committed by the court in allowing the prosecuting attorney, for the purpose of refreshing the recollection of the witness, to inquire of him whether he had not testified to the omitted facts before the committing magistrate and grand jury, and, upon his admission that he had done so, to ask if the statements theretofore made were not true, and that the affirmative reply of the witness was competent evidence to submit to the jury. Not only the error but the grave consequences to result from such a doctrine were aptly pointed out by Chief Justice Shaw in *Com.* v. *Phelps*, 11 Gray, 73, where an attempt was made to refresh the memory of a witness by reference to testimony before *a grand [706 jury not contemporaneously given. The chief justice said:

"It is not a regular mode of assisting the recollection of a witness to recur to his recollection of his testimony before the grand jury. If it was not true then, it is not true now; if it was true then, it is true now, and can be testified to as a fact. Of what importance is the fact that he had a memorandum to aid him in testifying before the grand jury? To ask what he testified to before the grand jury has no tendency to refresh his memory. The fact of his having testified to it then is not testimony now. It is an attempt to substitute former for present testimony."

Equally lucid and cogent are the expressions of the supreme court of Pennsylvania in *Velott* v. *Lewis*, 102 Pa. 326, where, in holding that the memory of a witness could not be refreshed by reading to him notes of testimony given by him in a former trial of the same cause, the court said (p. 333):

If the fact that a witness "failed to recollect what he had previously sworn to, . . . were enough to admit the notes of a former trial, we might as well abandon original testimony altogether, and supply it with previous notes and depositions. It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always be thus led to the exact words of his former evidence. As we are not yet prepared for an advance of this kind, we must accept the ruling of the court below as correct."

In leaving this branch of the case it is well to say that *Hickory* v. *United States*, 151 U. S. 303 [38: 170], referred to by the supreme court of North Dakota in *George* v. *Triplett* (N. D.) 63 N. W. 891, as sustaining the exception to the general rule there announced, does not warrant the assumption. *Hickory* v. *United States* concerned merely the question of the right of a party, after proper foundation had been laid, to contradict his own witness and in no way involved the right to refresh the memory without reference to the contemporaneousness of the statements, or whether they were oral or written.

*Our conclusion, therefore, is that the [707 exception to the action of the court in allowing the use made of the minutes of the grand jury was well taken, and that there was prejudicial error in this particular. Its existence, however, relates to and affects only the conviction under the second count of the indictment.

3. *Defendant's ownership of stock in the bank.* The tenth assignment alleged error in the sustaining of an objection to a question propounded by counsel for the defendant upon the cross-examination of a witness for the prosecution. The witness (Charles E. Byington) had testified, on direct examination, that the defendant had turned over to the bank bonds of the par value of $35,000,

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and that the defendant had a paramount interest in the companies which had issued such bonds. On cross-examination, the witness stated that the accused held, on his own account, a large amount of the stock of the companies referred to, was buying and selling, and had on hand more or less of said securities. The counsel for the accused then asked the following question:

"*Q.* What percentage of the stock of the National Granite State Bank of Exeter did Mr. Putnam own during the first six months of 1893?"

On objection being made by the government, counsel stated that his purpose was to show the relations of the accused to the bank and his ownership of the stock, and that the proposed evidence was pertinent as bearing upon the intent of the defendant with reference to the purchasing of securities for the bank, and in dealing with the bank's funds; and that it made a difference whether he owned all of the stock or did not own any of it. The court ruled that the government had not "opened up affirmatively the ownership of the stock," and that the proposed evidence was not proper cross-examination.

As the order in which evidence shall be produced is within the discretion of the trial court, and as the matter sought to be elicited on the cross-examination for the accused was not offered by him at any subsequent stage [708] of the trial, it is *manifest that no prejudicial error was committed by the ruling complained of.

4. *Jurisdiction of the court over the seventh count.*

The twelfth and seventeenth assignments of error result from an exception taken to the refusal of the court to grant defendant's request, made at the close of the testimony, for a peremptory instruction in his favor, as to the seventh count. This request was based on the assumption that all the acts relied on to convict under that count, and which were enumerated in the bill of particulars, took place in Massachusetts, and hence were beyond the jurisdiction of the court. A like question also arises from an exception taken to the charge of the court on the same subject. We will consider first the exception taken to the charge of the court, since if it erroneously applied the law to the facts it must lead to reversal, although the court may have rightly refused the peremptory instruction.

As heretofore stated, this count charged the unlawful abstraction and conversion to his own use by the defendant at Exeter, New Hampshire, of "monies, funds, and credits of the property of said association" (the National Granite State Bank, etc.), "a more particulardescription of which monies, funds, and credits is to the said jurors unknown;" and that the district attorney furnished to the counsel for the defendant a bill of particulars covering fifteen checks.

In considering these assignments it is at the outset clear that, although the commission of the offense charged may have been begun in Massachusetts, if it was completed in New Hampshire the court had jurisdiction, under U. S. Rev. Stat. § 731, which provides "that when any offense against the United States is begun in one judicial district and completed in another, it should be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein."

We summarize the facts, which are stated at length in the bill of exceptions, as follows: The National Granite State Bank of Exeter kept an account with the National Bank of *Redemption of Boston, which [709] was a reserve agent. From time to time deposits were made by the bank of Exeter with the Boston bank, and were placed to the credit of this account, and checks were drawn by the bank of Exeter on the Boston bank, and when paid by the latter were debited to the account. The checks mentioned in the bill of particulars were all drawn by the accused, as president of the National Granite State Bank of Exeter, on the Boston bank. Two of these checks were drawn respectively on January 17 and 23, and were for $5,000 each. These checks were both drawn and dated in Boston; were made payable to the American Loan & Trust Company there, which company gave to the accused, as consideration for them, its drafts on Winslow, Lanier, & Co., of New York, which drafts were paid to the accused or his assigns, and the proceeds in no way inured to the benefit of the Exeter bank. The American Loan & Trust Company, the payee of the checks, collected them in Boston, and the sum of the checks thus paid out by the Boston bank was by it debited to the account of the Exeter bank. The other checks referred to in the bill of particulars were also drawn by the accused, as president of the Exeter bank, on the Boston bank, between the 1st day of April and the 6th day of May, 1893, and they were delivered in Boston to the payees thereof for a valuable consideration, which also in no way inured to the Exeter bank, and were paid, and the amount was also debited to the account of the Exeter bank. At the time these checks were drawn, and when they were presented to and paid by the Boston bank and debited by it, there was a credit to the account of the bank of Exeter adequate to meet the checks, so that the effect of debiting them was not to overdraw the account of the Exeter bank. The bill of exceptions moreover recites that—

"Evidence was admitted, subject to defendant's exception, tending to show that at a meeting of the directors of the bank at Exeter, held about one year prior to the alleged unlawful drawing of checks by the defendant at Boston, a vote had been passed by the board of directors that no one but the cashier should thereafter have authority to draw checks *against the account with the re- [710] serve agent; that the defendant was present at that meeting and acted as clerk of the board.

"Such a vote was never recorded in the directors' record, and the reserve agent was never notified of it."

There was also testimony tending to show that the Boston and Exeter banks twice a month adjusted their running account by

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means of statements which are called in the record "reconciliation sheets." When these reconciliation sheets came to the Exeter bank in February they were accompanied with vouchers, among which were the two canceled checks for $5,000 each drawn in January, and which had been paid and debited, as above stated. The evidence also tended to show that the bank at Exeter owed to the American Loan & Trust Company a note or notes amounting to $10,000. When the cashier of the Exeter bank discovered the debit of the two January checks on the reconciliation sheets and observed these checks among the vouchers returned by the Boston bank, he asked the president (the accused) for what purpose he had drawn the checks, and the president answered they had been drawn in order to pay the note or notes of the Exeter bank held by the American Loan & Trust Company. Thereupon the cashier entered on the books of the bank at Exeter the payment of the note or notes held by the American Loan & Trust Company, and settled the reconciliation sheets with the Boston bank, and accordingly credited the account of the Boston bank with the sum of the two January checks. There was also testimony tending to show that neither the cashier nor directors (except the accused) knew anything of the checks drawn in January until the receipt of the February reconciliation sheets, and that they also knew nothing of the April and May checks until the reconciliation sheets for May, with their accompanying vouchers, were received. The evidence also tended to show that when the payment of these last checks by the Boston bank was discovered, the defendant was asked for an explanation. He first refused to give information, then evaded doing so, until about the 24th of May, 711]when he stated to the directors *of the Exeter bank that the checks had been used in order "to put money into the Leavenworth Electric Railway Company and the Hydraulic Company."

On the face of the foregoing facts it is evident that the alleged criminal acts arising from the two January checks were begun in Massachusetts. The question is, Were such acts there completed, or did the final act, which was essential to effectually absorb the credit of the Exeter bank with the Boston bank, take place in New Hampshire? The relation between the banks was that of debtor and creditor. The checks having been drawn, collected, and debited in Boston, constituted a concluded transaction, if there was authority to draw them. On the contrary, if there was no authority, the mere fact that they were debited to the account of the Exeter bank did not absorb the credit of that bank, as only a lawful and authorized check could have justified the debit. Of course, no ratification was essential to cause the checks to successfully obtain the money of the Boston bank, for such obtaining was consummated and concluded by the fact of paying out the same on the checks. But we are here concerned, not with whether the checks obtained the money of the Boston bank, but with whether such checks absorbed the credit of the Exeter bank, which fact was distinct and separate from the question of payment, and depended on whether the debit made in consequence of the payment of the checks lawfully absorbed the credit of the Exeter bank. If, then, the checks were unauthorized and the illegal debit which was made as the result of their payment was ratified and made binding in New Hampshire by the Exeter bank, it is clear that the act which consummated the taking of the credit of the Exeter bank was completed in New Hampshire, and was therefore within the jurisdiction of the court. Such was the view taken by the court in its charge to the jury, as follows:

"Mr. Branch, representing the government, says the whole transaction in Boston, so far as the drawing of the checks and the receiving of the money was concerned, was fraudulent. He argues that the bank at a meeting had adopted a resolution, providing that the president should not draw checks, and that, *therefore, the president had no author [712 ity, and the president knew he had no authority, to draw checks. This becomes material if you find it was so, because if he had the authority to draw checks and did withdraw the funds, although he may have done it for the purpose of misappropriating and abstracting the money, if he had authority to draw those checks, it would become a past and completed act in Massachusetts as you will see; but, if he did not have authority, if he was acting outside of his authority, and acting fraudulently, while the drawing of the checks was effectual in withdrawing the funds from the Bank of Redemption in Boston, it would not withdraw and abstract the credit of the bank in Exeter, existing in its behalf in the Bank of Redemption in Boston, because notwithstanding his drawing the checks, if he had no authority to draw them, the Exeter bank would still be in position to enforce its rights and receive the benefits of its credit which had been improperly and unlawfully interfered with by some unauthorized act in Boston, and while the money had gone and been misapplied the credit of the Exeter bank would be the same substantially and might be enforced. . . . So, in order to give jurisdiction here and enable you to pass upon this question, you must find that the offense was partly committed in Massachusetts, which it is conceded was so, if there was any offense, and partly here, that is, in order to give this court jurisdiction, in order to make this offense completed partly in Massachusetts and partly here, you must find that he conceived the plan, not only of abstracting the moneys by means of the checks, but of making the transaction complete and effectual by withdrawing the credit existing in behalf of the Exeter bank. So if he came into New Hampshire, and through artful deception and fraudulent misrepresentation, with the intent of making the abstraction begun in Massachusetts complete, induced the officers of the bank to surrender that credit, then he is guilty under this charge which alleges that he wilfully and unlawfully abstracted moneys, funds, and credits of the Exeter bank."

Having determined the correctness of this

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713] instruction, it *remains only to ascertain whether the proof sustained the court in leaving to the jury the ascertainment of the facts contemplated in the charge, that is to say, whether the court rightly refused the peremptory request, made by the defendant, to direct a verdict in his favor. There can be no doubt that the president of a national bank, *virtute officii*, has not necessarily the power to draw checks against the account kept with another bank by the bank of which he is president. Indeed, the statutes expressly provide that the powers of the president of a national bank may be defined by the board of directors. U. S. Rev. Stat. § 5136. True it is, that by a course of dealing with a particular person, the power of an officer to perform a particular act may be implied when such power is not inconsistent with law. *Merchants' Nat. Bank* v. *State Nat. Bank*, 77 U. S. 10 Wall. 604 [19: 1008]. Now, here there was an entire absence of all proof as to a course of business implying authority on behalf of the president to draw checks in the name of the bank. In view of the fact that the power to draw the check did not inhere in the functions of the president, and in consequence of the absence of proof as to a course of business implying the power, as also in consideration of the fact that the January checks were not drawn at the banking establishment, but in another city, we think the proof was adequate to justify the court in refusing to take the case from the jury, and in leaving it to them to determine whether there was such infirmity in the checks as made a subsequent ratification, obtained in New Hampshire by the fraudulent representation of the defendant, one of the efficient causes for the absorption of the credit resulting from the debit of the checks. Apart from this view, which was covered by the charge of the court, there were other considerations which rendered it equally improper to take the case from the jury. It cannot be denied that if when the January checks were called to the attention of the bank at Exeter, the authority of the president to draw them had been repudiated, and if such denial had been communicated to the Boston bank, the ability of the president of the Exeter bank to have obtained payment of the subsequent checks would not have ex-
714]isted. As the failure of the Exeter *bank to repudiate the January checks, and in so doing give notice to the Boston bank, may have been consequent upon the fraudulent misrepresentation as to the purpose for which the January checks were drawn, it was competent for the jury to consider the relation which this fact bore to the drawing of the subsequent checks. In other words, the condition of evidence was such that the misrepresentation made in New Hampshire as to the reason for the drawing of the January checks, in connection with all the other evidence, was competent to go to the jury as tending to show, not only the completion in New Hampshire of the wrongful obtaining of the credit, commenced by the drawing and debiting, in Boston, of the January checks, but also the initiation in New Hampshire of the wrongful obtaining of the credit completed subsequently in Massachusetts by the drawing of the April and May checks, if the jury thought from all the evidence that when the misstatements were made as to the January checks the purpose was to further defraud by drawing the subsequent checks.

The foregoing considerations dispose of all the questions presented, and the conclusion which results from them is that there is error in the conviction as to the second count, and none as to that under the seventh count. The sentence imposed in consequence of the verdict of guilty on both counts was distinct and separate as to each count, and was made only concurrent. It follows, therefore, that if the verdict and sentence as to the second count be set aside, nevertheless the entire amount of punishment imposed will be undergone. Under these circumstances, it is doubtful whether the error committed, as to the second count, should be treated as prejudicial, since the only effect of reversing and ordering a new trial, as to this count, will be to leave the full term of the existing sentence in force and to submit the accused to another trial on the second count, from which trial, if convicted, an additional sentence may result. Considering this situation, we deem that the ends of justice will best be subserved by affirming the judgment and sentence under the seventh count, and by reversing *the judgment as to the second [715
count, and remanding the case to the court below for such proceedings with reference to that count as may be in conformity to law.

It is so ordered.

THE CHIEF JUSTICE dissenting: *Mr. Justice* **Brewer**, *Mr. Justice* **Brown**, and myself think the conviction on the second count ought to stand. In our opinion the discretion of the circuit court was properly exercised in allowing leading questions to be put to the witness Dorr, and they amounted to nothing more than enabling him to overcome temporary forgetfulness by reference to what he had said on a prior examination.

END OF REPORTED CASES IN VOL. 162.

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APPENDIX I.

In Memoriam.

HOWELL EDMONDS JACKSON,
DIED AUGUST 8, 1895.

SUPREME COURT OF THE UNITED STATES,
MONDAY, OCTOBER 14, 1895.

Present: The Chief Justice, Mr. Justice Field, Mr. Justice Harlan, Mr. Justice Gray, Mr. Justice Brewer, Mr. Justice Brown, Mr. Justice Shiras, and Mr. Justice White.

The Chief Justice said:

The court reassembles again, saddened by a vacant chair. Mr Justice Jackson died at Nashville, Tennessee, on the 8th day of August last. This was followed by the death of Mr. Justice Strong* on the 19th day of the same month, who, during his retirement, had maintained his companionship with the members of the bench he had adorned.

On Monday, November 25, 1895, Mr. Attorney General Harmon addressed the court as follows:

It is with more than a sense of official propriety that I comply with the request of the bar by presenting to the court their resolutions relating to the late Justice Jackson. We of his home circuit knew him best. There were his birthplace and his home. There his first regular judicial work was done, by which he made the reputation that led to the call from across the party wall to a seat beside your honors.

The active bar always feel some misgivings when a man in public life, even though he has won distinction there, is called to the bench, especially when he has reached middle age. But they soon found that Howell Edmonds Jackson was not so much a senator who had been appointed judge as a judge who had served for a time as senator. His mind, naturally broad and strong, symmetrically developed, controlled by steady purpose, and directed by industry which seemed almost weariless, would have enabled him to fill with credit any place which requires such qualities. He had so filled the high positions to which the resolutions refer, but he was peculiarly fitted for the duties of a judge. He had in high degree patience to hear and consider and firmness to decide. He had an even temper, judgment unprejudiced toward men or things, and a logical turn of mind which naturally shed irrelevance and sophistry and inclined to accuracy of fact and correctness of conclusion. He loved justice in the concrete as well as in the abstract, and felt the pleasure a strong judge always takes in applying the principles of law to the redress of wrongs; but he knew and loved the system of judicial science too well to wrench or impair it, and unsettle the rights of the great body of the people, in seeking to avoid those occasional hardships against which human law, being necessarily general, cannot provide. So his decisions were of the kind which build and perfect our jurisprudence, and not a

*For proceedings on the retirement of Mr. Justice Strong see book 26, p. 5.

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series of mere arbitrary judgments. There are few among them which the legal mind hesitates to adopt among the precedents which keep the law in healthful life and growth.

He was never chargeable with the blunders of a careless man or the vacillations of a weak one, but won respect even when he failed to convince, because he reached his conclusions by the broad highways, and not by indirection or evasion.

Some have excelled him in extent of learning and others in mere force of intellect, but few have equaled him in the comprehensive perception and abiding sagacity which result from a harmony of powers. His vigorous practical understanding was not to be bewildered by details, confused by doubtful or conflicting precedents, nor misled by refinements of reasoning. His decisions always bore the stamp of his own mind and character.

Absorbed as he was in the exacting duties of the circuit, his health was shaken before he realized it, but he never lost patience or resolution. The vigor he showed as a member of this court in the number and promptness of his opinions, as well as by their lucid thoroughness, was in spite of the dragging of disease. And one of the most striking incidents of the calm heroism of peace was the resumption of his place when the public interest required it, in the Income Tax Case. However opinion, legal and lay, was and may remain divided on the questions involved in that case, there is, and will be, no divided judgment about the high qualities shown by the opinion of Mr. Justice Jackson, which all feared would be, and which was, his last. Though the effort required undoubtedly hastened the end, no true friend or patriot can feel regret, because it has put on imperishable record an example of devotion to public duty whose worth cannot be too highly esteemed.

The feeling of personal bereavement which prevails to a very unusual extent among those who knew Justice Jackson seems to me the highest tribute to his memory. There is no warmth in mere mental power or acquirement, nor in the most careful correctness. These may kindle admiration or envy, but not the affection which is the best tribute of man to man. I do not mean the mere result of pleasant ways, but the sturdy liking implied in the line—

"He makes no friends who never made a foe."

He had a kind and considerate nature, but it did not blind him to his duty, nor swerve him from it; and he was free from that morbid excess of virtue which makes some good men unjust to their friends.

Reputation and honors did not affect his quiet simplicity, nor add to the unobtrusive dignity which needed no assertion.

The entire life of Justice Jackson illustrates the efficiency of steadfast devotion to duties which come without selfseeking and are met with diligence, earnestness, and sincerity of mind and purpose. His seven years as circuit judge gave him time to accomplish a most honorable career. Few positions put capacity and character to so severe a test as the office of judge of a court of first resort and general jurisdiction. This applies with great fitness to the sixth circuit, whose four states, reaching from Lake Superior to the Appalachian Range, like a cross section of the great Republic, present almost every variety of population, business, and laws. Such a judge must admit and exclude evidence, sift, discern, and analyze facts, and apply legal principles generally, all without the advantage of associates, sometimes with slight aid from counsel, and often with little opportunity for study and reflection. Many of his judgments are final,

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and few are open to complete review; but every act and utterance undergo the impartial and unerring scrutiny of the bar and the people.

The powers of this highest of all tribunals are too great to be committed to one man alone. Their exercise is placed beyond the reach and above the need of review by the association of minds which stimulate, aid, and correct each other. Who may fitly join in the deliberations of such a court but those who have stood the highest tests which the profession affords?

Justice Jackson's career as a member of this court was cut short by his untimely death; but he served long enough to confirm the fitness of his selection and sharpen still further our sense of loss. Whoever shall be called to take that vacant place will find it none the easier to fill because it was last held by Justice Jackson.

The resolutions are as follows:

The committee appointed at a meeting of the bar of the Supreme Court of the United States, held in the Supreme Court room at the city of Washington, October 14, 1895, in memory of Mr. Justice Jackson, to draft resolutions to be reported at an adjourned meeting, present for consideration the following:

On August 8, 1895, Mr. Justice Howell Edmonds Jackson departed this life at his home, near Nashville, Tennessee.

He was born at Paris, Tennessee, in 1832, obtained his academic education in his native state, graduated at the University of Virginia, and took the degree of bachelor of laws at the Cumberland University, in Tennessee.

He practiced law at Jackson and Memphis before the civil war, and at once displayed those qualities which gave promise of the high rank which he subsequently attained in the profession.

He was an earnest believer in the doctrines of the Whig party, was devoted to the Union, and opposed secession. After his native state passed the ordinance of secession and was threatened with invasion, he, like so many others who would have sacrificed their lives, if by this they could have removed the cause of strife and assured a happy union, adhered, with all of the ardor of his nature, to the side his people had chosen in the conflict. The war suspended the activities of civil life, and holding an office under the Confederate government, which, while one of great trust, left him much leisure, he devoted himself, throughout the war, to the most laborious and systematic study of the law, thus acquiring an accuracy and breadth of legal knowledge which made him so fully equipped for all of the responsible duties which came to him.

After the close of the civil war he practiced law in Jackson and Memphis, and achieved a reputation second to none of his competitors. His practice was varied, embracing office work of the most delicate and responsible character, and litigation in all of the state and Federal courts, and while his services were justly prized as a counsellor and as a chancery and supreme court lawyer, he was no less successful in the severest jury contests, where he achieved great triumphs, not by the graces of oratory, which he never cultivated, nor the meretriciousness of cunning advocacy, which he scorned, but by candor and earnestness, which won the confidence of the jury, and clear, forcible, and logical arguments, which convinced them.

On account of his reputation as a man and lawyer, he was called to a seat upon the court of referees of Tennessee, which was a provisional supreme court created to assist the regular court to dispose of the vast accumulation of cases

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occasioned by the civil war. He served on this court with great credit until its term expired.

Though never having taken any active part in politics, he consented, on account of his great interest in the question of the settlement of the state debt of Tennessee, to become a candidate on the state credit ticket for the state senate.

Following the custom established by immemorial usage in Tennessee, he met his opponent in joint debate, and made the canvass with so much ability and persuasiveness as to win his election in a heated contest, in which he advocated high taxes, the most unwelcome cause that could be championed.

This, though not suspected by him, was the initial point of his national career. A deadlock in the selection of a United States Senator, for which position he was not a candidate, was suddenly solved by his political opponents, who, moved by an estimate of his character like that which, on a later occasion, caused the President to nominate him to the Supreme Bench, came to his support as soon as his friends put his name before the legislature, and, co-operating with a majority of his own party, elected him on the first ballot. The offices of United States Senator, Circuit Judge, and Justice of the Supreme Court, all came to him in unbroken succession and without expectation or effort on his part.

His career in these honorable and responsible positions is too well known to need recapitulation.

His performance of the labors of his office, even when the hand of death rested heavily upon him, will always remain a pathetic and inspiring picture in the memory of those who saw his heroic efforts.

He was profoundly religious, and an elder in the Presbyterian Church.

His manner was reserved, and yet no one found him difficult of approach. He was frank and courageous in expressing his opinions of men and measures, yet free from bitterness and personal invective. He was serious in affairs, but in the company of friends was always jovial, enlivening conversation with sprightly humor and pointed anecdote. He felt and maintained the dignity of his office, and yet with those amenities which in a judge invest the intercourse between bench and bar with an atmosphere which is as wholesome as it is gracious.

He displayed exact learning, laborious investigation, unfaltering courage, absolute impartiality, and broad patriotism; therefore, be it

Resolved, That the members of the bar of the Supreme Court of the United States, profoundly impressed with the great loss sustained by the profession and the nation in the untimely death of Mr. Justice Jackson, desire to record their esteem for the qualities which distinguished his short career on the Supreme Bench, and which gave such perfect assurance that he was a worthy successor of those distinguished judges who have administered, with such fidelity and ability, the greatest trust ever confided by a nation.

Resolved, That we deeply sympathize with the bereaved family of Mr. Justice Jackson, and that a copy of these resolutions be presented to them by the secretary of this meeting.

Resolved, That the Attorney General be requested to present these resolutions to the Supreme Court in session, and request that they be recorded.

The Chief Justice responded:

Mr. Justice Jackson took his seat as a member of this court on the 4th of

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March, 1893, serving for the remainder of the current term, which closed on the 15th of May; sat through the next term, the month of March excepted; and heard argument in a few cases at October term, 1894.

Perhaps no greater eulogium can be passed on him than to say that, brief as was the period during which he was permitted to be with us, he impressed himself upon his colleagues and the country as possessed of the highest attributes of the judicial officer, and left enduring evidence of judicial eminence on the records of the court.

There was no eccentricity in his success. He came here with a mind disciplined by years of experience in business and political activities, in an extensive professional practice and in the discharge of judicial duties, and stored with knowledge of affairs as well as of books, knowledge qualifying him to deal with questions promptly and with practical wisdom, rather than knowledge of things "remote from use, obscure, and subtle."

Patience in hearing; assiduity in examination; quickness in grasp; clearness in thought; facility, simplicity, and directness in expression,—all these he had, and they enabled him to find the clew in records however lost in wandering mazes, and make it plain for guidance to correct results.

He profoundly realized that the administration of justice is the great end of human society, and that upon the conscientious labors of those to whom that administration is committed, the protection of life and liberty and property depends, and so the endeavor to do justice ran like a golden thread through all his work. Added and superior to all other grounds of praise, it could well be said of him, as an eminent English judge said of himself, that there was one merit to which he could boldly lay claim,—the determination to do what was right, whenever that could be discovered.

Of the cordial relations between Mr. Justice Jackson and his brethren, which his engaging qualities of mind and heart rendered of the closest, I do not care to speak. We part with him with a keen sense of personal bereavement as he takes his place in the goodly company of those who have gone before, though still remaining with us, one in the blood of common traditions and common labors.

There is little in the performance of judicial duty to attract popular attention or to win popular applause, but the influence of faithful service such as his—of labors so abundant—of a life shortened by effort in the public interest, "cut, like the diamond, with its own dust"—can scarcely be overestimated, and sooner or later will receive its meed of recognition.

The pathetic incident at the close of Mr. Justice Jackson's career, referred to by the Attorney General, was characteristic of the man. Devotion to duty had marked his course throughout, and he found in its inspiration the strength to overcome the weakness of the outward man, as, weary and languid, he appeared in his seat for the last time in obedience to the demand of public exigency. The response to the roll call under such circumstances gives complete assurance —though, indeed, it was not needed—that when, a few weeks later, he came to the passage of the river, Good Conscience, to whom in his lifetime he had spoken to meet him there, lent him his hand and so helped him over.

The resolutions and the remarks by which they have been accompanied will be entered on our records, and the court will now adjourn to Monday next.

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APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1895.

SUPREME COURT RULE.

An additional rule of practice is adopted by the Supreme Court of the United States as follows:

RULE 39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

Promulgated November 25, 1895.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1895.

ADMIRALTY RULE.

The 51st Rule of Admiralty Practice is by order of court amended to read as below. To show the change the new portion of the rule is here printed in italics.

RULE 51.

When the defendant in his answer alleges new facts, these shall be considered as denied by the libelant, and no replication, general or special, shall be *filed, unless allowed or directed by the court on proper cause shown.* But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libelant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

Promulgated January 27, 1896.

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APPENDIX IV

Supreme Court of the United States.

OCTOBER TERM, 1895.

ORDER.

There having been an associate justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the circuits, agreeable to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Horace Gray, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, George Shiras, Jr., Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, Henry B. Brown, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Stephen J. Field, Associate Justice.

February 3, 1896.

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